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Co-chairs of the Cross Community Working Group on Enhancing ICANN Accountability (CCWG)
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Re: Response by CIRA to the second draft proposal from the CCWG on Enhancing ICANN
Accountability

The Canadian Internet Registration Authority (CIRA) is the private, not-for-profit corporation responsible for the operation of the .CA country code top-level domain (ccTLD). CIRA is a member of the Country Code Names Supporting Organization (ccNSO) and a member of CENTR, the Council of European National Top Level Domain Name Registries. I offer the following comments on the CCWG's second draft proposal in my capacity as the president and CEO of CIRA.

I would like to recognize the complexity of the work the CCWG has been tasked with, and I commend the members of the working group and the ICANN staff for their dedication in producing such a comprehensive document. Therefore, I respectfully and constructively submit the following comments on the key points of the draft proposal that are of particular interest to CIRA.

Community Mechanism as Sole Member model

Regarding the Community Mechanism as Sole Member model, CIRA welcomes the work that the CCWG has done to find a model that removes the problematic requirement for some Supporting Organizations (SOs) and Advisory Councils (ACs) to become legal persons under California law. That being said, we have concerns regarding certain aspects of this proposed mechanism:

1. *Allocation of the votes:* The proposal would have the three SOs (the ASO, GNSO and the ccNSO) have five votes each, two ACs (the GAC and ALAC) have five votes each, and the RSAC and SSAC to have two votes each. This allocation is at odds with the current composition of the voting members on the ICANN Board, the only other point of reference for vote distribution within the ICANN structure. Of the seven ICANN voting members chosen by the SO/AC community, six are SOs and one is an AC. As a result, the proposal represents a significant shift in authority in the ICANN community away from the SOs and in favour of the ACs. A justification for this shift is not provided in the proposal.

We find the dilution of the authority and influence of the SO community that would result from the implementation of this mechanism to be problematic. The extent of this dilution cannot be adequately determined at this point, as the degree to which the AC community may choose to participate has yet to be determined. Greater clarity on this point will be required before the proposal can be finalized.

2. *Enhanced Role for the GAC:* CIRA also requests that special scrutiny be afforded to the GAC's right to vote within the Community Mechanism, as identified in the proposal. This increase in authority, in addition to the special authority the GAC now enjoys in the provision of advice to the ICANN Board of Directors, could, in CIRA's opinion, prompt concerns that the proposal may not entirely be consistent with the NTIA's March 14, 2014 statement that it "will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution."

Appeals Mechanisms

CIRA supports the proposed creation of "a standing, independent – review – panel of skilled jurists/arbitrators who are retained by ICANN and can be called upon over time and for various unrelated issues to resolve disputes regarding whether ICANN is staying within its limited technical Mission and acting in accordance with ICANN's Articles of Incorporation and/or Bylaws."

I also endorse the proposal's statement that "decisions regarding ccTLD delegations or revocations would be excluded from standing, until the ccTLD community, in coordination with other parties, has developed relevant appeals mechanisms."

We note a reference in section 5.2 (Reconsideration Process Enhancement) to the April 15, 2015 letter from the CWG-Stewardship regarding exclusion of ccTLD delegation and transfer from the enhanced appeal mechanism. However, the CCWG proposal is silent on the significance of this paragraph in the context of section 5.2, as this section deals not with the enhanced appeal mechanism, but rather with reconsideration process enhancement. Consideration of excluding ccTLD delegation and transfer decisions from the reconsideration process was never discussed by the CCWG's Design Team B (which examined the issue of ccTLDs and the appeal mechanism) or the CWG-Stewardship. CIRA therefore requests that the CCWG proposal not make this exclusion from the reconsideration process.

The term 'ccTLD delegations and redelegations' has fallen into common usage in the ccTLD community and, as such, is used in the CCWG's proposal. However, as the Framework of Interpretation Working Group (FOIWG) has pointed out, the term 'redelegation' does not appear in RFC1591. Rather, the proper term used is 'transfer'. As the CCWG moves to finalize its report and the drafting of such legal instruments as revisions to the ICANN bylaws commences, we request that the more precise terminology found in the FOIWG be used, rather than this more colloquial language.

Fulfillment of CWG Dependencies

CIRA is concerned that the CCWG's proposal may not fully meet the sixth of the dependencies for the CCWG that the CWG set out (page 21) in its proposal. In particular, I note the following:

"6. Appeal mechanism. An appeal mechanism, for example in the form of an Independent Review Panel, for issues relating to the IANA functions. For example, direct customers with non-remediated issues or matters referred by ccNSO or GNSO after escalation by the CSC will have access to an Independent Review Panel. The appeal mechanism will not cover issues relating to ccTLD delegation and re-delegation, which mechanism is to be developed by the ccTLD community post-transition."

I do note that the CCWG-Accountability has indicated that it believes that it meets this CWG dependency, as it states:

“5. Appeals Mechanism CCWG-Accountability proposals include significant enhancement of ICANN’s existing appeals mechanisms, including the IRP. The IRP will be available to TLD managers to challenge ICANN decisions including with respect to issues relating to the IANA functions (with the exception of ccTLD delegations and redelegations, as requested by the CWG- Stewardship).”

However, the CCWG’s actual proposal for an enhanced IRP (page 39) states that:

“The role of the Independent Review Process (IRP) will be to . . . hear and resolve claims that ICANN through its Board of Directors or staff [emphasis added] has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws . . . ”

CIRA’s concern is that since PTI will be the sole entity responsible for the exercise of the IANA functions, and since PTI, as a separate legal entity from ICANN, cannot be considered to be ‘ICANN’ nor comprised of ICANN staff, it will not be bound by any ICANN bylaw in respect to the existing or enhanced IRP. It appears that the enhanced IRP would not apply to PTI, and therefore not to IANA decisions. We believe that this element must be fully clarified in the next iteration of this proposal.

Once again, I commend the members of the CCWG-Accountability for their considerable work on this second draft proposal. I look forward to the working group’s next iteration of this important proposal.

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