

Dear CCWG-Accountability:

*“ ... with community you of course mean 'ICANN community'. Whatever be the intention of the 'ICANN community', even NTIA's announcement asked for the oversight to pass to 'global multistakeholder community' and **not** [just] to the 'ICANN community'. Now if the 'ICANN community' being in charge of running the transition process appropriates that new (partly) transitioned oversight role to itself, it is perhaps an understandable human failing, but that would normally be called as an illegitimate capture.--[parminder](#), 13 June 2015, CCWG-Accountability mail list*

Here's the question: Does the CCWG believe that the global public interest is always defined by "community" consensus or "community" dictates? Yes or no? I believe that the great majority of the time the two are consistent, but I believe that there are cases in which they diverge. Is there any disagreement among us that this could happen? In that case, what should a Board member do? Which is the higher authority according to the CCWG's thinking?-- [George Sadowsky](#), ICANN Board Member, on the CCWG-Accountability mail list

[Emily Taylor: ICANN: Bridging the Trust Gap](#) (pdf): “[What happens] if the [ICANN] community delivers an outcome that threatens the public interest ... what happens if a policy is crazy or bad? Who looks after the public interest? ... With no membership, ICANN’s directors represent the end of the line in terms of accountability. Introducing a membership into ICANN’s corporate structure would not be a straightforward task. How would **balance** be ensured, to prevent **capture** by **special interests**?”

Your good faith efforts have failed to produce an acceptable proposal. I respect the process enough to take the time to respond and provide feedback. I will be honest. I hope you are not offended by my frank appraisal of the situation or your proposal. I know you will disregard most of the comments and just do what you want anyway, but for the record, just “[hear me out](#).”

Let’s be honest. The U.S. government has a problem. The “world clock” has run out on the “era of U.S. stewardship.” We are now in first overtime period, and the score is tied 50-50: 50 to the multistakeholder team and 50 to the government/intergovernmental team. Whoever wins the trophy gets to make the rules, at least for a while (kind of like the America’s Cup where the winning yacht club becomes trustee of the Cup and largely determines the rules for the next sailing regatta).

ICANN has had a lot of problems, from the beginning. Jon Postel’s death was a tragic loss, and in many ways, ICANN has never fully recovered from that loss. Many good and thoughtful people have, through the years, “given up” on ICANN (if you need a list of names, I will be glad to provide it). But we have to consider the alternative(s). The global Internet community is now standing somewhat in the position of Winston Churchill when he said: “*Democracy is the worst form of government, except for all the others.*” Like many, I have been a critic of ICANN, however I disagree with Fred Krueger, I do not think ICANN is one of the [single worst organizations](#) on this planet. I can think of a lot of organizations that are worse.

Your proposal, though well-intentioned, is unacceptable and fundamentally flawed. You have failed to follow your own Charter, and in your “rush to meet a deadline” you have failed to achieve the charter’s stated **goal**: a proposal which enhances ICANN’s accountability towards all stakeholders—*i.e.*, the **global multi-stakeholder community**. Instead, you have focused solely on a power-game of “who’s on top”—the ICANN Board of Directors or the few well-resourced, special interests, who dominate and control the so-called “ICANN stakeholder community” which is not representative of, nor even **accountable** to the global Internet community a/k/a global multi-stakeholder community. Your proposal does not “enhance ICANN’s accountability towards all stakeholders.” It does subject the ICANN Board of Directors to greater direct manipulation, control, and capture by the “special interests” which NTIA’s stewardship and the Affirmation of Commitments had prevented, to some degree. Your proposal, as it stands, is therefore not in the public interest, nor is it in the best interests of the global multi-stakeholder community. In fact, your proposal is a step backwards and will hasten the demise of ICANN within just a few years, at the insistence of a global multi-stakeholder community, fed up with the avarice of those self-serving “ICANN community stakeholders” or “special interests” who disrespect the values and ideals of Jon Postel and his peers as expressed in [RFC 1591](#): “*The designated manager [of a TLD] is the **trustee** of the top-level domain for ... the **global Internet community**.*” “Whatever happened to the **fiduciary standard** of duties **owed** by gTLD (and ccTLD) registry operators to the **global Internet community**? The ICANN community of stakeholders, like [Esau](#), traded its “inheritance” for the equivalent of a bowl of soup (or in ICANN’s case, lucre). The ICANN Board of Directors didn’t do that on its own. You, the “ICANN stakeholder community,” particularly its dysfunctional GNSO, did that through its inept new gTLDs’ policy-making. Then a *passive* or *conflicted* ICANN Board failed to stop the ill-advised ICANN stakeholders’ policy, and ICANN management and staff compounded the problem by their inept implementation resulting in such things as the dotSUCKS fiasco, the DotConnectAfrica Trust (DCA) IRP decision, the revelation that new gTLDs “fail to work as expected on the internet” and “break stuff,” or “need to be blocked” according to security firms. Then there is the toothless “New gTLD Registry Operator Code of Conduct” which the IPC, ICANN Business Constituency, and the entire global Internet community found out in the course of the aforementioned *fiasco* utterly **fails** in its *declared* purpose of “*protecting domain name registrants.*” *Should I continue?* How about the way that future “bait-and-switch” price increases, and exorbitant or extortionate domain name pricing schemes have been enabled by the ICANN stakeholder community policy-making and ICANN staff implementation? Apparently, the ICANN community of stakeholders, collectively, and the ICANN organization as a whole, wants the “power and money” but none of the “responsibility and accountability” that one would expect of a global monopoly responsible for “coordinating” the global Internet DNS in the global public interest.

None of this should come as a surprise to anyone who has been paying attention:

In the words of [Avri Doria](#) on the CCWG-Accountability mail list:

*“Having been a member or observer of many of these entities [ICANN stakeholder groups] I have found that they are often **disorganized, ruled by a few strong personalities** in a sea of apathy, and given to **making up rules on the fly** when needed. They **do not even necessarily follow the rules** they have agreed to in the charters, though some do, not all of them. And for the most part, though **they are supposed to transparent, most aren't**. So what i fear is that they are **accountable to none** except the few strong personalities. So if we want to base our trust in ICANN on a membership model, **we need to make sure it is at least as accountable as what we have now.**” (emphasis added)*

Or as [Greg Shatan](#) stated on the CCWG-Accountability mail list:

“... A membership organization is fundamentally different from a non-membership organization in terms of accountability and power structure. **In a member organization, the Board owes a fiduciary duty to the corporation and to the members.** The **members essentially sit above the Board in the corporate hierarchy.** This is the basis of the rights (a/k/a "mechanisms"), as well as the ability to enforce those rights, as well as the tools (including but not limited to litigation) to implement enforcement if need be. Second, it is interesting to see the observation that "Membership moves the problem from accountability of one ICANN to the accountability of the many UA. We move the **problem of accountability** to a space which is **historically not very transparent** in its bottom-up mechanisms." and "**We have close to no experience in insuring that constituencies, stakeholder groups, RALOs, ACs or SOs are accountable to their members.**" I read this as a **mistrust** of or concern regarding the **stakeholders**, or really the **existing stakeholder groups** that claim to represent stakeholders. Maybe I'm interpreting this wrong, as it comes from someone who I see as a champion of the multistakeholder model and voice in ICANN. I agree **that we have not (in this group) explored the accountability of stakeholder entities** to their members, **or the accountability of stakeholder entities** (singly and collectively) **to the larger community**, or for that matter, the **accountability of stakeholder entities to their non-member (and non-participating) stakeholders.** **If this is truly a deep concern**, then it could be seen as **a fundamental flaw in our entire plan**, which is based on the **existing stakeholder entities** -- no matter how you design it (members, designators, delegates, etc.)..." (emphasis added)

Your proposal, using factors delineated by Greg Shatan above, is **fundamentally flawed** and **fails what I now refer to as the “Avri Doria test”** above.

Unless you are willing to backtrack and spend the necessary time—at a minimum, six months or more—to reconsider, redraft and correct your fundamentally flawed proposal, you should sit down in LA later this month and honestly try to work out something with the Board—setting aside your collective egos, your obvious “sunk cost bias” in favor of the CCWG proposal, and the “group think” clearly evident on your CCWG mail list. I suggest you listen closely to Mathieu Weill. I have been a close observer of your work since the beginning and I trust his judgment and leadership. I have reviewed the [ICANN submittal](#) of September 11, 2015, and while it is far from perfect, as best I understand it, a dialogue with the Board may help lead to a path forward.

Frankly, the best thing that happened this year, in terms of improving or “enhancing” ICANN accountability, was the dotSUCKS fiasco, because now all of ICANN—stakeholders, directors, officers, staff, contracted parties, and service providers—are now on the radar of the US Federal Trade Commission, and probably the U.S. Justice Department as well. I agree with INTA, U.S. jurisdiction should be a fundamental bylaw. The potential for corruption, particularly within the ICANN Global Domains Division, is too great to allow ICANN to try to escape or evade prosecution by relocating to a “friendlier” jurisdiction. The global multi-stakeholder community really doesn’t need more FIFA-like scandals.

I agree with ALAC and others who have submitted comments already, that certain proposed changes to the ICANN bylaws are unacceptable and actually contradict the Affirmation of Commitments. For example: I would not delete (underlined phrase) “Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.”

Excerpts from [CCWG-Accountability Charter](#) (emphasis added):

*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.*

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.*

3. Suggested areas of focus going forward (WS-1 or WS-2):

While continuous improvement of ICANN’s organizational structures, meetings, stakeholder groups, and processes, making them more transparent, accountable, and open to participation by, and input from, members of the global multi-stakeholder community, should be a permanent imperative, it won’t solve the immediate problem of how to “enhance ICANN’s accountability” enough to make it possible to responsibly end US oversight.

There is only one proven way to “fix” a corporation—public, private, profit or non-profit—first “fix” its Board of Directors, and then empower the Board to take the necessary actions, hire/fire management, etc., which will result in an effective organization fulfilling its mission and serving its stakeholders.

ICANN may need Board reform—that should have been priority #1. Almost every failing of ICANN can ultimately be attributed to a Board of Directors that was not activist, failed to question, failed to challenge stakeholders, management, staff or GAC advice, failed to be vigilant, pro-active.

Therefore, review and improve processes for selecting members of the ICANN Board of Directors, which will lead to independent, activist, vigilant ICANN directors, reflective of the diversity of the global multi-stakeholder community, who will question, investigate, and push back (when necessary or appropriate) against policies advanced by self-interested ICANN stakeholders which are to the detriment of the global public interest or the global multi-stakeholder community; **directors who will question and hold accountable** ICANN officers, ICANN staff, GAC advice, and all ICANN stakeholders, including policy-making proposals, inquiring as to whether ICANN policies and principles have been followed.

As noted by Anne E. Aikman-Scalese recently on the CCWG mail list, the Board does, and as Emily Taylor notes above, should be involved in policy-making, assuring that the global public interest is served, and not harmed, by any policy outcome from the ICANN stakeholder community.

I incorporate by reference my comments to the ICG proposal:
<https://comments.ianacg.org/pdf/submission/submission53.pdf>

Finally, I concur with Christopher Wilkinson in his mail list comment below of Sep 2, 2015: *to CCWG, cwg-stewardship*

<http://mm.icann.org/pipermail/accountability-cross-community/2015-September/005155.html>

“... I would also raise a specific point regarding "CCWG proposal Section 7.3" about removing individual ICANN Board members:

There, it is proposed that any Supporting Organisation or Advisory Committee (SO/AC) may initiate the process to remove an individual Director appointed by the Nominating Committee,

That is not acceptable for the following reasons:

1. It is a fundamental objective of the internal governance of ICANN that **there is a permanent and effective balance between the interests of the functional/operational communities and the public interest.**

This is most important in the light of ICANN's regulatory responsibilities respecting fair competition, users' interests and international and local law.

Some of these responsibilities have significant financial and economic consequences.

2. When the Nominating Committee process was initially established in 2002, it was as a successor to, and a surrogate for, the election of ICANN Board members by Internet users.

The NomCom process was accepted at the time by the ICANN Community as a feasible method of creating and re-enforcing the necessary balance in ICANN's internal governance.

Thus, **the idea that any particular Supporting Organisation may threaten to attack individual independent Board members - appointed by the NomCom - from which they happen to dissent, would seriously undermine the independence of NomCom appointed Directors as well as the intrinsic balance of powers and interests within the ICANN structure.**

3. Since the Section 7.3 proposal, if implemented, would further compromise the balance between commercial interests and the public interest in ICANN, it would inevitably give rise to additional demands for enhanced governmental influence within ICANN through the GAC. I trust that CCWG and CWG shall reconsider their positions in this regard.”

Respectfully submitted,

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