CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations
(draft-ccwg-accountability-proposal-2015-11-30-en)

Comments:

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Q3 *Responding on behalf of:* Comments as an individual

Q4: *Is establishing an Empowered Community for enforcing Community Powers a solution that is acceptable to you?*

Yes

Yes, But:

The choices to the ten questions had to be selected from a "Yes" or "No", which are restricted choices to choose from, as, based on the scope of Accountability discussions, the topics discussed, the components examined in detail, the present level of consensus or absence of consensus, when viewed together, it is difficult to totally agree or totally disagree with the proposals in its present form, or as proposals to be implemented immediately without further thoughts.

The answer of Yes to the above question is subject to the following observations and comments:

ICANN Community is nascent, needs a little more water and a little more nurture before it could be empowered. The Community could be empowered, in this immediate transitional phase, without legal powers, without reinforcing a framework for Governance defined in a legal parlance. It is not necessary to empower the community to such an extent as to render the Board powerless.

Q5: *Is empowering the community through consensus: engage, escalate, enforce a solution that is acceptable to you?*

No

No, not immediately.

Engagement, Escalate, Enforce process could complicate ICANN processes into one that is like that of the UN process with its rigid rules of procedure. The Internet Community is known for open, free and accessible processes - for example the ICANN Public forum where any individual raises an issue which receives a response from the Board, the Comments Forum, the IETF's hum process etc. If these processes could be strengthened without complicating with complex rules of procedure, the ability of the Board and Executive to be effective and respond to challenges would be greatly enhanced. Any changes to the ICANN processes need to be of such a nature as to improve the speed with which ICANN makes Governance decisions rather than to slow it down.

Q6: Is redefining ICANN's Bylaws as 'Standard Bylaws' and 'Fundamental Bylaws' a solution that is acceptable to you?

Yes

But not in a rush.

Q7: Is ensuring community involvement in ICANN decision-making: seven new Community Powers a solution that is acceptable to you?

No

What is the grave and urgent need (from a legal point of view) for the Community to obtain the status as an Empowered Community?

With a focus on defining a legal framework for accountability, various powers are recommended for the community. Two of the important legal powers recommended by the third proposal to be guaranteed by legal processes are a) removal of Directors/Board Members and b) approval/rejection of Budgets.

If a legal framework is indeed required on these matters, or in matters in global public interest, changes are not imperative to enable the community to go to court. Even without any changes, an individual or a representative of the Community could "go to federal district court and file against the Board Chair for a violation of bye-law where the heart of the complaint is egregious misbehaviour of a director.

"Under California law, the Empowered Community only has the legally guaranteed power (statutory right) to appoint and remove ICANN Board Directors (whether an individual Director or an aggregate entire Board)." This does not

imply that the Courts would turn a blind eye on petitions to hear cases that merit its attention on issues related to an appointed Board Member. The grounds could vary if connected to a violation of the bye-laws. The lawsuit could be against the Board as an institution, and the Court would direct the Board to take action if the case has merit. On any Board Inaction, one could file a writ of mandamus. Several other legal recourse might be known to California Legal experts.

We don't have to go down the path of making ICANN, already under severe legal cost burdens, further dominated by even more legal processes. It is not necessary to empower only by legal rights. Such a legal-centric approach would render ICANN as an organization constantly under threat of being sued, more so. And the threat of legal action would only come from the very interested parties, who would threaten to take ICANN to court whenever their interests are threatened by policies otherwise made in global public interest. Such as situation would limit the abilities of Board Members or top executives to act freely in public interest.

The community is not to be empowered to an extent that overwhelms the Board. The Board could continue to be in charge. What is required is to pay attention to aspects related to Board Oversight, criteria of selection of Board Members, the process of selection of Board Members. As an interim measure, a simpler nomcom process to privately hear and review individual Board Members and if the need so arises, ask them to leave quietly, could be instituted, with responsible people named to oversee Nomcom extraordinary actions.

Q8: Is changing aspects of ICANN's Mission,Commitments and Core Values a solution that is acceptable to you?

No

Limitations on ICANN's mission and purpose would render ICANN to be narrower organization. Also, these limitations conflict with the Affirmation of Commitments.

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?

Yes

ICANN could include an aspirational statement in its mission statements, but [not] in any manner [of] a legal commitment that would cause it to incur legal costs, that it would endeavour to respect Human Rights as declared. The language of such an aspirational statement could convey its respect and commitment.

Q10: Is strengthening ICANN's Independent Review Process a solution that is acceptable to you?

Yes

Apart from the four enhancements suggested, the process also requires to be speedy and free of bottlenecks.

Q11: Is fortifying ICANN's request for reconsideration process a solution that is acceptable to you?

Yes

Far greater enhancements needed on Review and Reconsideration processes. Please see
http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/pdfHE6qgsPzlg.pdf

Q12: Is incorporation of the Affirmation of Commitments a solution that is acceptable to you?

Yes

Yes

Q13: Is enhancing the accountability of Supporting Organizations and Advisory Committees a solution that is acceptable to you?

Yes

Yes, but the AC/SO Accountability improvements need to PRECEDE any new processes related to Community Empowerment.

Q14: Is Board obligations regarding GAC Advice (Stress Test 18) a solution that is acceptable to you?

No answer chosen

Beyond the scope of this question on the stress test, one way to achieve an overall balance is to create a Business Advisory Committee so as to actually balance the three broader stakeholder groups and make the Advice from the stakeholder groups equal.

In addition, the business constituents of the Supporting Organizations could have a somewhat stronger voice in commercial decisions and in matters related to Business Compliance etc. in a structurally separate Commercial Division of ICANN;

Eventually on matters related to DNS policy and larger matters, the ICANN Community could be empowered as a single, balanced house of different stakeholders, all assembled in Global Public Interest.

Q15: Is committing to further accountability work in Work Stream 2 a solution that is acceptable to you?

Yes

Yes, Required, with attention to the need to broaden the definition and scope of the work to be carried out in response to questions such as:

What are the substantive changes proposed in Work Stream 1 of CCWG and what is left unattended? What remains unchanged and what changes?

Would there be greater fairness in its business and community actions? Would it bring better participation? Better people to govern?   Would there be elevated governance standards? Would there be greater trust? These were not within the purview of Work Stream1.

The scope for Work Stream 2 needs to be unlimited, towards bringing out broader and more substantive changes to elevate the organization by instituting much higher Accountability and ethical standards framework so as to enhance its acceptability and trust even among those who are slow to trust.

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

The work done by the CCWG so far is substantive and achieves a certain purpose. The work by Members and Participants of the CWG, CCWG and ICG, most of whom volunteers, over numerous face to face and Internet meetings and

email exchanges, often in odd hours, exemplifies the spirit of the Multi Stakeholder process at work in ICANN. A process such as this that determines the future of the governance of Critical Internet Resources, complicated by differing visions and conflicting positions, is proceeding smoothly, largely free of harsh stalemates.

It is with praise for the extensive work done so far by the Members and Participants, most of whom worked in global public interest, that the answers to the questions and the comments are submitted. As a participant of the process, these answers as above and the comment that follows together represent a deliberately intense "self-criticism" of the severe limitations of the emerging outcome. These comments are submitted with ample respect for the Internet, Internet Governance process as it is, ICANN's multi-stakeholder process, its Board, Staff, Members of the Advisory Committees, Supporting Organizations and Working Groups, in particular those of ICG, CWG and CCWG. These are well meant comments drafted in commitment to the long term evolution of ICANN as a truly Global Organization fair to all concerned. No effort is made to restrain comments or to soften the difficult language, hence it becomes necessary to spell out clearly that these comments are NOT made out of dissatisfaction of the way ICANN works, in fact the comments stem from satisfaction over the swift progress made by ICANN in the evolution of its multi-stakeholder process in its initial 18 years and with a deep interest in drawing the required attention that everything that needs to be done to further the further evolution of ICANN as a Global multi-stakeholder Organization must be done without restraints and with ample faith.

Instead of legal provisions for community to reject a budget, the budgetary process could be redesigning the budgetary process as a process with an organized flow of community inputs with periodic briefs exchanged between the Board and Community on their respective thinking. A convention could evolve for the Board to take into account community inputs, and by virtue of the fact that the Budgetary process becomes a part of Community discussion agenda items.

Nomcom could set its sights high to find individuals of commitment to global public interest. The focus of the Accountability exercise should be that of strengthening ICANN as an organization of people of commitment to global public interest, to institute just enough processes to ensure that there is fairness, as well room for timely amends or remedial measures on the rare occasions when there is a deviation.

Until such time as the Community is empowered to remove a Director or the entire Board, NOMCOM could institute a process of a gentle interim review of those appointed. When an inevitable situation occurs, NomCom could be

empowered to review and remove Directors quietly and without the need for legal recourse or without the threat of defamation lawsuits, and without jeopardizing the ability of ICANN to attract outside people of rank and reputation.

All the usable redressable processes are to exist in the background, ready to be invoked, but everything needs to work in all fairness without any individual, AC/SO or the entire community ever being pushed into a situation of a need to invoke a redressal process.

There are imbalances within NomCom, be corrected by altering the number of AC/SO nominees to Nomcom, to ensure that this core body that determines the standards of the Board and AC/SOs is well centred.