

Consensus Accountability Statement

There appeared to be considerable support (and even enthusiasm) at the 6/16 meeting for continuing to work on developing a consensus civil society statement on post-transition ICANN Accountability that could help to frame the coming public debate while simultaneously serving as a measuring stick against which to evaluate the complex proposals being considered by, or emerging from, the CCWG-Accountability process.

1. AN ACCEPTABLE TRANSITION PLAN MUST INCLUDE CLEAR AND ENFORCEABLE LIMITS ON ICANN'S POWERS.

One critical goal of the entire “accountability process” is to ensure, to the extent possible, that after removal of direct US government oversight and control over its activities, ICANN will not be subject to capture by any public or private entity or interest seeking to use DNS resources for its own self-interested purposes, and that it will confine its activities to the narrow technical coordination mission for which it has been constituted, forbearing from leveraging its power over the DNS to exercise control over non-DNS-related Internet conduct and content.

ICANN has (and has had, at least on paper, since its inception) a narrow (though critical) technical mission: *to coordinate a consensus-based process to develop policies relating to the stability, security, and interoperability of the DNS, and to implement the policies that emerge from that process.* It is the Internet stakeholder community, acting by consensus, that has the responsibility to formulate DNS policy; ICANN's responsibility is to organize and coordinate the activities of that community, and to implement the consensus policies that emerge from that process. Only when ICANN is acting within the limits of that mission – implementing policies relating to the continued smooth functioning of the DNS on which there is a meaningful consensus among affected stakeholders – does it have any authority to bind third parties to the rules and regulations that it adopts.

ICANN's post-transition Bylaws must state this, clearly and unequivocally, and in a manner that can only be amended in the future by extraordinary joint effort by both the Board and the stakeholder community (a “Fundamental Bylaw,” in the words of the CCWG Proposal).

Effective implementation of this limitation will go a long way towards assuring the larger Internet community that ICANN will stick to its knitting – implementing policies which relate to the openness, interoperability, resilience, and/or stability of the DNS, arrived at by consensus of the affected communities.

Deficiencies of the May 6 Draft CCWG Proposal:

The CCWG Proposal contains an excellent and well-crafted statement of ICANN’s mission:

“ICANN’s Mission is to coordinate the development and implementation of policy developed through a bottom-up, consensus-based multistakeholder process that is designed to ensure the stable and secure operation of the Internet’s unique names systems, and for which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS.”

Inserting that Mission Statement into the Bylaws, even as a Fundamental Bylaw, will not by itself serve to constrain ICANN’s powers, unless the Bylaws also clearly say: “Action taken by the corporation that is outside of, or inconsistent with, the Mission is not valid.”

The CCWG Proposal, however, doesn't take that second step. To the contrary, it contains several provisions that substantially weaken the effectiveness of the Mission Statement as an enforceable limitation on ICANN’s powers.

First, instead of saying that “action taken by the corporation that is outside of, or inconsistent with, the Mission is not valid,” it says something quite different:

“ICANN shall not undertake any other Mission *not specifically authorized in these Bylaws.*” (emphasis added)

This will gravely weaken the Mission Statement in two ways. First, it clearly implies that ICANN *may* act in a manner inconsistent with the Mission Statement, in some circumstances (where those actions are “specifically authorized” elsewhere in the Bylaws). Second, it will not be difficult to justify virtually *any* action by the corporation as having been specifically authorized by one or more of the “Core Values” and “Commitments” set forth elsewhere in the CCWG Proposal. Precisely because those Core Values and Commitments are phrased in broad and often aspirational terms, and cover so much overlapping ground – *e.g.*, “ensuring that decisions are made in the global public interest,” “taking into account the public policy advice

of governments and public authorities,” “promoting competition,” “operat[ing] with efficiency and excellence, acting in a fiscally responsible and accountable manner and at a speed that is responsive to the needs of the global Internet community” – there is a vast range of action *outside of ICANN’s narrow Mission* that ICANN could rather easily justify as being “authorized” by one or more of those aspirational goals.

ICANN’s narrow Mission should not be treated as merely one aspirational goal among many, a “Commitment” on the part of the corporation¹ to be balanced against other Commitments and Core Values of equal weight, but as a fundamental limitation on ICANN’s powers, and the Bylaws should reflect that distinction.

2. AN ACCEPTABLE TRANSITION PROPOSAL MUST CONTAIN MECHANISMS TO ENSURE, TO THE EXTENT POSSIBLE, THAT ICANN ADHERES TO THESE LIMITS AS SET FORTH IN THE MISSION STATEMENT.

An Independent Review Board (IRB) should be specifically charged, in a “Fundamental” Bylaw, with enforcing the Mission Statement, and expressly authorized to declare actions taken by the corporation outside of those limits invalid.

Like the Board of Directors, the IRB will function most effectively if its powers – which are also potentially subject to capture and abuse - are carefully enumerated and confined narrowly to *its* core mission of enforcing the limitations on ICANN’s powers. The IRB should not become a general-purpose catch-all institution to which anyone who might claim that ICANN has acted improperly towards them, or harmed them in some way, has recourse. Defining the IRB’s mandate too broadly will embroil it in any number of ordinary commercial/contractual disputes, distracting and deflecting it from its core mission.

The IRB needs to be an independent *institution*, with the institutional weight, institutional memory, and institutional power necessary to perform its central task with the requisite degree of seriousness and gravity that is required. The IRB’s mission is far removed from ordinary commercial arbitration, and the institution will require a different structure, one that is modeled more closely on the constitutional courts common in civil law countries –

¹ The CCWG Proposal includes “limiting ICANN’s activities to matters that are within ICANN’s Mission,” and “employing open, transparent and bottom-up, policy development processes,” merely as two of the “Commitments” intended to “guide” ICANN action, to be balanced against the other Commitments and Core Values.

institutions whose task, like the IRB's, is to determine whether the terms and limitations set forth in the relevant foundational documents have been complied with - than on commercial arbitration systems. ICANN, of course, is and will continue to be enmeshed in a complex web of contracts between and among registries, registrars, and registrants, and the disputes that inevitably arise concerning performance under those contracts are already subject to commercial arbitration (see, *e.g.*, § 5.2 of the Base Registry Agreement). But ordinary commercial arbitration systems are ill-designed for the fundamental purpose the IRB is meant to serve. It is not reasonable to give a single arbitrator, chosen by a third-party provider, who may have little or no prior contact with or understanding of the complex world of DNS policy-making, who may never again be called upon to examine any aspect of ICANN's operations or to consider its role in the management of DNS resources, who has no body of prior precedential decisions to use as a guide to decision-making and little or no incentive to add to the stock of well-reasoned and persuasive decisions, the power to overturn Board action (with no appeal of the decision permitted).

Deficiencies of the May 6 Draft CCWG Proposal:

The CCWG Proposal defines the scope of the IRB's duties and powers too broadly. At various points in the draft, the IRB's duties are deemed to include resolving the question of "whether ICANN is staying within its limited technical Mission"; whether it is "abiding by policies adopted by the multistakeholder community"; whether "in carrying out its Mission and applying consensus policies it is acting in accordance with ICANN's Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed Statement of Mission, Commitments & Core Values, or ICANN policies"; whether "in carrying out that Mission, [it] acts in a manner that respects community-agreed fundamental rights, freedoms, and values"; whether its actions "violate community-approved standards of behavior, including violations of established ICANN policies"; and whether it has complied with "policies established to hold ICANN accountable to legal requirements applicable to non-profit corporate and charitable organizations."

We believe these formulations are much broader than necessary for the IRB to serve its core “constitutional” function. Reference to the IRB’s powers should be consolidated in one place in the Bylaws, and stated more directly:

The Independent Review Board shall have the power to determine whether ICANN has acted (or has failed to act) in violation of these Bylaws. Any person materially harmed by action or inaction by ICANN in violation of these Bylaws may file a claim with the IRB to remedy that violation.

We also believe that in a number of crucial features, the IRB, as described in the CCWG Proposal, too closely resembles ordinary commercial arbitration systems.² We do not believe that members of the IRB “Standing Panel” should be nominated by “international arbitral bodies,” as provided in the CCWG Proposal. We do not believe those institutions, as skilled as they may be in handling commercial disputes, are appropriately tasked with finding persons with the combination of legal expertise and a strong understanding of the DNS that will make them successful IRB members. Appointment by the Board of Directors subject to supermajority Community confirmation should be sufficient for that task.

More importantly, the IRB should not be structured as a “Standing Panel” comprising a number of arbitrators who are available for service on individual 1- or 3-person panels for the purpose of resolving individual disputes, before being returned to the available “pool.” The IRB should hear and decide cases *as an institution*, with all members participating in all cases. The institution, speaking as an institution with a single institutional voice, needs to develop and stand behind its decisions, which will make them harder to ignore. It will also make the development of a true precedential system far more likely by placing the weight of the entire institution, and not merely the views of a small subset of members of a largely anonymous pool of available arbitrators, behind the decisions it makes.

² For example, following procedures commonly used for arbitration of ordinary commercial disputes, members of the IRB “Standing Panel” would be nominated by “international arbitral bodies,” in much the way that the International Chamber of Commerce might be asked, under ICANN’s existing arbitration clauses, to propose possible arbitrators for a contract dispute; IRB panelists are to “receive training on the workings and management of the domain name system,” with “access to skilled technical experts upon request,” as in ordinary commercial arbitration; and in any particular dispute brought before the IRB, “a single or 3-member panel will be drawn from the Standing Panel,” by agreement between ICANN and the complainant (in the case of a single member panel) or with each party selecting one panelist, and those panelists selecting a third (in the case of a 3-member panel).