Appendix A: Background

Background

This section includes an overview of the Enhancing ICANN Accountability & Governance process, and its foundation in the NTIA IANA Functions' Stewardship Transition.

Background On The NTIA IANA Functions' Stewardship Transition

On 14 March 2014 the National Telecommunications and Information Administration (NTIA) announced its intent to transition its stewardship of the Internet Assigned Numbers Authority (IANA) functions and related root zone management to the global multistakeholder community. NTIA asked ICANN to convene a multistakeholder process to develop a proposal for the transition.

In making its announcement, 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.

The IANA Stewardship Transition Coordination Group (ICG) was formed in July 2014 to assemble and deliver through the ICANN Board to NTIA a transition proposal consistent with the key principles outlined in the NTIA announcement. The ICG is made up of 30 individuals representing 13 communities of both direct and indirect stakeholders of the IANA functions. Direct stakeholders are "direct customers" of the IANA functions, e.g. top-level domain registry operators, while indirect stakeholders are all those who benefit from performance of the IANA functions, e.g., businesses and end users.

In September 2014, the ICG published a Request for Proposals (RFP) to the three communities. The three operational communities with direct operational or service relationships with the IANA functions i.e. Domain Names, Number Resources and Protocol Parameters were asked to provide a formal response to the ICG regarding its community's use of the IANA functions, its existing, pre-transition arrangements, proposed post-transition oversight and accountability arrangements, and any anticipated transition implications.

Each of the three operational communities formed working groups to develop a proposal:

- **Domain Names:** Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship)

- **Number Resources:** Consolidated Regional Internet Registries (RIRs) IANA Stewardship Proposal Team (CRISP Team); and
- **Protocol Parameters:** IANAPLAN Working Group (IANAPLAN WG)

In January 2015, the ICG received a proposal from the Protocol Parameters community and a proposal from the Numbering Resources community; the Domain Names community finalized its proposal for the ICG in June 2015.

Following submissions from the three communities, the ICG is assessing the respective outputs and assembling a complete proposal for the transition. This will provide opportunities for additional input and comment.

Introduction To The Enhancing ICANN Accountability & Governance Process

As initial discussions of the IANA Stewardship Transition were taking place, the ICANN community raised the broader topic of the impact of the transition on ICANN's current accountability mechanisms. From this dialogue, the Enhancing ICANN Accountability process was developed to propose reforms that would see ICANN realize a level of accountability to the global multistakeholder community that is satisfactory in the absence of its historical contractual relationship with the U.S. Government. This contractual relationship has been perceived as a backstop with regard to ICANN's organization-wide accountability since 1998.

Informed by community discussions held in March 2014 at ICANN's public meeting in Singapore, ICANN published a proposed process on Enhancing ICANN Accountability, with an opportunity for public dialogue and community feedback from 6 May – 27 June 2014, in addition to the comments received during the dedicated Enhancing ICANN Accountability session held on 26 June 2014 at the ICANN 50 meeting in London. The comments related to the development of the process were considered in the refinement of the second iteration of the process published on 14 August 2014. In response to community requests for additional time to review proposals and post questions and comments, ICANN provided an additional 21-day comment period from 6-27 September 2014.

The final Revised Enhancing ICANN Accountability: Process and Next Steps includes considering how ICANN's broader accountability mechanisms should be strengthened in light of the transition, including a review of existing accountability mechanisms such as those within the ICANN Bylaws and the Affirmation of Commitments.

Formation of the CCWG-Accountability

Following public comment periods and discussions on accountability, the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) was convened, designed and approved by a Drafting Team (DT) composed of five ICANN community groups. Further information, including document drafts and meeting transcripts of the Drafting Team that developed the CCWG-Accountability Charter (see Appendix B), is available on the CCWG-Accountability Wiki site.

The CCWG-Accountability Charter was circulated for adoption on 3 November. Since then, the following organizations have adopted the Charter:

- Generic Names Supporting Organization (GNSO) on 13 November 2014
- At-Large Advisory Committee (ALAC) on 18 November 2014
- Country Code Names Supporting Organization (ccNSO) on 20 November 2014
- Governmental Advisory Committee (GAC) on 8 December 2014
- Address Supporting Organization (ASO) on 9 December 2014
- Security and Stability Advisory Committee (SSAC) on 6 July 2015

Composition of the CCWG-Accountability

The CCWG-Accountability consists of 162 people, organized as 28 members, appointed by and accountable to the CCWG-Accountability chartering organizations, 136 participants, who participate as individuals, and 99 mailing list observers. Each of the Chartering Organizations may appoint a minimum of 2 and a maximum of 5 members to the working group in accordance with their own rules and procedures.

THE CCWG-ACCOUNTABILITY ALSO INCLUDES:

- 1 ICANN Board liaison who brings the voice of the Board and Board experience to activities and deliberations;
- 1 ICANN staff representative who provides input into the deliberations;
- 1 former ATRT member who serves as a liaison and brings perspective and ensures that there is no duplication of work;
- 2 ICG members who participate in the CCWG-Accountability, including two who serve as liaisons between the two groups.

Seven Advisors have also been appointed by a Public Experts Group (PEG) to contribute research and advice, and to bring perspectives on global best practices to enrich the CCWG-Accountability discussion, all while engaging with a broader network of accountability experts from around the world.

The CCWG-Accountability is open to all: anyone interested in the work of the CCWG-Accountability can join as a participant or observer. Participants may be from a chartering organization, from a stakeholder group or organization not represented in the CCWG-Accountability or currently active within ICANN, or self-appointed. For those who are merely interested to monitor the CCWG-Accountability conversations, there is the possibility to sign up as a mailing list "observer" which offers read-only access to the mailing list.

The group first met in December 2014 and has held weekly meetings since. It operates in a transparent environment: its mailing-lists discussions, meeting archives, drafts and correspondence are documented on a public wiki space.

Work Streams

Per the CCWG-Accountability Charter, the work of the CCWG-Accountability would proceed in two Work Streams defined as follows:

- **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

Methodology

This section describes the methodology through which the CCWG-Accountability developed and completed the Work Stream 1 proposal.

Defining Requirements for Work Stream 1

The primary goal of the CCWG-Accountability is to deliver proposals that would enhance ICANN's accountability towards all stakeholders. The first step in achieving this goal was to understand and describe the status quo. To do this efficiently, the CCWG-Accountability established four initial Work Areas:

- **Work Area 1:** Existing Accountability Mechanisms (including the Affirmation of Commitments reviews on accountability)
- **Work Area 2:** Review Input from Public Comment and Categorize Items into Work Streams 1 & 2 (Work Stream 1 & Work Stream 2)
- **Work Area 3:** Review Issues Identified by CWG-Stewardship
- **Work Area 4:** Identify Contingencies (especially in relation to Work Stream 1)

The four areas were populated with volunteer CCWG-Accountability members and participants who had dedicated mailing lists and wiki spaces to advance their work.

Work Area 1: Inventory of Existing Accountability Mechanisms

One of the first deliverables within the CCWG-Accountability was an inventory of existing accountability mechanisms on 15 December 2014, delivered just one week after the CCWG-Accountability first met. The inventory was the starting point of CCWG-Accountability's discussions about which ICANN accountability mechanisms should be enhanced to address the risks the group had identified, and where gaps would remain and the group would need to develop new mechanisms to mitigate against those risks.

Work Area 2: Assessment of Comments to Date

Another area of initial CCWG-Accountability work focused on a review of the collection of comments received during the development of the Enhancing ICANN Accountability process and assessed whether they were issues to address as part of Work Stream 1 or Work Stream 2. The group categorized the comments based on the following rationale:

- Work Stream 1 is designated for accountability enhancement mechanisms that must be in place or committed to, before IANA transition occurs.
- Work Stream 1 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 Work Stream 1 are adequate to force implementation of Work Stream 2 items despite resistance from ICANN management and board.

In addition to categorizing the comments, the ATRT Expert reviewed the comments and noted, where relevant, a reference to ATRT recommendations. Work Area 2 was complete as of 15 January 2015.

Work Area 3: Interrelation with the CWG-Stewardship Work

The CCWG-Accountability also reviewed the accountability elements identified by the CWG-Stewardship. In light of the clear linkage between the works of the two groups, the CWG-Stewardship and CCWG-Accountability Co-Chairs agreed that it would be valuable for the CWG-Stewardship to provide the CCWG-Accountability with a list of issues it identified during its deliberations where the work of both groups may overlap. A robust collaboration was built between the two groups including leadership coordination call and exchange of letters.

In January 2015, the CCWG-Accountability extensively discussed the CWG-Stewardship list of issues, offered input and indicated that these avenues of work would be one of the focuses of CCWG-Accountability attention.

While the work was completed in March 2015, the collaboration was maintained throughout the end of their respective mandates.

Work Area 4: Stress Test and Contingencies Work Party

A final area of focus was on the identification the main stress tests and contingencies that the CCWG-Accountability would use to test the proposed mechanisms and solutions, once elaborated.

The goal of this group was to identify the main contingencies that CCWG-Accountability should use to test proposed mechanisms and solutions once they are elaborated. The group defined contingencies as consisting of:

- An event (threat) to the IANA Functions Contract;
- Its consequence, such as creating significant interference with existing policy or the policy development processes, and;
- What contingency plan, if any, is known to exist.

21 broad scenarios were initially identified, including for example, the impact of financial crisis in the domain name industry, capture by one or more stakeholders, and termination of the Affirmation of Commitments. A full list is available from the Work Area 4 webpage.

The group also received inputs from the ICANN Board Risk Committee on enterprise-wide risks identified within ICANN, as an input to its work. Furthermore, details of strategic risks that ICANN may face are identified in "ICANN Strategic Plan for fiscal years 2016-2020".

This work continues through the Stress Tests Work Party (ST-WP): During the Istanbul Meeting of the CCWG, bundled the stress testing into 5 Categories Financial Crisis or Insolvency, Failure to meet Operational Obligations, Legal / Legislative Actions, Failure in Accountability and Failure in Accountability to External Stakeholders) ; Post Istanbul, the ST-WP continued with regular review of the existing Stress Tests and continued with its identification of stress tests and their application. In reviewing the first public comment, there were an additional nine stress tests identified and included in the 2nd draft for public comment. Section 7 of this proposal details the 'to date' and ongoing work of the Stress Test Work Party.

Defining Work Stream 1 High Level Requirements

The Frankfurt face-to-face meeting on 19-20 January 2015 was a key turning point for the CCWG-Accountability: the group moved from an assessment phase into a development phase. As part of this development phase, the CCWG-Accountability mapped out Work Stream 1 requirements leading to a restructure of the group into two Work Parties:

- **Work Party 1:** Community Empowerment is considering powers for the community to hold ICANN to account, and to develop a consensus on the most appropriate mechanisms to allow the community to exercise these powers. WP1 will set out the necessary changes that would be required (e.g. Bylaws changes) to deliver these.
- **Work Party 2:** Review and Redress is considering enhancements to existing accountability and new mechanisms and the creation of a standard for review and redress, the goal is to develop a clearly articulated standard against which ICANN's actions are evaluated.

Work Party 1 and Work Party 2 were formed following the Frankfurt meeting in January 2015. Work Party 3 was formed after the end of the first public comment period in order to address those issues flagged by the community that had not been discussed previously by the CCWG-Accountability.

Work Party 1: Community Empowerment

A new working group was formed to consider proposed powers for the community to hold ICANN to account, and to develop a consensus on the most appropriate mechanisms (or structures) that would allow the community to exercise these powers.

Powers and mechanisms were defined as follows:

- Powers are actions the community should be able to take to maintain and improve ICANN's accountability;
- Mechanisms are the structures or processes by which the community exercises its powers.

Work Party 2: Review & Redress

A second new working group was tasked with considering enhancements to existing accountability mechanisms and the creation of new accountability mechanisms to allow for review and redress for those affected by ICANN's failure to carry out its mission

statement, and to hold ICANN accountable for carrying out its mission in compliance with agreed-upon standards.

Work Party 2 articulated the following principles to guide its work:

- Ensure that ICANN actions relate to issues that are within its stated mission and require ICANN to act consistent with clearly articulated principles;
- Ensure that the ICANN Board can be held to its Bylaws;
- Ensure that ICANN carries out its mission consistent with a binding statement of values/principles;
- Prevent scope/mission creep through bylaws changes, policy, policy implementation, contracts and/or other mechanisms.

Work Party 3: Emerging Issues

A third new working party was tasked with reviewing the feedback received in the first public comment period with regards to issues flagged by the community as not being already addressed by the discussions and the draft proposal published by the CCWG-Accountability. Three topics were identified as emerging from feedback after the first public comment period:

- Enhancement of SO/AC accountability as the first draft document was perceived to be centered in Board accountability only.
- Enhancement of Staff accountability so that the mechanisms being discussed might also be applicable to Staff's action or inaction.
- Enhancement of diversity within ICANN and especially with regards to that of the newly created bodies being proposed.

Building Blocks

In February 2015, the CCWG-Accountability identified four building blocks that would form the accountability mechanisms required to improve accountability.

Drawing a state analogy:

- Empowered community refers to the powers that allow the community i.e. the people to take action should ICANN breach the principles.
- Principles form the Mission, Commitments and Core Values of the organization i.e the Constitution.
- ICANN Board represents the executive entity the community may act against, as appropriate.
- Independent Review Mechanisms, i.e. the judiciary, confers the power to review and provide redress, as needed.

The accountability framework was compared to a cookbook populated with recipes for which the CCWG-Accountability would need to identify ingredients. A distinction was made between triggered actions i.e. triggered by the community and non-triggered i.e. part of a normal ICANN processes. A template was designed to structure and help identify ingredients. A set of criteria was also suggested to frame discussions.

Legal Advice

The CCWG-Accountability engaged two law firms to receive expertise on feasibility of its proposed frameworks and mechanisms, Adler & Colvin and Sidley Austin LLP. The legal advice was key to the CCWG-Accountability in formulating its recommendations.

The CCWG-Accountability Legal Subteam's rules of engagement and working methodologies are described in Appendix C.

After a successful first phase lead by the Legal Subteam, and in response to the need for increased agility in the interaction between the external lawyers and the working parties, it was decided that the Legal Subteam should be dissolved in order to provide a more agile and direct interaction with the independent counsel. Rules of engagement changed: placing the Co-Chairs in charge of certifying the assignments for the lawyers but the rest of the general procedural rules stand and all interactions with counsel continue to be on record, public and open to anyone for participation or observation.

Definitions & Scoping

The CCWG-Accountability scoped out and elaborated a problem statement along with definitions to help refine its understanding of the task it was entrusted with. The group endeavored to produce a definition of what accountability is, listed transparency, consultation, review mechanisms and redress mechanisms as criteria of accountability mechanisms.

As a general concept, the group proposed that accountability encompassed processes whereby an actor answers to others for the effects on them of its actions and omissions. For the CCWG-Accountability, then, accountability involves the processes whereby ICANN answers to its stakeholders for the impacts on those stakeholders of ICANN's decisions, policies and programs.

The group proposed that accountability is comprised 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 programs are subject to outside monitoring and evaluation. The fourth dimension, redress, means that the accountable actor makes compensations for any harms of its actions and omissions, for example, by means of policy changes, institutional reforms, resignations, financial reparations, etc.

Independence and checks and balances were identified as two key qualities of any accountability mechanism. The group defined "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. The group investigated two different non-exclusive views 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 flagged to whom should ICANN be accountable as an important component, and assembled a list of stakeholders which distinguished between affected parties and

parties affecting ICANN. The following principles were agreed to guide CCWG-Accountability's activities:

- ICANN accountability requires that it comply with its own rules and processes (part of "due process", as a quality of fairness and justice);
- ICANN accountability requires compliance with applicable legislation, in jurisdictions where it operates;
- ICANN should be accountable to achieving certain levels of performance as well as security;
- 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.