



Comments of the U.S. Council for International Business

Cross Community Working Group on Enhancing ICANN Accountability Proposed Accountability Enhancements (Work Stream 1)

General Comments: Coordination of CWG and CCWG Work

Before examining specific elements of the CCWG Enhancing ICANN Accountability proposal, USCIB urges you to consider that the overall transition process would benefit from closer coordination of the development of the CWG-Stewardship and CCWG Enhancing ICAAN Accountability proposals. As the two documents are parts of a complete proposal and must be considered together by the community, their contents and reviews should be coordinated. For example, cross-references can be included in the respective sections of each document and availability of the documents and their respective review cycles can be coordinated to enable a holistic review of the proposals.

The CCWG current comment period closes on June 3, and you have planned a second 40-day public comment period in July. We therefore have recommended to CWG-Stewardship that it extend its current comment period to June 3 – provided that would not affect the availability of the complete document for review at the ICANN 53 meeting. This would better enable full consideration of the comments in the CCWG proposal and their potential impact on the CWG proposal. Furthermore, we recommended a second 40-day comment period for the CWG-Stewardship proposal that will coincide with the CCWG's period in July, where both proposals can be commented on simultaneously.

Public Comment Input Framework

1. Do you believe the set of Work Stream 1 proposals in this interim report, if implemented or committed to, would provide sufficient enhancements to ICANN's accountability to proceed with the IANA Stewardship transition? If not, please clarify what amendments would be needed to the set of recommendation.

We applaud the hard work by CCWG and all participants. Overall, we feel the draft Accountability proposal is high quality and inspires confidence that the final proposal will meet all requirements.

Below we have some specific comments. Where appropriate, we cite the paragraph number for precision.

Revised Mission, Commitments & Core Values

1. Do you agree that these recommended changes to ICANN's Mission, Commitments and Core Values would enhance ICANN's accountability?
 2. Do you agree with the list of requirements for this recommendation? If not, please detail how you would amend these requirements.
- **@50, 71-76:** The need to balance competing interests exists in ICANN's current Bylaws. USCIB seeks clarification as to why changes are needed to existing language. Any amendments to the existing

language should promote prompt resolution of issues and not inactions. USCIB strongly urges the CCWG to address this in the next iteration of the proposal.

- **@58:** The current draft does not contain ICANN’s mission with respect to protocol, port, and parameter numbers (which is to be provided by IETF). We wait for this important element.
- **@60, @337:** We strongly support the proposition that ICANN should not attempt to establish obligations on non-contracted parties. Indeed, ICANN’s entire multi-stakeholder structure is built on a self-regulatory system implemented through contractual obligations and thus ICANN can only establish contractual obligations on parties with which it has privity through a negotiated and mutually agreeable contract/amendment with such parties. Therefore, @60 should be clarified and we propose that it should read as follows: *“ICANN shall not engage in or use its powers to attempt to establish contractual obligations on companies with which it is not in privity of contract and shall not attempt to establish contractual obligations on contracted parties that are not agreed by such parties.”*

We also note and support ICANN’s obligation at paragraph 337, *“ICANN will ensure that as it expands the top-level domain space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.”* Paragraph 337 says this language will be added to the bylaws core values section, which USCIB supports. However, the entirety of this section does not appear in the proposed bylaw core value changes proposed by the CCWG and we request that the entirety of this language be added.

- **@89:** We support the retention of the term “private sector.” It is both historically accurate and an important element to retain.

Fundamental Bylaws

3. Do you agree that the introduction of Fundamental Bylaws would enhance ICANN's accountability?
4. Do you agree with the list of requirements for this recommendation, including the list of which Bylaws should become Fundamental Bylaws? If not, please detail how you would recommend amending these requirements.

Yes. Critical elements that require a high standard to change, are important both from a stability standpoint, and also to address legitimate concerns for the integrity of the transition.

Independent Review Panel Enhancement

5. Do you agree that the proposed improvements to the IRP would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

In general, USCIB agrees with the proposed improvements. Below, we offer some specific comments:

- USCIB supports the creation of a standing pool of arbitrators, although we would urge that the pool of potential candidates be broadened to ensure participants have the requisite international arbitration expertise combined with an understanding of ICANN and the DNS.

- We also think a liberal approach to who may petition the panel, coupled with the ability of the Panel to provide for loser pays/fee shifting in the event it identifies a challenge as frivolous, seems a good balance between open access to due process, and mitigating delay tactics. The independent nature of the panel also is a crucial element.
- We strongly support the proposed scope of review, in which parties may seek review based on substance and procedure, based on ICANN's Bylaws, Articles of Incorporation, or Statement of Mission, Commitments, and Core Values. USCIB agrees that parties should be able to seek review of both substance and procedure. Redress should be available when a particular action or failure to act "violates either (a) substantive limitations on the permissible scope of ICANN's actions, or (b) decision-making procedures, in each case as set forth in ICANN's Bylaws, Articles of Incorporation, or Statement of Mission, Commitments, and Core Values or ICANN policies."
- As it continues to deliberate how to enhance the IRP, USCIB encourages the CCWG-Accountability to be mindful of the fact that IRP procedures should encourage parties to participate in the bottom-up ICANN policymaking process in an active and timely way so that issues can be addressed and resolved at an earlier stage of the process if at all possible. We would appreciate the CCWG-Accountability's proposals for how to strike this balance in the next version of this proposal, seeking to ensure that the IRP is not abused by those seeking to override community-developed and approved policies.
- In addition, there appears to be a risk that one party could file an IRP to a 1-person panel and overturn community-led policy if the IRP panel decided in its favor. There is some fear that this could put too much power in the hands of few people and create binding precedent that is impossible to overturn. Thus, a new stress test should be considered for this situation, and if the result is unsatisfactory, consideration of a community-based override with a high voting threshold.
- Finally, with respect to enhancements for both the Independent Review Panel and the Reconsideration Process (below), USCIB recommends providing definitions of "materially affected" and "materially harmed" to clarify if such terms refer to economic harm or would include broader concepts of harm to an entity.

Reconsideration Process Enhancement

6. Do you agree that the proposed improvements to the reconsideration process would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements. Are the timeframes and deadlines proposed herein sufficient to meet the community's needs? Is the scope of permissible requests broad / narrow enough to meet the community's needs?

We support the revisions to the Reconsideration Request, but offer the following suggestions:

- We strongly suggest that CCWG clarify that the Ombudsman must be fully independent of ICANN Legal staff in order to conduct the initial review as proposed. It should also be ensured that the office of the Ombudsman is properly staff so as to avoid bottlenecks in the review process.
- In addition, we iterate concerns expressed above regarding the IRP process. As it continues to deliberate how to enhance the Reconsideration Request process, USCIB encourages the CCWG-Accountability to be

mindful of the fact that procedures should encourage parties to participate in the bottom-up ICANN policymaking process in an active and timely way so that issues can be addressed and resolved at an earlier stage of the process if at all possible. We would appreciate the CCWG-Accountability's proposals for how to strike this balance in the next version of this proposal, seeking to ensure that the Reconsideration Request is not abused by those seeking to override community-developed and approved policies.

Mechanism to empower the Community

7. What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed options related to the relative influence of the various groups in the community mechanism? Please provide the underlying rationale in terms of required accountability features or protection against certain contingencies.

Overall, USCIB supports the proposal that Supporting Organizations (SO) and Advisory Committees (AC) establish themselves as legal entities by forming unincorporated associations. We agree that this approach would provide an effective means for SOs/ACs to exercise the powers and rights of Members of a non-profit organization incorporated in California on a number of critical governance issues.

We further agree with the rationale used in assigning voting weights for the SOs and ACs as prescribed by the Reference Mechanism, in which the ASO, ccNSO, GNSO, At Large, and GAC communities each receive 5 votes, with the SSAC and RSSAC each receiving 2 votes.

@186: We note that all the implementation details, (such as how the communities will cast votes) will not be developed until the second draft, and we look forward to reviewing such details.

Power: reconsider/reject budget or strategy/operating plans

8. Do you agree that the power for the community to reject a budget or strategic plan would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

@199: We strongly support the power for the community to reject a budget or strategic plan. In many instances, the power of the purse provides the ultimate check on an institution's. Further clarification also is needed regarding what constitutes when the Board has "failed to properly consider community input."

However, USCIB shares the concerns of the ICANN's Business Constituency (BC) that a sustained rejection of ICANN budgets could result in the corporation having to operate under prior-approved budgets for multiple years, comparable to the U.S. Government's practice of operating under a "continuing resolution" based on the budgets of prior fiscal years. This is not an efficient or effective way to operate an organization like ICANN, and USCIB concurs with BC recommendation that the CCWG consider at what point the budget veto would be truncated after multiple votes to block the Board's proposal.

Power: reconsider/reject changes to ICANN "standard" Bylaws

9. Do you agree that the power for the community to reject a proposed Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

Power: approve changes to "Fundamental" Bylaws

10. Do you agree that the power for the community to approve any fundamental Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

@199: We strongly support the requirement that the community ratify new "Fundamental" by-laws by giving positive assent.

Power: Recalling individual ICANN Directors

11. Do you agree that the power for the community to remove individual Board Directors would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

Power: Recalling the entire ICANN Board

12. Do you agree that the power for the community to recall the entire Board would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

@199: We support the ability of the community to recall board members. However, because "spilling the board" should be considered a measure of last resort, we support an 80 percent threshold for this action.

Incorporating the Affirmation of Commitments into the ICANN Bylaws

13. Do you agree that the incorporation into ICANN's Bylaws of the Affirmation of Commitments principles would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.
14. Do you agree that the incorporation into ICANN's Bylaws of the Affirmation of Commitments reviews would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

The AoC currently calls for several reviews that have served as effective tools for reviewing and strengthening ICANN's accountability. USCIB therefore strongly supports the inclusion of the Accountability and Transparency Review (ATRT), the Security, Stability, & Resiliency of the DNS Review, the Competition, Consumer Trust, & Consumer Choice Review, and the WHOIS Policy Review into Article IV of the ICANN Bylaws so that ICANN will be legally bound to continue them on a regular and permanent basis. In sum, we regard incorporation of the AoC into the ICANN Bylaws as a fundamental requirement of the transition. This will provide the Internet user community with greater confidence that the safety, security, and resiliency of the DNS will continue uninterrupted as NTIA's stewardship of the IANA functions is transitioned.

@269: The proposed text for insertion in the bylaws is "*where feasible, and appropriate, depending on market mechanisms.....*" We feel that there is a large range of opinions on the role of the market. The AoC, however, is stronger in its support of the marketplace, so we would suggest deleting the words "*and appropriate*".

@345: We support the bylaw changes on the new gTLD program generally and specifically: "Subsequent rounds of new gTLDs should not be opened until the recommendations of the previous review required by this section have been implemented."

Bylaws changes suggested by Stress Tests

15. Do you agree that the incorporation into ICANN's Bylaws of the above changes, as suggested by stress tests, would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

Overall, we agree with the changes suggested by Stress Tests. Below are some specific comments:

- **@377:** The consultation notes that where the Board has not taken a formal decision (such as not following AC advice), the community might not have a mechanism to challenge the Board's action (or inaction) to act. USCIB would support a mechanism that allows for a "response" to trigger the review mechanisms.
- We note that Stress Test #18 considers a potentially concerning scenario in which Governments in ICANN's Government Advisory Committee amend their operating procedures to change from consensus decisions to majority voting for advice to the Board. **@387:** Thus, we strongly support the proposed language in paragraph 387 that limits imposing the obligation on the Board to find a mutually acceptable solution between the GAC and Board to only GAC advice that was developed by consensus.
- Moreover, we have seen little discussion about how the proposed accountability measures would address instances where the Board accepts GAC advice without consideration by or in contradiction to the wishes of the community. We thus recommend creating a separate stress test for the situation where the Board and GAC find a mutually acceptable solution that the community believes is outside the scope of GAC Advice or Board mandate, or otherwise disagreeable to the community and considering a community review mechanism over such Board actions if the stress test indicates that the community cannot sufficiently hold the Board accountable for such action.
- **@550:** We note that important questions with respect to the Root Zone Maintainer still need to be resolved. Direct insight into the process of transitioning the Root Zone Maintainer would help to ensure that there is a well-established structure and process for approval of major architectural and operational changes to the Root Zone environment. USCIB commends that any future proposal to clarify which entity will have this role, and further, to explicitly establish the process that would be utilized for consultation be a topic of public consultation with the multistakeholder community.
- **@636:** As mentioned above concerning the proposed response presented in paragraph 387 for Stress Test #18, USCIB supports amending the Bylaws such that only GAC consensus advice would trigger the obligation for the Board to find a mutual acceptable solution. However, we disagree with the paragraph 636, which states that the threat posed by Stress Test #18 "is not directly related to the transition of IANA stewardship. To the contrary, USCIB regards this issue, as captured in Stress Test #18, **as directly related** to the transition.

Implementation

We feel the estimate for Work Stream 1 implementation (roughly nine months) is reasonable and prudent, and would allow for a safe and smooth transition from NTIA stewardship to the global multi-stakeholder community.

Items for Consideration in Work Stream 2

The CCWG-Accountability seeks input from the community regarding its proposed work plan for the CCWG-Accountability Work Stream 2? If need be, please clarify what amendments would be needed.

Additional Suggestions

I. Prevention of government capture or undue ICANN influence on public policies unrelated to ICANN's core mission.

Governments could seek to control ICANN decision making processes by providing *quid pro quos* for actions taken by ICANN or governments could try to use intimidation. This situation could cause ICANN to make policy decisions that are not based on what is in the best interest of the ICANN community, but what would benefit ICANN as a corporation. In addition, ICANN could use its tremendous resources and clout to interfere with Internet governance public policies that are outside the scope of ICANN's technical obligations.

Therefore, USCIB suggests that an additional bylaw be added that requires ICANN or any individual acting on ICANN's behalf to make periodic public disclosure of their relationship with any government official, as well as activities, receipts and disbursements in support of those activities on behalf of ICANN. Disclosure of the required information facilitates evaluation by the multi-stakeholder community of the statements and activities of such persons in light of their function as representatives of ICANN.

Thank you for your consideration.



Barbara P. Wanner
Vice President, ICT Policy