

APPENDICES

Appendix A - Cross Community Working Group on Enhancing ICANN Accountability Charter



Cross Community Working Group (CCWG) Charter

WG Name:	Cross Community Working Group on Enhancing ICANN Accountability
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Section I: Cross Community Working Group Identification	
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Chartering Organizations:					
Charter Approval Date:					
Name of WG Chair(s):					
CCWG Workspace URL:					
CCWG Mailing List:					
Resolutions adopting the charter:	<table border="1" style="width: 100%;"> <tr> <td style="background-color: #e0e0e0;">Title:</td> <td></td> </tr> <tr> <td style="background-color: #e0e0e0;">Ref # & Link:</td> <td></td> </tr> </table>	Title:		Ref # & Link:	
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Important Document Links:	<ul style="list-style-type: none"> • 				

Section II: Problem Statement, Goals & Objectives and Scope	
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Problem Statement:

The National Telecommunications and Information Administration (NTIA) has requested that ICANN “convene a multistakeholder process to develop a plan to transition the U.S. government stewardship role” with regard to the IANA Functions and related root zone management. In making its announcement, the NTIA specified that the transition proposal must have broad community support and meet the following principles:

- Support and enhance the multistakeholder model
- Maintain the security, stability, and resiliency of the Internet DNS
- Meet the needs and expectation of the global customers and partners of the IANA services
- Maintain the openness of the Internet.

NTIA also specified that it would not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution.

During discussions around the transition process, the community raised the broader topic of the impact of the change on ICANN's accountability given its historical contractual relationship with the United States and NTIA. Accountability in this context is defined, according to the [NETmundial multistakeholder statement](#), as the existence of mechanisms for independent checks and balances as well as for review and redress.

The concerns raised during these discussions around the transition process indicate that the existing ICANN accountability mechanisms do not yet meet stakeholder expectations. Recent statements made by various stakeholders suggest that current accountability mechanisms need to be reviewed and, if need be, improved,

amended, replaced, or supplemented with new mechanisms (see for instance ATRT recommendations) in light of the changing historic contractual relationship with the U.S. Government. Considering that the NTIA has stressed that it is expecting community consensus regarding the transition, a failure to meet stakeholder expectations with regards to accountability may create a situation where NTIA does not accept the IANA transition proposal as meeting its conditions. Thus reviewing ICANN's accountability mechanisms was considered to be crucial for the transition process.

Goals & Objectives:

The CCWG-Accountability is expected to deliver proposals that would enhance ICANN's accountability towards all stakeholders.

The term stakeholder should be considered for the CCWG-Accountability in its wider acceptance, for instance by relying on the definition provided by the [European Framework for Quality Management \(EFQM\)](#): a person, group or organization that has a direct or indirect stake or interest in the organization because it can either affect the organization or be affected by it. This includes but is not limited to all ICANN SOs and ACs.

The goal is for the transition proposal regarding the IANA functions to be communicated to NTIA in a timeframe which is consistent with the expiration date of the current IANA Functions Contract, which is set at 30th September 2015. The CCWG-Accountability will therefore work as expeditiously as possible to identify those mechanisms that must be in place or committed to before the IANA Stewardship Transition in light of the changing historical contractual relationship with the U.S. Government (Work Stream 1) and those mechanisms for which a timeline for implementation may extend beyond the IANA Stewardship Transition (Work Stream 2).

In order to facilitate evaluation and adoption of its proposals, the CCWG-Accountability is expected to provide a detailed description on how its proposals would provide an adequate level of resistance to contingencies ("stress tests"), within the scope of each Work Stream.

Further, Work Stream 1 may identify issues that are important and relevant to the IANA stewardship transition but cannot be addressed within this time frame, in which case, there must be mechanisms or other guarantees that can ensure that the work would be completed in a timely manner as soon as possible after the transition.

Scope:

The CCWG-Accountability will investigate accountability mechanisms regarding all of the functions provided by ICANN.

In the discussions around the accountability process, the CCWG-Accountability will proceed with two Work Streams:

- **Work Stream 1:** focused on mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition;
- **Work Stream 2:** focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.

The CCWG-Accountability will allocate issues to Work Stream 1 and Work Stream 2. Some issues may span both Work Streams.

Suggested questions to be considered as part of Work Stream 1 include, but are not limited to:

- What would be the impact of NTIA's transition of the IANA Functions Contract in ensuring ICANN's accountability and what potential accountability concerns could this cause?
- What enhancements or reforms are required to be implemented or committed to before the NTIA

Stewardship Transition?

- How will these enhancements or reforms be stress-tested?
- What enhancements or reforms must be committed to before the NTIA Stewardship Transition, but could be implemented after.
 - If the implementation of enhancements or reforms are to be deferred, how can the community be assured they will be implemented?
 - How will these enhancements or reforms be stress-tested?

Suggested questions to be considered as part of Work Stream 2 include, but are not limited to:

- What enhancements or reforms can be addressed after the NTIA Stewardship Transition?
 - If there are enhancements or reforms that can be addressed after NTIA disengages, what new or existing processes ensure they will be addressed and implemented?
 - How will these enhancement or reforms be stress-tested?

Suggested questions to be considered as part of both Work Stream 1 and 2 include, but are not limited to:

- What mechanisms are needed to ensure ICANN's accountability to the multi-stakeholder community once NTIA has disengaged from its stewardship role?
- What enhancements or reforms are needed to ICANN's existing accountability mechanisms?
- What new accountability reforms or mechanisms are needed?
- If accountability enhancements and reforms are made through changes to ICANN's Articles of Incorporation or By-Laws, how can the community be assured that those changes will be permanent, or not subject to unilateral amendment by the ICANN Board at a later date?

Other topics within scope of the work of the CCWG-Accountability include, but are not limited to [ATRT2 Recommendation 9, and more specifically 9.2](#).

Link with scope of Cross Community Working Group (CWG) to Develop an IANA Stewardship Transition Proposal on Naming Related Functions, and other groups developing the IANA Stewardship Transition proposal:

This process on Enhancing ICANN Accountability is taking place alongside a parallel and related process on the transition of the stewardship of the IANA functions through the CWG to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (hereinafter CWG-Stewardship). The CWG-Stewardship's scope is focused on the arrangements required for the continuance of IANA functions in an accountable and widely accepted manner after the expiry of the IANA Functions Contract. Accountability for the administration of the IANA functions (i.e., implementation and operational accountability) is not within the scope of the CCWG-Accountability as it is being dealt with by the CWG-Stewardship. Nevertheless, the two processes are interrelated and interdependent and should appropriately coordinate their work.

Other groups' (i.e. the numbers and protocol parameters communities, as outlined in the ICG [Request for Proposals](#)) proposals are intended to cover accountability issues related to the IANA Stewardship Transition, as well as issues already being considered by RIRs and IETF communities related in their respective areas in their engagement with ICANN. These issues are outside of scope of the CCWG-Accountability. The CCWG-Accountability will communicate with these groups to ensure that the CCWG-Accountability does not cover issues going beyond its scope.

Section III: Deliverables, Timeframes, and Reporting

Deliverables:

In working towards its deliverables, the CCWG-Accountability will, as a first step, establish and adopt a high-

level work plan and tentative associated schedule, which should be publicly available. Both work plan and associated schedule, should take into account and be on activities under Work Stream 1 and Work Stream 2, and align the timelines for Work Stream 1 with the CWG-Stewardship and ICG timelines. In addition, the work plan and schedule should include time frames and methods for public consultation and expected date for submission of Draft Proposal(s) and Final Proposal(s) and revisions thereof for Work stream 1 and 2, and should establish an expected date for submission of a Board Reports. In those cases where there are incompatibilities, these should be informed to the CWG-Stewardship and/or ICG and discuss ways to address the incompatibilities.

In the course of its work the CCWG-Accountability should update and refine its work plan and schedule regularly, and make the amended work plan and associated schedule publicly available.

The following non-exhaustive list of areas of work shall guide the working group in establishing a work plan. The CCWG-Accountability may add additional tasks at its sole discretion:

- Review of the guidelines given in this charter
- A definition/description of what differentiates a Work Stream 1 issue from a Work Stream 2 issue
- Identify which issues to go into Work Stream 1 and which issue to go into Work Stream 2
- Provide timeline of key dates and target date of proposal(s) for each Work Stream
- Review of existing accountability mechanisms, including a review of their efficiency based on prior work such as ATRT reviews and proposals for changes, enhancements, and additional mechanisms
- Identification of contingencies to be considered in the stress tests
- Analysis of core issues based on the current situation analysis, in relation to the CCWG-Accountability's goal and the IANA Stewardship Transition
- Identification of priorities to focus work on such issues with highest potential to enhance ICANN's accountability
- Review and analyze statements, responses and questions provided by the U.S. Department of Commerce
- Review of possible solutions for each Work Stream including stress tests against identified contingencies. The CCWG-Accountability should consider the following methodology for stress tests
 - analysis of potential weaknesses and risks
 - analysis existing remedies and their robustness
 - definition of additional remedies or modification of existing remedies
 - description how the proposed solutions would mitigate the risk of contingencies or protect the organization against such contingencies
- CCWG-Accountability must structure its work to ensure that stress tests can be (i) designed (ii) carried out and (iii) its results being analyzed timely before the transition.

Examples of individual items to be looked at may include:

- Affirmation of Commitments (see <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>)
- Expert Panel (ASEP) as one basis for its discussions
- 2013 Report of the Accountability & Transparency Review Team (see <https://www.icann.org/en/about/aoc-review/atrt/final-recommendations-31dec13-en.pdf>)
- Operation and Viability of current Reconsiderations process
- Operation and Viability of the CEP (cooperative engagement process) within the Independent Review
- Independent Review Process (IRP) criteria
- Possible solutions including
 - Input received in relation to solutions as part of earlier public comment periods (see <https://www.icann.org/en/system/files/files/proposed-solutions-25aug14-en.pdf>)

- Input received in CCWG-Accountability comment periods

Reporting:

The co-chairs of the CCWG-Accountability will brief the chartering organizations on a regular basis as well as their representatives on the ICG (particularly in relation to Work Stream 1).

Section IV: Membership, Staffing and Organization

Membership Criteria:

Membership in the CCWG-Accountability, and in sub-working groups should these be created, is open to members appointed by the chartering organizations. To facilitate scheduling meetings and to minimize workloads for individual members, it is highly recommended that individual members participate in only one sub-working group, should sub-working groups be created. Each of the chartering organizations shall appoint a minimum of 2 and a maximum of 5 members to the working group in accordance with their own rules and procedures. Best efforts should be made to ensure that individual members:

- Have sufficient expertise to participate in the applicable subject matter (see for example <https://www.icann.org/resources/pages/enhancing-accountability-faqs-2014-08-22-en#12> for areas identified for expertise);
- Commit to actively participate in the activities of the CCWG-Accountability on an ongoing and long-term basis; and
- Where appropriate, solicit and communicate the views and concerns of individuals in the organization that appoints them.

In appointing their members, the chartering organizations should note that the CCWG-Accountability's decision-making methodologies require that CCWG-Accountability members act by consensus, and that polling will only be used in rare instances and with the recognition that such polls do not constitute votes.

Chartering organizations are encouraged to use open and inclusive processes when selecting their members for this CCWG-Accountability. Best efforts should also be made to ensure that the CCWG-Accountability and any sub-working groups, if created, have representation from each of ICANN's five regions.

In addition, the CCWG-Accountability will be open to any interested person as a participant. Participants may be from a chartering organization, from a stakeholder group not represented in the CCWG-Accountability, or may be self-appointed. Participants will be able to actively participate in and attend all CCWG-Accountability meetings, work groups and sub-work groups. However, should there be a need for a consensus call or decision, such consensus call or decision will be limited to CCWG-Accountability members appointed by the chartering organizations.

All members and participants will be listed on the CCWG-Accountability's [Wiki](#). The mailing list of CCWG-Accountability will be [publicly archived](#). All members and participants in this process are required to submit a Statement of Interest (SOI) following the procedures of their chartering organization or, where that is not applicable the GNSO procedures may be followed or alternatively a statement should be provided which at a minimum should include name, whether the participant is representing a certain organization or company as part of his/her participation in this effort, areas of specific interest in relation to this effort, material relationship with other parties affected by ICANN and primary country of residence.

Volunteer co-chairs appointed by the chartering organizations, should a chartering organization decide to appoint a co-chair to the CCWG-Accountability, will preside over CCWG-Accountability deliberations and ensure that the process is bottom-up, consensus-based and has balanced multistakeholder participation. ICANN is expected to provide day-to-day project administration and secretariat support and, upon request of the CCWG-Accountability co-chairs, professional project facilitators or expert assistance.

In addition to the working relationship between groups developing the IANA Stewardship Transition proposal which is detailed in a subsequent section, the CCWG-Accountability will include a liaison from the ICANN Board, who would be an active member of the CCWG-Accountability, bringing the voice of the Board and Board experience to activities and deliberations. The CCWG-Accountability will also include an ICANN Staff representative to provide input into the deliberations and who is able to participate in this effort in the same way as other members of the CCWG-Accountability. Should there be a need for any consensus call(s), neither the Board liaison nor the Staff representative would participate in such a consensus call.

Group Formation, Dependencies, & Dissolution:

Each of the chartering organizations shall appoint members to the CCWG-Accountability in accordance with their own rules and procedures.

Working Relationship with the ICG, the CWG, and other groups developing the IANA Stewardship Transition Proposal

The co-chairs of the CCWG-Accountability will discuss and determine, along with representatives of the ICG, the CWG-Stewardship, and other groups developing the IANA Stewardship proposal, the most appropriate method of sharing information and communicating progress and outcomes, particularly in relation to Work Stream 1. This could, for example, be done through regular Chairs calls. In particular, the co-chairs will agree the method by which the final Work Stream 1 deliverable of the CCWG-Accountability, the “**Enhanced ICANN Accountability Related to the IANA Stewardship Transition Proposal**”, will be provided from the CCWG-Accountability to the ICG and CWG-Stewardship. The delivery of this Work Stream 1 Proposal is expected to occur following approval of the ICANN Board as outlined in Section V of this charter (see also <https://www.icann.org/resources/board-material/resolutions-2014-10-16-en#2.d>).

Expert Advisors

In addition to input from the community, the CCWG-Accountability is expected to solicit and consider the input from the up to seven Advisors selected by the Public Experts Group (PEG) to provide independent advice, research and identify best practices, at an early stage of its deliberations. In addition to input that is specifically solicited by the CCWG-Accountability, the CCWG-Accountability is also expected to give due consideration to any additional advice or input that the Advisors provide as part of the CCWG-Accountability deliberations. The Advisors are expected to contribute to the dialogue similar to other CCWG-Accountability participants. However, should there be a need for any consensus call(s), the Advisors would not participate in such a call.

In addition to the advisors selected by the PEG, the CCWG-Accountability may also identify additional advisors or experts to contribute to its deliberations in a similar manner as the Advisors selected by the PEG. Should additional costs be involved in obtaining input from additional advisors or experts, prior approval must be obtained from ICANN. Such a request for approval should at a minimum include the rationale for selecting additional advisors or experts as well as expected costs.

The CCWG-Accountability should integrate one Accountability and Transparency Review Team (ATRT) past participant to bring perspective and avoid duplication of work. Should there be a need for any consensus call(s), the ATRT Expert would not participate in such a consensus call (unless the ATRT Expert is also selected as a member by one of the chartering organizations).

Staffing & Resources

The ICANN Staff assigned to the CCWG-Accountability will fully support the work of the CCWG-Accountability as requested by the co-chairs, including meeting support, document drafting, editing and distribution and other substantive contributions when deemed appropriate by the CCWG-Accountability. ICANN will provide access to relevant experts and professional facilitators as requested by the CCWG-Accountability Chairs. ICANN

staff, in a coordinated effort with the CCWG-Accountability, will also ensure that there is adequate outreach to ensure that the global multistakeholder community is aware of and encouraged to participate in the work of the CCWG-Accountability.

Staff assignments to the Working Group:

ICANN will provide sufficient staff support to support the activities of the CCWG-Accountability.

The CCWG-Accountability is encouraged to identify any additional resources beyond the staff assigned to the group it may need at the earliest opportunity to ensure that such resources can be identified and planned for.

Section V: Rules of Engagement

Decision-Making Methodologies:

In developing its Proposal(s), work plan and any other reports, the CCWG-Accountability shall seek to act by consensus. Consensus calls should always make best efforts to involve all members (the CCWG-Accountability or sub-working group). The Chair(s) shall be responsible for designating each position as having one of the following designations:

- a) Full Consensus - a position where no minority disagrees; identified by an absence of objection
- b) Consensus – a position where a small minority disagrees, but most agree

In the absence of Full Consensus, the Chair(s) should allow for the submission of minority viewpoint(s) and these, along with the consensus view, shall be included in the report.

In a rare case, the chair(s) may decide that the use of a poll is reasonable to assess the level of support for a recommendation. However, care should be taken in using polls that they do not become votes, as there are often disagreements about the meanings of the poll questions or of the poll results.

Any member who disagrees with the consensus-level designation made by the Chair(s), or believes that his/her contributions are being systematically ignored or discounted should first discuss the circumstances with the relevant sub-group chair or the CCWG-Accountability co-chairs. In the event that the matter cannot be resolved satisfactorily, the group member should request an opportunity to discuss the situation with the Chairs of the chartering organizations or their designated representatives.

SO and AC support for the Draft Proposal(s)

Following submission of the Draft Proposal(s), each of the chartering organizations shall, in accordance with their own rules and procedures, review and discuss the Draft Proposal(s) and decide whether to adopt the recommendations contained in it. The chairs of the chartering organizations shall notify the co-chairs of the WG of the result of the deliberations as soon as feasible.

Supplemental Draft Proposal

In the event that one or more of the participating SO's or AC's do(es) not adopt one or more of the recommendation(s) contained in the Draft Proposal(s), the Co-Chairs of the CCWG-Accountability shall be notified accordingly. This notification shall include at a minimum the reasons for the lack of support and a suggested alternative that would be acceptable, if any. The CCWG-Accountability may, at its discretion, reconsider, post for public comments and/or submit to the chartering organizations a Supplemental Draft Proposal, which takes into accounting the concerns raised.

Following submission of the Supplemental Draft Proposal, the chartering organizations shall discuss and decide in accordance with its own rules and procedures whether to adopt the recommendations contained in the

Supplemental Draft Proposal. The Chairs of the chartering organizations shall notify the Co-Chairs of the CCWG-Accountability of the result of the deliberations as soon as feasible.

Submission Board Report

After receiving the notifications from all chartering organizations as described above, the Co-Chairs of the CCWG-Accountability shall, within 10 working days after receiving the last notification, submit to the Chair of the ICANN Board of Directors and Chairs of all the chartering organizations the CCWG-Accountability Board Report, which shall include at a minimum:

- a) The (Supplemental) Proposal as adopted by the CCWG-Accountability; and
- b) The notifications of the decisions from the chartering organizations
- c) Documentation of the process that was followed, including, but not limited to documenting the process of building consensus within the CCWG-Accountability and public consultations.

In the event one or more of the chartering organizations do(es) not support (parts of) the (Supplemental) Proposal(s), the Board Report shall also clearly indicate the part(s) of the (Supplemental) Final Proposal(s) which are fully supported and the parts which not, and which of the chartering organizations dissents, to the extent this is feasible.

Board consideration and interaction with CCWG-Accountability and chartering organizations

It is assumed that after submission of the Board Report, the ICANN Board of Directors will consider the Proposal(s) contained in this Report in accordance with the process outlined in its resolution of 16 October 2014 (see <https://www.icann.org/resources/board-material/resolutions-2014-10-16-en#2.d>):

Resolved (2014.10.16.17), the Board commits to following the following principles when considering the Cross Community Working Group Recommendations on Enhancing ICANN Accountability and Governance:

1. *These principles apply to consensus-based recommendations from the Cross Community Working Group on Enhancing ICANN Accountability and Governance.*
2. *If the Board believes it is not in the global public interest to implement a recommendation from the Cross Community Working Group on Enhancing ICANN Accountability and Governance (CCWG Recommendation), it must initiate a dialogue with the CCWG. A determination that it is not in the global public interest to implement a CCWG Recommendation requires a 2/3 majority of the Board.*
3. *The Board must provide detailed rationale to accompany the initiation of dialogue. The Board shall agree with the CCWG the method (e.g., by teleconference, email or otherwise) by which the dialogue will occur. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.*
4. *The CCWG will have an opportunity to address the Board's concerns and report back to the Board on further deliberations regarding the Board's concerns. The CCWG shall discuss the Board's concerns within 30 days of the Board's initiation of the dialogue.*
5. *If a recommendation is modified through the CCWG, it is returned back to the Board for further consideration. The CCWG is to provide detailed rationale on how the modification addresses the concerns raised by the Board.*
6. *If, after modification, the Board still believes the CCWG Recommendation is not in the global public interest to implement the CCWG Recommendation, the Board may send the item back to the CCWG for further consideration, again requiring a 2/3 vote of the Board for that action. Detailed rationale for the Board's action is again required. In the event the Board determines not to accept a modification, then the Board shall not be entitled to set a solution on the issue addressed by the recommendation until such time as CCWG and the Board reach agreement.*

Before submitting a modified recommendation to the ICANN Board of Directors, as envisioned under 5. of the Board resolution, the CCWG-Accountability will submit a Draft Supplemental Board Report to the chartering organizations containing:

- a) The modified recommendations, and associated detailed rationale,
- b) The Board decision, and associated detailed rationale
- c) The recommendation as contained in the Board Report

Following submission of the Draft Supplemental Board Report, the chartering organizations shall discuss and decide in accordance with their own rules and procedures whether to adopt the modified recommendations contained in the report. The Chairs of the chartering organizations shall notify the co-chairs of the CCWG-Accountability of the result of the deliberations as soon as feasible.

After receiving the notifications from all chartering organizations, the co-Chairs of the CCWG-Accountability shall, within 10 working days after receiving the last notification, submit to the Chair of the ICANN Board of Directors and Chairs of all the chartering organizations the CCWG-Accountability Supplemental Board Report, which shall include at a minimum:

- a) The modified recommendations, and associated detailed rationale.
- b) The notifications of the decisions from the chartering organizations.
- c) Documentation of the process that was followed, including, but not limited to documenting the process of building consensus within the CCWG-Accountability and consultations with the chartering organizations.

If, in accordance with 6., the Board determines not to accept a modified recommendation, the CCWG-Accountability shall follow the procedure regarding the Supplemental Board Report, as just described, to reach agreement with the Board.

Modification of the Charter:

In the event this charter does not provide guidance and/or the impact of the charter is unreasonable for conducting the business of the CCWG-Accountability, the co-chairs have the authority to determine the proper actions. Such action may, for example, consist of a modification to the Charter in order to address the omission or its unreasonable impact, in which case the Co-Chairs may propose such modification to the chartering organizations. A modification shall only be effective after adoption of the amended Charter by all chartering organizations, in accordance with their own rules and procedures.

Problem/Issue Escalation & Resolution Processes:

All participants are expected to abide by the [ICANN Expected Standards of Behavior](#).

The co-chairs are empowered to restrict the participation of someone who seriously disrupts the working group. Generally, the participant should first be warned privately, and then warned publicly before such a restriction is put into place; in extreme circumstances, this requirement may be bypassed. This restriction is subject to the right of appeal as outlined above.

In the event that no consensus is reached by the CCWG-Accountability, the co-chairs of the CCWG-Accountability will submit a Report to the chartering organizations. In this Report the co-chairs shall document the issues that are considered contentious, the process that was followed and will include suggestions to mitigate prevention of consensus. If, after implementation of the mitigating measures consensus can still not be reached, co-chairs shall prepare a Final Report documenting the processes followed, including requesting suggestions for mitigating the issues that are preventing consensus from the chartering organizations. The Final Report will be submitted to the ICANN Board and the chartering organizations requesting closure of the CCWG-Accountability by the chartering organizations.

Closure & Working Group Self-Assessment:

The CCWG-Accountability will consult with their chartering organizations to determine when it can consider its work completed. The CCWG-Accountability and any sub-working groups shall be dissolved upon receipt of the notification of the Chairs of the chartering organizations or their designated representatives.

Section VI: Charter Document History

Version	Date	Description
1.0		

Staff Contact:		Email:	
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Appendix B – Legal Subteam Methodology

LEGAL SUBTEAM METHODOLOGY

See <https://community.icann.org/display/acctcrosscomm/Legal+SubTeam>

Scope of work

- Adler & Colvin will be the primary source of advice on corporate governance law and California not-for-profit law.
- Sidley & Austin will be addressing international law and jurisdiction issues and any additional topic, as deemed appropriate.

Rules of Engagement & Working Methodologies

COMMUNICATIONS & COORDINATION

Law firms coordination

- Sidley & Austin will be the coordinating firm. Both firms are expected to work on the different issues assigned to them but Sidley Austin will coordinate how the complementary and collaborative work will be developed by the firms. It is of the essence for the success of the group to avoid having duplicate work that may impact in duplicate billable hours.
- Private coordination meetings between lawyers would be acceptable and desirable. Information should flow freely between law firms.

Legal Subteam & Law firms coordination

- Law firms report to the CCWG-Accountability and receive instructions from the legal executive sub team only. Legal Executive Subteam Members include: León Sánchez (lead); Athina Fragkouli; Robin Gross; David McAuley; Sabine Meyer; Edward Morris; Greg Shatan and Samantha Eisner (support);.
- Should there be the need for a call between the available members of the Executive Legal Subteam and any of the law firms in order to address urgent matters without the ability to setup a public call, it will always be required to provide proper debrief to the open list in a timely fashion. This method will be exceptional.
- A single mailing-list will be used. Legal sub team members who are not listed in the legal executive subteam have viewing rights to help streamline communications. Posting privileges should carry request privileges.
- The mailing-list remains open to any observers.

- Activities and requests will be documented on the dedicated wiki page - <https://community.icann.org/display/acctcrosscomm/Legal+SubTeam>

Mailing-List

- All formal requests, including follow-up clarifications, are made in writing and communicated through the public mailing list ccwg-accountability5@icann.org – public archives available at <http://mm.icann.org/pipermail/ccwg-accountability5/>

Conference calls

- All weekly calls are to be recorded, transcribed and archived in the public wiki space.
- Legal sub team and law firms coordination call will be held on Wednesdays: 14:00-15:00 UTC legal subteam only - 15:00-16:00 UTC legal subteam and lawyers.
- Calls are open to anyone.

REQUESTS FOR EXPERTISE & LEGAL ADVICE

Requests for Advice

- No individual outside the executive legal sub team should send requests to law firms.
- Law firms are to alert the legal executive sub team of any requests made by individuals outside the legal executive sub team.
- Only tasks assigned by memorandum will be subject for lawyers work. It is important that both law firms continue to follow the calls of the CCWG and the discussion in the mailing lists as there might be important topics or questions raised over the different discussions that might provide context to the assignments made by the legal sub-team.
- Questions will continue to be gathered and compiled in a single document by the legal sub-team to keep track of the different concerns and questions raised within the larger group and they will be triaged in order to then be assigned formally to the lawyers.
- On each assignment, the legal sub-team will do its best effort to provide as much context as possible to better guide the lawyers on the needs that the particular assignment is trying to address.
- Requests for legal advice should be numbered consecutively for reference purposes.
- All requests will be archived in the public wiki space.

Legal Advice

- While recognizing that Sidley Austin will be coordinating the work of both law firms with the aim of having a harmonized voice, law firms should state any deferring views they may have on any particular issue where this difference happens. Furthermore, should this difference in views happen, each law firm will be required to provide the rationale for its deferring view.
- During face-to-face meetings/calls, high level legal advice should come in real time in reply to anyone raising a question within the Charter's scope.
- Lawyers' involvement with WP1, WP2 and WPST will be key for next steps as it is them that are building the proposals that will be subject to public comment. Therefore, the legal sub-team and

the law firms should be able to provide these WPs with the tools they need to build feasible and legally viable proposals.

- It is of the essence that as a next step the law firms analyze the different templates of powers and mechanisms attached herein in order to provide advice on whether those powers and mechanisms are legally viable in the first place and if not, which would be the alternatives. On a second phase, the law firms will be asked to advice on how these mechanisms and powers may be implemented in a holistic view of the accountability enhancement process.

Appendix C – Problem Statement & Definitions

CCWG Accountability – Problem definition

13 March 2015

“When I have one week to solve a seemingly impossible problem, I spend six days defining the problem. Then the solution becomes obvious.”

Albert Einstein

1. Problem statement

The Charter of the CCWG-Accountability defines the following problem statement:

The National Telecommunications and Information Administration (NTIA) has requested that ICANN “convene a multistakeholder process to develop a plan to transition the U.S. government stewardship role” with regard to the IANA Functions and related root zone management. In making its announcement, the NTIA specified that the transition proposal must have broad community support and meet the following principles:

- Support and enhance the multistakeholder model
- Maintain the security, stability, and resiliency of the Internet DNS
- Meet the needs and expectation of the global customers and partners of the IANA services
- Maintain the openness of the Internet.

NTIA also specified that it would not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution.

During discussions around the transition process, the community raised the broader topic of the impact of the change on ICANN's accountability given its historical contractual relationship with the United States and NTIA. Accountability in this context is defined, according to the [NETmundial multistakeholder statement](#), as the existence of mechanisms for independent checks and balances as well as for review and redress.

The concerns raised during these discussions around the transition process indicate that the existing ICANN accountability mechanisms do not yet meet stakeholder expectations. Recent statements made by various stakeholders suggest that current accountability mechanisms need to be reviewed and, if need be, improved, amended, replaced, or supplemented with new mechanisms (see for instance ATRT recommendations). Considering that the NTIA has stressed that it is expecting community consensus regarding the transition, a failure to meet stakeholder expectations with regards to accountability may create a situation where NTIA does not accept the IANA transition proposal as meeting its conditions. Thus

reviewing ICANN's accountability mechanisms was considered to be crucial for the transition process.

The CCWG-Accountability reviewed these guidelines as well as took into consideration inputs from the session organized during ICANN 50 in London, on 26 June 2014, titled "Enhancing ICANN Accountability"¹. Of particular interest were some questions raised by Professor Jan Aart Scholte², from the University of Gothenburg:

- Accountability to whom?
- What is accountability?
- Accountability for what purpose?

The purpose of this section is to provide the preliminary view of the CCWG-Accountability on these fundamental questions, clarifying the issues at stake, in order to guide the work of the group going forward.

2. What is accountability?

The CCWG acknowledges the existence of various definitions of accountability, such as :

- „The condition or quality of being accountable which in turn means responsible; having to give an explanation for one's actions; answerable.” (Longman Dictionary)
- “Accountability refers to the implicit or explicit expectation that one may be called on to justify one's (beliefs, feelings and) actions to others” (Lerner, J.; Tetlock, P.E. 1999, p. 255)
- Another element is a “notion of personal responsibility for potential negative consequences of one's own behavior and actions on others”.
- Accountability may be achieved through the adhering to a framework of agreed rules and standards and of defined rights and responsibilities for those accountable and for those that an individual/entity is accountable to.

As a general concept, accountability encompasses processes whereby an actor answers to others for the effects on them of its actions and omissions. In the present case, then, accountability involves the processes whereby ICANN answers to its stakeholders for the impacts on those stakeholders of ICANN's decisions, policies and programmes.

Accountability is generally understood to comprise four dimensions. One, transparency, means that an actor (ICANN) is answerable to its stakeholders by being open and visible to them. A second, consultation, means that the actor (ICANN) continually takes input from and explains its positions to the stakeholders. Third, review means that the actor's actions, policies and programmes are subject to outside monitoring and evaluation. The fourth dimension, redress, means that the accountable

¹ <https://london50.icann.org/en/schedule/thu-enhancing-accountability>

² Professor Scholte has since then been appointed by the Public Experts Group as an Advisor to the CCWG-Accountability

actor makes compensations for any harms of its actions and omissions, for example, by means of policy changes, institutional reforms, resignations, financial reparations, etc.

Accountability not only manifests itself in strategic, Board decisions, but also in everyday decisions made by and within an organization, through delegation of management responsibilities for instance.

The CCWG-Accountability Charter also provides a helpful starting point to this key question.

Accountability in this context is defined, according to the NETmundial multistakeholder statement, as the existence of mechanisms for independent checks and balances as well as for review and redress³.

The definition clarifies how accountability can be achieved: by providing the appropriate set of mechanisms. It is useful however to replace this definition in its broader context within Netmundial statement :

Open, participative, consensus driven governance: The development of international Internet-related public policies and Internet governance arrangements should enable the full and balanced participation of all stakeholders from around the globe, and made by consensus, to the extent possible.

- *Transparent: Decisions made must be easy to understand, processes must be clearly documented and follow agreed procedures, and procedures must be developed and agreed upon through multistakeholder processes.*
- *Accountable: Mechanisms for independent checks and balances as well as for review and redress should exist. Governments have primary, legal and political accountability for the protection of human rights*
- *Inclusive and equitable: Internet governance institutions and processes should be inclusive and open to all interested stakeholders. Processes, including decision making, should be bottom-up, enabling the full involvement of all stakeholders, in a way that does not disadvantage any category of stakeholder.*

The goal of the group is to enhance ICANN's accountability by elaborating proposals for enhancements or new mechanisms. The focus on this definition is therefore absolutely critical to the CCWG. However further clarity regarding the definition's various components is needed.

3. Aspects of accountability mechanisms

a. Transparency

³ The CCWG acknowledged that the CWG proposed a definition of accountability as such :
"Accountability provides the ability for an independent entity to impose binding consequences to ensure the IANA Functions Operator meets its formally documented and accepted agreements, standards and expectations". It was felt that the CCWG definition was compatible with the CWG approach. [Comment from Jan Art Scholte :
*The CWG definition of accountability cited in note 3 is quite narrow in terms of the dimensions and purposes covered. The CCWG approach is more comprehensive (and better for that).]

With respect to *transparency*, accountability requires that an actor is visible to its stakeholders. In other words, the affected constituents must always, from the start to the finish of a given action, be able to see what ICANN is doing and how. They should also be supplied with information to understand the rationale for ICANN's actions; i.e. why ICANN is acting the way it does. In a situation of accountability, impacted circles should be able readily to discover what decisions are taken, when, by whom, through what procedures, on the basis of what evidence, drawing on what resources for implementation, and with what expected consequences. They should also be provided the information in sufficient advance time to be able to reasonably participate in the decision making process. Without such information stakeholders are left ignorant and cannot effectively scrutinize ICANN, nor participate in its processes; thus transparency is a sine qua non of accountability. Of course there are rare situations (such as criminal investigations) where public interest may require some temporary restrictions on the release of information. However, in accountable governance the default position is timely and full disclosure, and any exceptions to that rule require thorough and documented justification.

Examples include :

- Document Information Disclosure Policy (DIDP)
- Publication of documents several days before decisions are made

b. Consultation

With respect to *consultation*, accountability requires that an actor explain intended actions to its stakeholders, and adjust previous plans in the light of information, analysis and preferences heard from them. In other words, decision-taking is accountable when affected people are incorporated into the deliberations and have primary responsibility for, and ample opportunity to, shape the outcomes. In thorough accountability this participation extends across the policy cycle, from the initial agenda formulation to the final report and its ultimate implementation. The consultation may be direct (involving the affected persons themselves) or indirect (involving mediating parties such as constituency groups). In the case of indirect participation the mediating agent ('the ICANN community') should in its turn be accountable to those for whom it purports to speak.

Examples include :

- Public comment periods
- Requests for constituency statements

c. Review mechanisms

The definition of "review" is : "a formal assessment or examination of something with the possibility or intention of instituting change if necessary."

With respect to *review*, accountability requires that the impacts of ICANN's actions on its stakeholders are thoroughly and externally monitored and assessed. Such evaluations might take the form of academic studies, civil society reports, judiciary proceedings, journalistic investigations, officially commissioned enquiries, parliamentary reviews, or testimonies of the affected persons

themselves. Accountability entails an obligation on an actor to determine how affected circles have been affected. Impacted persons have a right to know how well the impacting agent has complied with its decisions and achieved the promised results. Stakeholders furthermore have a right to receive tenable explanations when outcomes have fallen short of expectations.

The group considers review mechanisms to be mechanisms that assess the performance and relevance of processes or structures, and provide non binding recommendations for improvement.

Examples include:

- Periodic structural reviews of SOs and ACs (as currently mandated in the ICANN Bylaws)
- AoC-mandated ICANN organizational reviews for Accountability and Transparency; Security, Stability, and Resiliency; WHOIS; and Competition and Consumer Trust.

d. Redress mechanisms

The definition of “redress” is : “remedy or compensation for a wrong or grievance”.

With respect to *redress*, accountability requires that an actor provides its stakeholders with compensation in cases where ICANN's actions have had harmful consequences for affected people. This compensation might take the form of apologies, policy changes, institutional reorganisations, staff reprimands, management resignations, economic reparations, or even incarcerations. In a situation of accountability, affected circles must be assured that affecting actors take responsibility for their actions, learn from any mistakes, and have ability to take corrective measures.

The group defines redress mechanisms as mechanisms that focus on assessing the compliance or relevance of a certain decision (as defined in the “purpose” section below), and has the power to confirm, cancel or amend the decision. Thus, an accountability mechanism of the “redress” category, always starts by “reviewing” the decision. However, its output is binding.

Examples include:

- State of California or other legal jurisdictions where ICANN has a presence or sufficient contacts to be held accountable via binding and enforceable Court decisions

4. Qualities of Accountability mechanisms

a. Checks and balances

Checks and balances can be defined as: “a system in which the different parts of an organization (such as a government) have powers that affect and control the parts so that no part can become too powerful”⁴.

⁴ Merriam Webster dictionary <http://www.merriam-webster.com/dictionary/checks%20and%20balances>

The group defines “checks and balances mechanisms” as a series of mechanisms put in place to adequately address the concerns from the various interested parties in the discussion and decision process, as well as to ensure that the decision is made in the interest of all stakeholders.

Examples include:

- Establishment of balanced groups of stakeholders to shape or define policy decisions (e.g. the composition of the GNSO Council and the ICANN Board of Directors)
- Ability to provide advice before a decision is made (e.g. Advisory Committees such as GAC, SSAC)

b. Independence

The NETmundial definition of accountability relies on the existence of “independent” mechanisms. It is well known that independence is extremely difficult to define and assess as the demarcation of having no interest, having an interest and being conflicted is often unclear. Decision makers possessing neutrality of interest in (or un-attachment to) the underlying issue is an important goal of independence in accountability mechanisms.

Notably, the group investigated two different views (non exclusive) in order to assess independence: independence of persons participating in the decision process, and independence of a specific accountability mechanism with regards to other mechanisms.

The group acknowledges that not all accountability mechanisms will have the same level of independence. Internal accountability mechanisms with high transparency standards might provide a first level of accountability and external, more independent bodies might act as last resort mechanisms.

i. Independence of persons participating in the decision process

The notion of independence is well researched. For instance Basic Principles on the Independence of the Judiciary were adopted by United Nations Congress⁵, including a section defining the independence of the judiciary.

Within ICANN, section 3 of Article IV of the ICANN bylaws define the notion of independence for members of the expected “omnibus standing panel”⁶.

In corporate governance through the notion of independent Director, which appears in many countries’ corporate governance codes of conduct. One definition is provided as such⁷ :

“For the purpose of this clause the expression 'independent directors' means directors who apart from receiving director's remuneration, do not have any other material pecuniary relationship or

⁵ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

⁶ <https://www.icann.org/resources/pages/bylaws-2012-02-25-en#IV>

⁷ [Are we making a mockery of independent directors?](#) Dr. Madhav Mehra, President, World Council for Corporate Governance (circa 2004)

transactions with the company, its promoters, its management or its subsidiaries, which in judgment of the board may affect independence of judgment of the directors."

For the benefit of this CCWG, independence of a mechanism could be assessed through the independence of the persons involved in making or validating the decision along these lines:

The persons involved in making or validating the decision, apart from participating to this mechanism, do not have any other material relationship, transaction or professional aspiration with ICANN or related to the underlying subject matter of the decision in question which may affect their independence of judgment.

It should be noted that such a definition has triggered an ongoing debate regarding the loss of the qualification of "independent" after a certain number of years of service as Board member in an organization.

The group also noted that this definition was focused on "economic" independence, rather than political independence for instance. It was however considered that this addressed the most pressing expectation from stakeholders.

ii. Independence of a specific accountability mechanism

Considering the special nature of the multistakeholder model, which by definition empowers interested parties to participate and make decisions, the group considers that independence could also be considered as independence between the various accountability mechanisms.

Independence of two accountability mechanisms can be assessed through:

- Examining whether the persons making decisions in one of the mechanism are similar to the other mechanism.
- Examining whether the persons making decisions in one of the mechanism are appointed by the persons in charge of the other mechanism.
- Examining whether the persons making decisions in one of the mechanism have material relationships with the other mechanism that may affect their independence of judgment.
- Examining whether the persons making decisions in one of the mechanisms have conflicted interests in any of the mechanisms they take part.

5. To whom should ICANN be accountable?

The CCWG-Accountability provides the following clarification (emphasis added), as well as a definition of stakeholders:

The CCWG-Accountability is expected to deliver proposals that would enhance ICANN's accountability towards **all stakeholders**.

The term stakeholder should be considered for the CCWG-Accountability in its wider acceptance, for instance by relying on the definition provided by the European Framework for Quality

Management (EFQM): a person, group or organization that has a direct or indirect stake or interest in the organization because it can either affect the organization or be affected by it. This includes but is not limited to all ICANN SOs and ACs.

The view of the group is that this definition is useful, and can be further clarified by illustrating which stakeholders can affect ICANN or be affected by ICANN, either directly or indirectly.

The group also discussed references to pre-existing categories of stakeholders. The Tunis Agenda for the Information Society, outcome of the World Summit on Information Society, mentioned “governments, the private sector, civil society and international organizations.” The Netmundial multistakeholder statement refers to “governments, private sector, civil society, technical community, and academia “. The group’s view was that these categories may not be the most appropriate for the issue of ICANN’s accountability.

a. Affected parties

Affected parties are individuals or entities upon which the decisions made by ICANN have an impact.

i. *Directly-affected parties*

The group classifies directly-affected parties as parties affected by ICANN’s decisions through contracts, individual decisions or policies. They would therefore include:

Stakeholder	Affected by contracts	Affected by individual decisions made by ICANN	Affected by policy	Comment
gTLD registries	X	X	X	
ICANN-accredited registrars	X	X	X	
Internet users	X	X	X	if a domain name is taken down for instance
gTLD registrants	X	X	X	through UDRP or WHOIS verification policies for instance
ccTLD registrants				through potential IANA performance issues if they affected security and stability of the DNS
Governments			X	including law enforcement agencies
IP Right owners		X	X	ex: UDRP, URS, TMCH...
Free speech and civil liberties advocates	X	X	X	
RIRs		X		through numbering allocation policies for instance

ISPs		X		through numbering allocation or naming policies for instance, or for instance deployment of DNSSEC
Registry services providers	X		X	
Domain name resellers			X	
ccTLD managers		X		Mainly as far as IANA decisions are processed
IDN ccTLD managers		X	X	Affected by IDN ccTLD policy and some individual panel decisions
IETF		X		
Dispute Resolution Providers, e.g. for UDRP and URS	X		X	
ICANN contractors such as the TMCH operator	X		x	

Individual decisions in this context are decisions made by ICANN on operational matters extending beyond policy (implementation or in case of necessity to interpret the policy).

ii. Indirectly-affected parties

Other parties are affected indirectly by ICANN's decisions.

- Specific communities of users, industries, or sectors of the economy (through the introduction of new gTLDs for instance), or noncommercial civil society.
- ccTLD registrars (through common business practices as well as trends in the market shaped by policy – such as new gTLD introduction).
- RIR communities.
- The root zone maintainer, through IANA Functions contract and its own contract with the Department of Commerce, or any future arrangement.
- DNS Name server operators (including root server operators, Internet Service Providers, private network DNS operators, through, for instance deployment of DNSSEC or IPv6).

b. Parties that affect ICANN

Parties affecting ICANN are parties that influence ICANN's decisions or actions, either directly or indirectly, or shape the environment in which ICANN operates.

i. Parties affecting ICANN directly

The group classifies as parties affecting ICANN directly the individuals or entities that participate directly in ICANN's decision processes. They would therefore include:

- Registry Stakeholder Group (RySG) and Registrar Stakeholder Group (RrSG)
- Commercial stakeholder group (CSG), i.e. Commercial business users (BC), Intellectual Property Constituency (IPC) and Internet Service Provider and Connectivity Providers Constituency (ISPCP)
- Non Commercial Stakeholder Group (NCSG), i.e. Non-Commercial Users Constituency (NCUC) and Not for Profit Operational Concerns Constituency (NPOC)
- Governments in the GAC
- Security experts (SSAC)
- Internet users (through ALAC)
- RIR communities (through ASO)
- ccTLD managers who are ccNSO members, as well as ccTLD regional organizations such as CENTR or APTLD
- NomCom nominees to the various groups
- Root server operators (RSSAC)
- The NTIA (currently) through the AOC
- ICANN Board
- ICANN staff and contractors
- Community members participating in public comment fora or corresponding with ICANN
- IETF (through arrangements regarding IANA and changes affecting internet identifiers)
- Auditors, (community) working groups, (external) review teams

ii. Parties affecting ICANN indirectly

Other parties affect ICANN or shape its environment, although indirectly, such as:

- The US Congress (through various audits and legislations that affect ICANN as a US-based organization and an organization in contract with the US government through NTIA).
- Governments that are not GAC members.
- ccTLDs that are not ccNSO members.
- Other entities working on communication policy such as the IGF, UN family of organization (CSTD, ITU), Internet Society, etc.
- (Potential) domain name registrants through their buying / selling behaviours shaping the market.
- Future Internet users.

The role of actors outside the institution is very important to the organization's accountability, as described by Allen Buchanan and Robert O. Keohane⁸: "*It is not enough for the institutions to make information available. Other agents, whose interests and commitments do not coincide too closely with those of the institution, must provide a check on the reliability of the information, integrate it, and make it available in understandable, usable form, to all who have a legitimate interest in the operations of the institution. Such activities can produce positive feedback, in which appeal to standards of legitimacy by the external epistemic actors not only increases*

⁸ "The legitimacy of global governance institutions", Ethics and International Affairs, 2006, vol. 20, p. 405ff

compliance with existing standards but also leads to improvements in the quality of these standards themselves. For these reasons, in the absence of global democracy, and given the limitations of the democratic channel described earlier, legitimacy depends crucially upon not only the epistemic virtues of the institution itself but also on the activities of external epistemic actors. Effective linkage between the institution and external epistemic actors constitutes what might be called the transnational civil society channel of accountability. The needed external epistemic actors, if they are effective, will themselves be institutionally organized."

6. What are the purposes of ICANN's accountability ?

This question mentioned by Professor Scholte in London raised a healthy and thorough discussion on the CCWG mailing list. Different perspectives were expressed, exposing clearly how different the views could be in the community about the ultimate goals and priorities of ICANN. However, the discussion was useful in enabling identification of four types of purpose that are relevant, within the limited scope of ICANN's mission and values. It should be noted that the purposes of accountability may not always be reconcilable with each other. For example, there could be occasions where compliance with legislation in a particular jurisdiction is in tension with ICANN's own due process, security of the Internet and/or (certain understandings of) the public interest.

- a. ICANN should be accountable to complying with its own rules and processes (part of "due process", as a quality of fairness and justice)

One of the key purposes of ICANN's accountability is to ensure that ICANN, when elaborating policies, implementing or enforcing them, follows the specific rules and processes that were set, either by its Bylaws or through the policies themselves. Stakeholders expect ICANN to abide to these rules since ICANN is empowered to affect their operations or environment through its actions.

This implies that accountability mechanisms must be put in place to address for example:

- Disregard of established procedures (such as advice not being afforded due deference, or the absence of PDP...)
- Decisions being taken outside of remit (a group or staff member taking a decision that extends beyond its mission)
- Violations of policy or process, such as decisions without material information
- Community-approved policies being materially changed in "implementation"

This particular purpose of accountability should not affect the ability to evolve the rules and processes themselves, when appropriate and following predefined rules and procedures.

- b. ICANN should be accountable to comply with applicable legislation, in jurisdictions where it operates

ICANN Bylaws state that :

"The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its

Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

Thus ICANN, like any organization, is accountable to comply with applicable legislation, in jurisdictions where it operates, as well as internationally agreed laws, including considerations of human rights as bounded by ICANN's mission and core values.

ICANN's responsibility to govern in the public interest further requires it to conform its policies with internationally recognized human rights standards.

c. ICANN should be accountable to achieving certain levels of performance as well as security

Aside from compliance, ICANN is also expected to deliver certain services to certain stakeholders. These services are, among other things, related to the IANA function, but not only. The Global Domains Division within ICANN serves gTLD registries and registrars. ICANN also operates the L-root.

Like any professional organization, ICANN should be held accountable to provide these services at the appropriate level of performance. This performance can be expressed in terms of:

- Service levels (through, for instance, a Service Level Agreement), expressed for instance in terms of delay to service a request or agreements with contracted parties that carry obligations that rely upon enforcement from ICANN's Compliance Department;
- Security level (especially for key infrastructure such as DNSSEC facilities) or data (including personal information) collected by ICANN or required to be collected by ICANN;
- Cost to achieve the given levels of performance.

d. ICANN should be accountable to ensure that its decisions are for the benefit of the public, not just in the interests of a particular set of stakeholders or ICANN the organization.

The term "public interest" is referenced several times in the Affirmation of Commitments between ICANN and the US Government's Department of Commerce⁹. Considering the differences of approach regarding the definition of this notion, which is not provided by the AoC, as well as the changing nature of the needs of the Internet and the Internet users, the group considers that one of ICANN's accountability purposes can be defined as ensuring that its decisions are, to quote the AoC, "in the public interest, and not just the interests of a particular set of stakeholders". ICANN's decisions must also ensure that they are not made primarily in the interests of ICANN, the corporation.

The term stakeholder should be understood here as defined above in this document, including directly and indirectly affected parties as well as directly and indirectly affecting parties. Clarifying

⁹ <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>

ICANN's notion of public interest would however most certainly be highly beneficial to the organization by setting clear expectations with all stakeholders on what it can and cannot be held accountable to. The CCWG-Accountability took note that this action was alluded to in ICANN's Strategic Plan.

Moreover, in line with this purpose of accountability and as a bottom-up organization, ICANN has a duty to be as inclusive and open as possible, in order for everyone to have a voice in its processes, which is consistent with the fact that its decisions be not taken in the interest of a particular set of stakeholders. Keeping the community inclusive and self renewing are therefore important goals.

Additional comment received from William Currie, Independent Advisor:

The "problem of accountability" is frequently cast in technocratic terms; it is a problem of poor oversight and inadequate representation, amenable to correction through stringent regulation, more representative electoral and decision-making processes, and backed up through punitive measures. From attempts to frame accountability in these terms, a range of definitions have emerged:

- the process of holding actors responsible for actions;
- the means by which individuals and organizations report to a recognised authority and are held responsible for their actions;
- the capacity to demand someone engage in reason-giving to justify her behavior, and/or the capacity to impose a penalty for poor performance

These definitions point to a core sense of accountability as having a set of three features:

- It is external, in that the account is given to an outside authority
- It involves social interaction and exchange, with one side seeking answers or rectification, while the other responds and accepts sanctions; and,
- It implies rights of authority, where those calling for an account assert rights of superiority over those who are accountable.

This is essentially a principal-agent view of accountability, in which the lead actor or principal sets goals and employs agents to accomplish them. The primary accountability problematic thus lies in constraining the opportunistic behavior of agents. The logic of accountability flows from this. The core components of accountability in governance hence are:

- Transparency - collecting information and making it available and accessible for public scrutiny;
- Answerability or Justification - providing clear reasoning for actions and decisions, including those not adopted, so that they may reasonably be questioned;
- Compliance - monitoring and evaluation of procedures and outcomes, combined with transparency in reporting those findings;
- Enforcement or Sanctions - imposing sanctions for shortfalls in compliance, justifications, or transparency.

Because each of these components builds on the others (with transparency being necessary for compliance, and enforcement depending on all), accountability relies on the presence of all four.

To operationalize accountability in practice, two further distinctions are needed:

- vertical accountability refers to mechanisms in which citizens and their associations select representatives and also hold incumbents to account.
- horizontal accountability refers to inter-institutional mechanisms or checks and balances such as review bodies, ombudspersons etc.

This approach to accountability describes the current state of affairs at ICANN and the CCWG's approach. The United States Government through the NTIA has performed the role

of the external authority hitherto and since the Affirmation of Commitments has sought to transition its role to ICANN itself through the refinement of the bottom-up multistakeholder model. The IANA transition is the final step in this process. The CCWG has taken the issues of vertical and horizontal accountability and is exploring them through discussion of a vertical membership model for ICANN with a community veto and tightening up the horizontal mechanisms, for example, related to review mechanisms.

While it is clear that the CCWG is doing what is required within the terms of this accountability approach and this is a necessary step in terms of meeting the challenge of the NTIA with respect to accountability, the question arises as to whether this is adequate. Jan's final point touches directly on this issue. If ICANN were simply a national institution dealing with a national Internet, the principal-agent approach would likely be adequate in itself. But as a complex global institution ICANN needs to do more than this. So it may be worth expanding the problem definition by including and exploring a third direction in addition to the two being currently pursued. The accountability problematic should include:

- improving vertical accountability by reforming representation in existing governance structures.
- improving horizontal accountability through quasi-independent oversight mechanisms, separation of powers, ombudspersons, judicial review and conflict management procedures.
- establishing new approaches to decision-making that are less well charted and constrained by the binary distinctions of principal-agent and vertical-horizontal dichotomy, but which are more pluralistic, on the grounds that this can improve both legitimacy and effectiveness.

Appendix D – Establishing an Inventory of Existing Accountability Mechanisms / ATRT Recommendations

SubGroup 1

Establishing an inventory of existing accountability mechanisms / ATRT recommendations

1. ICANN Bylaws
 - a. **REDRESS Mechanisms:** ICANN Bylaws specifically provide four avenues for review of perceived failures of accountability:
 - i. Request for Reconsideration (Art. IV, Sec. 2) of
 1. one or more staff actions or inactions that contradict established ICANN policy(ies); or
 2. 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
 3. 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.
 - ii. Process for "independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws" (Art. IV, Sec. 3)¹
 - iii. "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,

¹ Until 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 specified three areas for allowable review:

"The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a.) did the Board act without conflict of interest in taking its decision?
- b.) did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c.) did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?"

- and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.” (Art. IV, Sec. 4)
- iv. **Office of an Ombudsman (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.”
 - b. **Policy Consideration requirements:** requirements for how the Board shall consider policy recommendations from its advisory committees
 - i. GNSO
 - ii. ccNSO
 - iii. ASO
 - c. **Bylaws-based ADVISORY mechanisms:** requirements for the Board obtaining and considering advice from its Advisory Committees
 - i. Security and Stability Advisory Committee (SSAC) recommendations
 - ii. Governmental Advisory Committee (GAC) advice
 - iii. At-Large Advisory Committee (ALAC) advice
 - iv. Root Server Stability Advisory Committee (RSSAC)
2. **Affirmation of Commitments (AoC)**
 - a. AoC requires multiple reviews to be undertaken, specifically the Accountability and Transparency Reviews (see below for high-level summary of recommendations)
 3. **Jurisdiction of California and United States, enforced by:**
 - a. Secretary of State of California
 - b. Courts (California and U.S. Federal)
 4. **Jurisdiction of laws of other nations where ICANN has a presence**
 5. **Contractual requirements**
 - a. Relevant requirements of binding commitments by ICANN entered into with NTIA (for example, clauses C.2.9.2.c and C2.9.2.d of the IANA Functions Contract).
 - b. Registry and Registrar Agreements

ATRT1 Recommendations:

- **Rec 1 Board Operations, Composition & Review of Decisions**
 - 1.a-d Mechanisms for identifying collective Board skill-set; benchmarking Board/Board Governance Committee skill-sets; tailoring & consulting on skills; reviewing for each Nominating Committee (NomCom); publishing outcomes & requirements with NomCom’s notice.

- **Rec 2 Board Operations, Composition & Review of Decisions**
Regularly reinforce/review training & skills building.
- **Rec 3 Board Operations, Composition & Review of Decisions**
Increase transparency of NomCom’s deliberations & decision-making process. ASAP but starting no later than next Nom Com.
- **Rec 4 Board Operations, Composition & Review of Decisions**
Continue to enhance Board performance & work practices.
- **Rec 5 Board Operations, Composition & Review of Decisions**
Implement compensation scheme for voting Board Directors.
- **Rec 6 Board Operations, Composition & Review of Decisions**
Clarify distinction between Policy Development & executive function issues
- **Rec 7 Board Operations, Composition & Review of Decisions**
7. 1 Promptly publish all appropriate Board materials related to decision-making processes.
7.2 Publish rationale for Board decisions and for accepting or rejecting public & community input.
- **Rec 8 Board Operations, Composition & Review of Decisions**
Publish redaction conditions.
- **Rec 9 Governmental Advisory Committee (GAC) Operations, Engagement, Interaction with Board**
Clarify what constitutes GAC public policy “advice” under the Bylaws.
- **Rec 10 GAC Operations, Engagement, Interaction with Board**
Create formal, documented process for requesting, tracking GAC advice.
- **Rec 11 GAC Operations, Engagement, Interaction with Board**
Ensure timely provision & consideration of GAC advice and mechanisms for Board follow-up.
- **Rec 12 & 13 GAC Operations, Engagement, Interaction with Board**
Board, acting through the JWG, should develop & implement a process to engage the GAC earlier in the policy development process; ensure GAC is fully informed of policy agenda & policy staff is aware of GAC concerns.
- **Rec 14 GAC Operations, Engagement, Interaction with Board**
Increase support & commitment of governments to the GAC process.
- **Rec 15 Public input & Multilingual Access**
Implement stratified, prioritized public Notice & Comment processes.
- **Rec 16 & 17 Public input & Multilingual Access**
Provide “Comment” cycle & a “Reply Comment” comment cycles; review and adjust fixed timelines for Notice & Comment
- **Rec 18 Public input & Multilingual Access**
Ensure multilingual access in Policy Development Processes (PDP) to maximum extent feasible.
- **Rec 19 Board Operations, Composition & Review of Decisions**
Publish translated Board material within 21 days.

- **Rec 20 Board Operations, Composition & Review of Decisions**
Ensure/certify that inputs in policymaking processes are considered by the Board.
- **Rec 21 Public input & Multilingual Access**
Create annual public comment forecast.
- **Rec 22 Public input & Multilingual Access**
Ensure senior staffing arrangements are appropriately multilingual.
- **Rec 23 Board Operations, Composition & Review of Decisions**
Get input from committee of independent experts on restructuring review mechanisms.
- **Rec 24 Board Operations, Composition & Review of Decisions**
Assess Ombudsman relationship and confirm framework is consistent with international standards.
- **Rec 25 Board Operations, Composition & Review of Decisions**
Clarify standard for Reconsideration requests.
- **Rec 26 Board Operations, Composition & Review of Decisions**
Adopt standard timeline & format for Reconsideration Requests.
- **Rec 27 Measuring Success**
Evaluate and report on progress on recommendations and accountability & transparency commitments in the AoC.

ATRT2 Recommendations

- **Rec 1 Board Performance & Work Practices**
Develop and analyze measures for determining the quality of ICANN Board members.
- **Rec 2 Board Performance & Work Practices**
Develop and analyze measures of effectiveness of the Board's functioning and improvement efforts.
- **Rec 3 Board Performance & Work Practices**
Analyze qualifications of Board candidate pools, and assess Director's compensation levels against prevailing standards.
- **Rec 4 Policy/Implementation/Executive Function**
Develop understanding of the distinction between policy development and policy implementation. Develop mechanisms for SO/ACs to consult with the Board on matters, including but not limited to policy, implementation and administrative matters, on which the Board makes decisions.
- **Rec 5 Decision Making Transparency & Appeals**
Create a single published redaction policy. Institute a process to regularly evaluate redacted material to determine if redactions are still required and if not, ensure that redactions are removed.

- **Rec 6 GAC Operations & Interaction**
 - 6.1. Make deliberations more transparent and better understood.
 - 6.2. Adopt a policy of open meetings to increase transparency.
 - 6.3. Develop and publish rationales for GAC Advice, using the GAC register.
 - 6.4. Develop and document a formal process for notifying and requesting GAC advice (see ATRT1 Recommendation 10).
 - 6.5. Vote on appropriate bylaw changes to formally implement the documented process for Board-GAC bylaws consultation (see ATRT1 Recommendation 11).
 - 6.6. Remove barriers for participation, including language barriers, and improve understanding of the ICANN model and access to relevant ICANN information for GAC members. Improve its procedures to ensure more efficient, transparent and inclusive decision-making.
 - 6.7. Regularize senior officials' meetings.
 - 6.8. Work with ICANN's Global Stakeholder Engagement group (GSE) to develop guidelines for engaging governments.
 - 6.9. Develop a baseline and set of measurable goals for stakeholder engagement.
- **Rec 7 Decision Making Transparency & Appeals**
 - 7.1. Improve Public Comment process.
 - 7.2. Implement a process of correcting inaccuracies within comment summaries.
- **Rec 8 Multilingualism**
 - Improve translation quality and timeliness and interpretation quality. Implement continuous improvement.
- **Rec 9 Decision Making Transparency & Appeals**
 - 9.1. Mandate Board Response to Advisory Committee Formal Advice.
 - 9.2. Explore Options for Restructuring Current Review Mechanisms.
 - 9.3. Review Ombudsman Role
 - 9.4. Develop Transparency Metrics and Reporting
 - 9.5. Arrange an audit to determine the viability of the ICANN Anonymous Hotline as a whistleblowing mechanism and implement any necessary improvements.
- **Rec 10 Cross-Community Deliberation**
 - 10.1. Enhance GNSO policy development processes and methodologies to better meet community needs and be more suitable for addressing complex problems, including funding for professional services to assist GNSO policy development WGs and for face-to-face meetings and methodologies to utilize volunteer time more effectively.
 - 10.2. Develop methodologies to ensure that GAC and government input is provided to ICANN policy development processes and that the GAC has effective opportunities to provide input and guidance on draft policy development outcomes.
 - 10.3. Ensure more global participation in GNSO policy development processes, as well as other GNSO processes.
 - 10.4. Clarify circumstances under which the Board may establish or alter gTLD

policy .

10.5. Facilitate the equitable participation in applicable ICANN activities, of those ICANN stakeholders who lack the financial support of industry players.

- **Rec 11 AoC Review Process Effectiveness**

11.1. Ensure that the ongoing work of the AoC reviews is fed into the work of other ICANN strategic activities.

11.2. Coordinate various review processes so as to have all reviews complete before next ATRT review begins, and with the proper linkage of issues as framed by the AoC. 11.3. Ensure that AoC Review Teams are appointed in a timely fashion and have sufficient time to complete their work.

11.4. Prepare implementation report, including benchmarks and metrics, to be ready by review kick-off.

11.5. Allocate sufficient resources for Review Teams to fulfill their mandates and make the budget and rationale available at the start of the review.. This should include, but is not limited to, accommodation of Review Team requests to appoint independent experts/consultants if deemed necessary by the teams.

11.6. Address all AoC Review Team recommendations in a clear and unambiguous manner, indicating to what extent they are accepting each recommendation.

11.7. Provide an expected time frame for implementation

- **Rec 12 Financial Accountability & Transparency**

12.1. Ensure that the ICANN community, including all SOs and ACs, can participate and assist the ICANN Board in planning and prioritizing of work.

12.2. Consider the cost-effectiveness of ICANN's operations , in keeping with ICANN's status as a non-profit organization operating and delivering services in a non-competitive environment.

12.3. Conduct a benchmarking analysis.

12.4. Implement a multi-annual strategic plan and corresponding financial framework.

12.5. Improve the budget consultation process.

Appendix E – Input from Public Comment and Categorization into Work Streams 1 & 2

Cross-Community Working Group on Enhancing ICANN Accountability

Work Area 2: Review Input from Public Comment and Categorize into Work Streams 1 & 2

Draft 5.3, 15-Jan-2015

Proposed rationale for designating Work Streams: (updated to reflect discussion thru 12-Jan)

Work Stream 1 is designated for accountability enhancement mechanisms that must be in place or committed to, *before* IANA transition occurs.

WS1 mechanisms are those that, when in place or committed to, would provide the community with confidence that any accountability mechanism that would further enhance Icann's accountability would be implemented if it had consensus support from the community, even if it were to encounter Icann management resistance or if it were against the interest of Icann as a corporate entity.

All other consensus items could be in Work Stream 2, provided the mechanisms in WS1 are adequate to force implementation of WS2 items despite resistance from ICANN management and board.

Accountability Suggestions from public comments and posts	Supported by, and [opposition noted]	WS	ATRT Ref[2]
<i>1. Mechanisms giving the ICANN community ultimate authority over the ICANN corporation. Most of these are initially designated as WS1, since community Members need the leverage of IANA transition to obtain these Bylaws changes.</i>			
Community Members as ultimate authority[1]. Amend ICANN bylaws to recognize permanent cross-community Members (ALAC, ccNSO, GAC, SSAC, NRO, RSSAC, IETF, ASO, and each Constituency) with authority only in these specific areas:	GNSO Joint Statement, BC, ITIC, B.Carpenter, CNNIC, Siva, TPI, Verizon, NCSG, Just Net, E.Morris, Izumi	WS1	-
Appoint members of <i>Affirmation</i> review teams	BC, Spain, Avri Doria	WS1	
Review any board decision. Non-approval would send decision back to bottom-up policy development process. (Members could not revise bottom-up recommendations)	BC, ITIC, Heritage, SIIA, EC, C. Gutiérrez	WS1	-
[Alt:] Refer any board decision to an <u>independent</u> review panel. IRP decision should be binding	BC, ITIC, Heritage, SIIA, EC, Mueller, CWG , Gross	WS1	ATRT2 9.2
Approve changes to ICANN bylaws or Articles, with supermajority. (Members could not revise changes)	BC, ITIC, SIIA, Hutty, Robin Gross	WS1	-
Approve annual proposed ICANN budget [vote threshold?] (members could not make line-item changes)	BC, ITIC, USCIB	WS1	-
Recall one or all ICANN Board members [vote threshold?]	BC, Avri Doria, NCSG	WS1	-
Bring the <i>Affirmation of Commitments</i> (incl the Reviews) into the ICANN bylaws, with these amendments:	BC, USCIB, SIIA, Verizon, Morris	WS1	-
<i>Affirmation</i> Review Teams get access to all internal documents	Doria, MPAA, CIS, Morris	WS2	
<i>Affirmation</i> Accountability & Transparency Review Team could recommend sunset of original reviews and create new reviews	BC, USCIB	WS2	
Change <i>Affirmation</i> reviews from “in the public interest” to “for protection and advance of human rights and internet freedoms”	NCSG, Robin Gross [Opposition noted]	WS2	-
Change bylaws for Reconsideration Process: trigger when board acts arbitrarily or capriciously; decisions subject to Independent Review	Google	WS1	-
IRP’s decisions should be binding and publish reasoning. IRP should account for errors or ethical lapses.	NCSG	WS1	
Reduce IRP standard of review and reduce the cost to prosecute an IRP	Robin Gross	WS2	
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	David Johnson	WS1	-

Accountability Suggestions from public comments and posts	Supported by, and [opposition noted]	WS	ATRT Ref[2]
panel that could issue binding decisions.			
Replace <i>Affirmation</i> with accountability contract between ICANN and 'Contract Co.'	Guru Acharya	WS1	-
Independent certification for delegation & re-delegation requests	CWG	WS1	-
Independent Appeals Panel for contested root zone changes & WHOIS	CWG	WS1	-
Strengthen powers of the Ombudsman by granting it powers to set Board's decisions or policies aside.	NCSG	WS1	
Ombudsman should have authority to investigate any accountability-related complaint brought by an employee (with confidentiality)	NCSG	WS1	
<i>2. Mechanisms to restrict actions of the board and management of the ICANN corporation. Most of these are initially designated as WS2, since the Members could reverse board or management decisions if Members are empowered in WS1 (above).</i>			
Require supermajority for Board to approve action despite advice to the contrary from ACs or significant subsets of SOs	ISPCP, ITIC, Izumi	WS2	-
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].	Malcolm Hutty, Seun Ojedeji	WS1	
Prevent ICANN Board redefining mission/scope in Bylaws without community consensus	Malcolm Hutty	WS1	-
Ensure ICANN Board does not act "ultra vires", and stays within assigned mission and scope. e.g., prevent scope creep in policies imposed via RAA.	Malcolm Hutty, BC, TPI	WS1	
Prohibit ICANN from entering agreements that impose obligations unrelated to DNS management	Heritage [opposition noted]	WS2	-
Require supermajority of both board and community to change ICANN not-for-profit status or change ICANN's state of incorporation	USCIB, Verizon, SIIA [opposition noted]	WS2	-
Before leaving California, ICANN must show benefits exceed costs	SIIA, USCIB	WS2	-
Broadly expand grounds on which ICANN decisions and operations can be challenged; lower threshold to succeed in a challenge	Spain, Heritage	WS2	
<i>3. Mechanisms to prescribe actions of the ICANN corporation. Most of these are initially designated as WS2, since the Members could reverse board or management decisions if Members are empowered in WS1 (above). For example, a bottom-up consensus process to change ICANN bylaws might be rejected by ICANN board, but the Members could then reverse that decision and force the change.</i>			
Require a defined notion of consensus for any GAC advice that would need to be given deference by the ICANN board	Heritage, Izumi, BC Stress Test #6	WS2	
Let local courts hear complaints on free expression, security, and privacy	NCSG [opposition noted]	WS2	-
Establish an independent inspector general for ICANN	SIIA	WS2	-
Bylaws should commit ICANN to maintain freedom of expression	Heritage, NCSG	WS2	-
Require registry and registrar agreements be equitable and non-discriminatory	ITIC, Heritage	WS1	-
Require supermajority of board to [increase] change registry or registrar fees [Members could reverse]	Heritage	WS1	-
Create channels for inquiry/complaint/suggestions	ISOC of China	WS2	ATRT2 9.3
Recall mechanism for any board member selected by an AC/SO	Avri Doria	WS2	-
Recall mechanism for SO Council and ALAC member selected by NomCom	Avri Doria	WS2	-
ICANN to engage with all governments as equal community stakeholders	Fiona Asonga	WS2	-

Accountability Suggestions from public comments and posts	Supported by, and [opposition noted]	WS	ATRT Ref[2]
Allow GAC to select 2-4 voting ICANN board members	Spain [opposition noted]	WS2	-
Give Ombudsman ability to refer a matter to external body	NCSG [opposition noted]	WS2	
Change bylaws to establish term limits for ICANN senior officers	Heritage	WS2	-
Change bylaws to require that ICANN remain subject to US Law	Heritage, IPC [opposition noted]	WS2	-
Explore incorporation as international org under international law	NRO [opposition noted]	WS2	-
Limit ICANN executive function to implementation of policies	ITIC, Siva	WS1	
Require ICANN to operate under rule of law in jurisdictions that support effective redress	MPAA, CoA [opposition noted]	WS1	
Require one-third of board members to devote full time to ICANN	Spain	WS2	-
<u>Structurally</u> separate policy functions from root zone management functions	Heritage, Google, USCIB, Mueller, Verizon	WS1	-
Allow NomCom to select and retain Ombudsman	Morris	WS2	-
Have Transparency International conduct audit of all SOs and ACs	Morris [opposition noted]	WS2	-
Severely limit ICANN ability to deny disclosure/transparency requests	SIIA, Siva, R. Gross	WS2	ATRT1 7.1-2, ATRT2 5
ICANN subject to annual audit of transparency and achievement of goals	ITIC, Heritage, Google, Spain	WS2	Berkman 2010
Make all board deliberations transparent (with minimal redaction)	Siva, R. Gross, Internet Society of China, BC	WS2	ATRT2 9.4
Require more advance notice and detail re: upcoming board meetings	Robin Gross	WS2	
Require all Advisory Committees (incl GAC) and Supporting Organizations (incl Number and Protocol entities) to have accountability and transparency mechanisms aligned to those of ICANN	Morris, Fiona Asonga, Carlos Gutiérrez, R. Gross	WS2	-
Improve mechanism to obtain transparency of ICANN documents (e.g. FOIA)	USCIB, CIS, Verizon, R. Gross	WS2	ATRT2 9.4
Establish an Open Data Policy and develop an Open Data action plan, where ICANN documents are open by default.	ITIF, W. Donkor, R. Gross	WS2	ATRT2 9.4
<u>Equal footing of stakeholders</u> : rethink the separation of SOs and ACs. At least Users (if represented in ALAC) and Governments (GAC) deserve equal footing with commercial interests in policy making.	Carlos Gutiérrez [opposition noted]	WS2	-
<u>Equal footing in policymaking</u> : differences between contracted and non-contracted parties are blurred with new gTLDs. The representativeness of non-commercial Stakeholders, vis a vis ALAC and GAC remains a question. Academic accreditation does not seem related to the issues discussed in the IANA Stewardship transition and some of the newer PDPs. If there is equal footing, the GNSO houses have to be rebalanced as per above	Carlos Gutiérrez [opposition noted]	WS2	-
<u>Structural and/or Organizational separation</u> between a) Policy Making, b) Operations and c) Compliance functions.	Carlos Gutiérrez	WS2	-
Implement recommendations from ATRT1 and ATRT2	NCSG, Robin Gross	WS1	
Proposed ICANN policies and decisions should be evaluated to ensure they do not circumvent basic human rights of Internet users. ICANN must be required to provide at least the same level of protection to citizen's fundamental rights that are enshrined in the Universal Declaration of Human Rights and numerous national laws.	Robin Gross	WS2	

Notes

[1] 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)

[2] *Re the ATRT reference column. Very few of the specific recommendations in this list have a corresponding entry in ATRT1 or ATRT2 documentation. In some cases the topic was discussed but with different outcome. Also ATRT Recommendation 5 and 9 recommended several ongoing activities related to improving the appeals, transparency and ombudsman activities, that did not mention specific remedies, but rather recommended that a community wide process be convened to discuss those issues in detail. The Staff summary of previous comments was more general and this on that table it was easier to indicate the related area of the ATRT that dealt with that kind of issue. It is recommended that both this table and [Issues Identified During Public Comment](#) be consulted for a fuller picture.*

Links to sources cited in the table:

[GNSO Joint Statement](#), London, 26-Jun-2014

[Staff summary of accountability proposals taken from public comments](#), 15-Oct-2014

[ITIF post of Key Principles](#), 26-Jul-2014

[Public comments on enhancing ICANN Accountability](#), 7-May thru 30-Jul, 2014

[BC \(Business Constituency\) comments and Stress Tests](#), 27-May-2014

[Google comments](#), 28-May-2014

[SIIA comments](#), 30-May-2014

[Heritage Foundation comments](#), 20-Jun-2014

[Public comments on enhancing ICANN Accountability](#), 6-Sep thru 13-Oct, 2014

[ITIC Principles](#), 27-Sep-2014

[CDT Endorsement of ITIC principles](#), 4-Aug-2014

[ISPCP comments on proposed Bylaws change](#) 14-Sep-2014

[Malcolm Hutto](#), comments at ICANN51, [Enhancing ICANN Accountability session](#) 13-Sep-2014

[Op-Ed from ITIF regarding permanent cross-community group as ultimate authority](#), 17-Dec-2014

[Blog by David Johnson](#), 19-Dec-2014

[Staff Summary of Proposed Solutions from Public Comment](#), 14-Aug-2014

[Robin Gross Public Comments](#), 6-May-2014

[Milton Mueller's Public Comments](#), 6-May-2014

Appendix F – Affirmation of Commitments

**AFFIRMATION OF COMMITMENTS BY THE UNITED STATES
DEPARTMENT OF COMMERCE AND THE INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS**

1. This document constitutes an Affirmation of Commitments (Affirmation) by the United States Department of Commerce (“DOC”) and the Internet Corporation for Assigned Names and Numbers (“ICANN”), a not-for-profit corporation. In recognition of the conclusion of the Joint Project Agreement and to institutionalize and memorialize the technical coordination of the Internet’s domain name and addressing system (DNS)¹, globally by a private sector led organization, the parties agree as follows:

2. The Internet is a transformative technology that will continue to empower people around the globe, spur innovation, facilitate trade and commerce, and enable the free and unfettered flow of information. One of the elements of the Internet’s success is a highly decentralized network that enables and encourages decision-making at a local level. Notwithstanding this decentralization, global technical coordination of the Internet’s underlying infrastructure - the DNS - is required to ensure interoperability.

3. This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.

4. DOC affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users. ICANN and DOC recognize that there is a group of participants that engage in ICANN’s processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.

5. DOC recognizes the importance of global Internet users being able to use the Internet in their local languages and character sets, and endorses the rapid introduction of internationalized country code top level domain names (ccTLDs), provided related security, stability and resiliency issues are first addressed. Nothing in this document is an expression of support by DOC of any specific plan or proposal for the implementation of

¹ For the purposes of this Affirmation the Internet’s domain name and addressing system (DNS) is defined as: domain names; Internet protocol addresses and autonomous system numbers; protocol port and parameter numbers. ICANN coordinates these identifiers at the overall level, consistent with its mission.

new generic top level domain names (gTLDs) or is an expression by DOC of a view that the potential consumer benefits of new gTLDs outweigh the potential costs.

6. DOC also affirms the United States Government's commitment to ongoing participation in ICANN's Governmental Advisory Committee (GAC). DOC recognizes the important role of the GAC with respect to ICANN decision-making and execution of tasks and of the effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the Internet DNS.

7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) 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; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act. ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity.

9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:

9.1 Ensuring accountability, transparency and the interests of global Internet users:

ICANN commits 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 by: (a) continually assessing and improving ICANN Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions; (b) assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS; (c) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and

(e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development. ICANN will organize a review of its execution of the above commitments no less frequently than every three years, with the first such review concluding no later than December 31, 2010. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the Chair of the Board of ICANN, the Assistant Secretary for Communications and Information of the DOC, representatives of the relevant ICANN Advisory Committees and Supporting Organizations and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the Chair of the Board of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations. Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.

9.2 Preserving security, stability and resiliency: ICANN has developed a plan to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS, which will be regularly updated by ICANN to reflect emerging threats to the DNS. ICANN will organize a review of its execution of the above commitments no less frequently than every three years. The first such review shall commence one year from the effective date of this Affirmation. Particular attention will be paid to: (a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS; (b) ensuring appropriate contingency planning; and (c) maintaining clear processes. Each of the reviews conducted under this section will assess the extent to which ICANN has successfully implemented the security plan, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS, consistent with ICANN's limited technical mission. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

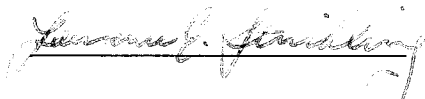
9.3 Promoting competition, consumer trust, and consumer choice: ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years. The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3.1 ICANN additionally commits to enforcing its existing policy relating to WHOIS, 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. One year from the effective date of this document and then no less frequently than every three years thereafter, ICANN will organize a review of WHOIS policy and its implementation to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, as well as experts, and representatives of the global law enforcement community, and global privacy experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

10. To facilitate transparency and openness in ICANN's deliberations and operations, the terms and output of each of the reviews will be published for public comment. Each review team will consider such public comment and amend the review as it deems appropriate before it issues its final report to the Board.

11. The DOC enters into this Affirmation of Commitments pursuant to its authority under 15 U.S.C. 1512 and 47 U.S.C. 902. ICANN commits to this Affirmation according to its Articles of Incorporation and its Bylaws. This agreement will become effective October 1, 2009. The agreement is intended to be long-standing, but may be amended at any time by mutual consent of the parties. Any party may terminate this Affirmation of Commitments by providing 120 days written notice to the other party. This Affirmation contemplates no transfer of funds between the parties. In the event this Affirmation of Commitments is terminated, each party shall be solely responsible for the payment of any expenses it has incurred. All obligations of the DOC under this Affirmation of Commitments are subject to the availability of funds.

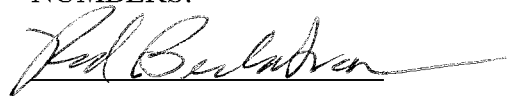
FOR THE NATIONAL
TELECOMMUNICATIONS AND
INFORMATION ADMINISTRATION:



Name: Lawrence E. Strickling
Title: Assistant Secretary for
Communications and Information

Date: September 30, 2009

FOR THE INTERNET CORPORATION
FOR ASSIGNED NAMES AND
NUMBERS:



Name: Rod Beckstrom
Title: President and CEO

Date: September 30, 2009