

#30



COMPLETE

Collector: Web Link 1 (Web Link)
Started: Tuesday, December 08, 2015 12:15:14 PM
Last Modified: Tuesday, December 08, 2015 2:49:32 PM
Time Spent: 02:34:18

PAGE 2: Personal Information

Q1: Name	Christopher Wilkinson
Q2: Affiliation	Civil society
Q3: Responding on behalf of	Myself

PAGE 3: Recommendation 1

Q4: Is establishing an Empowered Community for enforcing Community Powers a solution that is acceptable to you?(Please see Annex 1 - Recommendation #1: Establishing An Empowered Community For Enforcing Community Powers for more information)

Yes, I support this recommendation. ,

Comment

1. It is important to recognise that the international community, while generally supporting the transition, would not wish to see NTIA 'oversight' replaced by resort to the California courts. Should the exercise of empowerment result in expensive court cases, in which US based stakeholders would hold a distinct and unfair advantage, then the transition would quickly be perceived as having failed. 2. The Survey does not address Work Stream 2 until the end (Recommendation 12), and particularly the accountability of the representatives of the supporting organisation and advisory committees. This is however, critical to the credibility of the transition proposals as a whole, whereby very considerable reserve powers could redound to these representatives acting collectively if not individually. Indeed, under certain circumstances, the accountability of the representatives of the 'community' is a more important consideration than the accountability of the individual members of the ICANN Board or of ICANN staff. Accordingly, in addition to the accountability of SO/AC representatives to their respective communities, the internal checks and balances within the exercise of community powers is the most important consideration. Otherwise, the outcome of the transition could readily be perceived as simply creating a cartel of commercially interested parties in the operation of ICANN including particularly the IANA functions.

PAGE 4: Recommendation 2

Q5: Is empowering the community through consensus: engage, escalate, enforce a solution that is acceptable to you?(Please see Annex 02 - Recommendation #2: Empowering The Community Through Consensus: Engage, Escalate, Enforce for more information)

No, I do not support this recommendation.,

Comment

In general I would have wished to support the EEE process as it has come to be called, but it still suffers from three fundamental flaws. 1. Taken overall, the proposed procedure will prove to be so fraught and time-consuming that it will become operationally irrelevant. External formal and informal forces would intervene to address such problems long before the EEE process could yield practical results. 2. The proposals relating to the removal of Board Directors and recalling the whole of the ICANN Board are not realistic and could become highly destabilising for the organisation. - Board Directors once appointed have to be independent of the entities that appointed them. This is not primarily about 'fiduciary duty to the corporation'. It is - more importantly - about the responsibility of the Board to take full account of the global public interest. It should be expected that the Board shall from time to time act in ways that are not supported by individual or groups of ICANN stakeholders. - The proposal effectively facilitates the ability of specific stakeholders to attack individual Board members. As far as SO/AC Directors are concerned the solution is to elect a different Director next time. As far as Directors appointed by the Nominating Committee are concerned, the issue is more grave: NomCom appointments are by definition independent of the SO/AC stakeholders. Their presence on the Board is intended to counterbalance the interests of - particularly - the Supporting Organisations. The proposal weakens the independence of NomCom appointed Directors. The composition of the Nominating Committee should reflect its mission to appoint Directors independent of the SO/AC. 3. The last proposal relating to 'the triggering of Post-Transition IANA separation', is highly problematic, particularly as the membership of the SCWG (the final stage in a putative separation process) is skewed in favour of the GNSO groups, who - in the light of the CWG debates on this question - are likely to have originated the separation procedure in the first place. IANA is a critical global resource. Its 'ownership' and its status vis-à-vis ICANN and its constituent bodies should not be determined by a few delegates appointed by interested parties. The IANA functions are critical to the whole of the Internet economy (addressing, names and protocols). Users and governments have an enormous stake in its operation and oversight. Whereas the separation proposals are by design intended to extract the assets of IANA away from ICANN and away from existing oversight roles, including governments in the GAC. The separation proposals and procedures are fundamentally flawed, self-interested and unacceptable. There is little evidence that the wider user community world-wide has any cognizance of what is being proposed.

PAGE 5: Recommendation 3

Q6: Is redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws' a solution that is acceptable to you?(Please see Annex 03 - Recommendation #3: Redefining ICANN's Bylaws As 'Standard Bylaws' And 'Fundamental Bylaws' for more information)

Yes, I support this recommendation.,

Comment

In general, I support this recommendation except in so far as the Bylaws relate to Recommendation 2 above. However, in recent CWG conference calls, external counsel (Sidley) tabled a 60 page document outlining Proposed ICANN Bylaws. That would be a disproportionate and unrealistic approach to implementing the transition: (a) the ICANN community as a whole should have time (two or three years) to experience and improve on the outcome of the transition. Overly detailed Bylaws would be premature at this early stage. (b) In spite of the large number of participants in the CWG and the CCWG mailing lists, most of the substantive work has been undertaken by a small number of dedicated individuals, including external counsel. For all the credit that naturally redounds to them, they do not as a result in any sense 'own' the current outcome. Indeed, one can easily identify large areas of the global Internet community - particularly outside North America and Europe - which have, to date, hardly participated at all. The implementation phase of the transition will no doubt throw up many corrections, refinements and improvements. These should not be unjustifiably obstructed by overly detailed Bylaws at this stage.

PAGE 6: Recommendation 4

Q7: Is ensuring community involvement in ICANN decision-making: seven new Community Powers a solution that is acceptable to you? (Please refer to Annex 04: Details on Recommendation 4: Ensuring Community Involvement In ICANN Decision-Making: Seven New Community Powers for more information)

Yes, I support this recommendation.,

Comment

In general I support the recommendation except as it would be applied to powers 4, 5, and 7. (Removal of the Board or Board members and triggering 'separation) As set out under Recommendation 3, above, these three powers need to be carefully reconsidered. 4. The power to remove individual Directors must not have the general effect of undermining their independence, particularly those appointed by the Nominating Committee. 5. Recalling the whole Board is would have a destabilising effect on ICANN out of all proportion to the benefits to the global Internet community. 7. Separation of IANA from ICANN (and a fortiori dividing the IANA functions among different entities) would be a far-reaching issue with international economic and diplomatic consequences. For all the advantages of the multistakeholder bottom-up decision making process, the individual representatives of the ICANN supporting organisations and advisory committees do not have a mandate to proceed in the way proposed. Their future mandates depend very largely on the outcome of the (post transition) Work Stream 2 consideration of the accountability of the Supporting Organisations and Advisory Committees and that of their representatives.

PAGE 7: Recommendation 5

Q8: Is changing aspects of ICANN's Mission, Commitments and Core Values a solution that is acceptable to you?(Please refer to Annex 05 - Details on Recommendation #5: Changing Aspects Of ICANN's Mission, Commitments And Core Values for more information)

Yes, I support this recommendation.,

Comment

I support this recommendation with the general reservation that the above texts are in fact still under negotiation in CCWG. Furthermore, Stress Test 18 is still under negotiation within the GAC. Accordingly, the Survey - and this response - does not yet have the last word in this respect.

PAGE 8: Recommendation 6

Q9: Is reaffirming ICANN's commitment to respect internationally recognized human rights as it carries out its Mission a solution that is acceptable to you?(Please refer to Annex 06 - Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out Its Mission for more information)

Yes, I support this recommendation.

PAGE 9: Recommendation 7

Q10: Is strengthening ICANN's Independent Review Process a solution that is acceptable to you?(Please refer to Annex 07: Recommendation 7: Strengthening ICANN's Independent Review Process for more information)

Yes, I support this recommendation.

PAGE 10: Recommendation 8

Q11: Is fortifying ICANN's request for reconsideration process a solution that is acceptable to you?(Please refer to Annex 08 - Recommendation #8: Improving ICANN's Request For Reconsideration Process for more information)

Yes, I support this recommendation.

PAGE 11: Recommendation 9

Q12: Is incorporation of the Affirmation of Commitments a solution that is acceptable to you?(Please refer to Annex 09 - Recommendation #9: Incorporation of the Affirmation of Commitments for more information)

Yes, I support this recommendation.,

Comment

In general it is not clear why the incorporation of the Affirmation of Commitments needs to be held over to Work Stream 2. On the specific point of 'Enforcing its existing policy relating to WHOIS, subject to applicable laws', the text is too detailed at this time. (a) there are several current initiatives within ICANN designed to update, correct and amend existing WHOIS policy and practice. It would not be correct to enshrine current practice in the Bylaws without significant change. (b) existing WHOIS policy is not consistent with applicable laws, particularly regarding privacy and data protection. Recommendations have been made as to how policy should be appropriately amended to this effect.

PAGE 12: Recommendation 10

Q13: Is enhancing the accountability of Supporting Organizations and Advisory Committees a solution that is acceptable to you?(Please refer to Annex 10 - Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees for more information)

Yes, I support this recommendation.,

Comment

With reference to the responses to several above recommendations, the accountability of the Supporting Organisations and Advisory Committees is a critical issue, since the transition proposals would create significant new powers on the part of their representatives acting for the ICANN community. Note that there are several distinct dimensions to SO/AC accountability: 1. The accountability of the ICANN SO/AC entity to the whole community taken together, whether all Registries and Registrars, all ccTLDs, all user organisations (At Large Structures) etc. 2. The accountability of the SO/AC representatives to their communities when acting together or individually as members of the Single Designator or other entity created by virtue of the transition. 3. The future structure of ICANN resulting from the transition, including the accountability aspects and related checks and balances should be reviewed from the point of view of anti-trust law and competition policy. i.e. their accountability to the global Internet community and economy as a whole.

PAGE 13: Recommendation 11

Q14: Is Board obligations regarding GAC Advice (Stress Test 18) a solution that is acceptable to you?(Please refer to Annex 11 - Recommendation #11: Board obligations regarding GAC Advice)

Yes, I support this recommendation.,

Comment

I support this issue being resolved subject to the outcome of current negotiations within the GAC. CCWG and the transition process has unnecessarily complicated what was in any event a difficult international negotiation which the non-governmental stakeholders are not really competent to address. Accordingly the above texts are probably not final in the detail and it would be sensible for members of the community to reserve their positions until the GAC position is known.

PAGE 14: Recommendation 12

Q15: Is committing to further accountability work in Work Stream 2 a solution that is acceptable to you? (Please refer to Annex 12 - Recommendation #12: Committing to further accountability work in Work Stream 2)

Yes, I support this recommendation.,

Comment

The overall acceptability of the transition proposals depend to a large degree on the outcome of Work Stream 2 and the accountability of the SO/AC in particular. I would suggest that it is not the ICANN Board which lacks incentive to address SO/AC accountability but rather the SO/AC themselves. The accountability of the SO/AC representatives to their membership in ICANN and to the corresponding global communities is a critical consideration for the legitimate exercise of community powers as set out in the CWG and CCWG transition proposals. Accordingly, in addition to the accountability of SO/AC representatives to their respective communities, the internal checks and balances within the exercise of community powers is the most important consideration. Otherwise, the outcome of the transition could readily be perceived as simply creating a cartel of commercially interested parties in the operation of ICANN including particularly the IANA functions.

PAGE 15: Additional Information

Q16: Please submit comments you have in addition to the information provided above, including on NTIA criteria, CWG-Stewardship requirements and Stress Tests.

The eventual additional points have already been addressed in the above responses to the 12 Recommendations. I trust that this is adequate.

Most of these comments and concerns have already been made in the context of earlier public comment periods, on the CWG and CCWG mailing lists and orally in conference calls. I would be glad to respond to any comments, questions or corrections by e-mail.

cw@christopherwilkinson.eu

8 December 2015
