ALAC Briefing on CCWG-Accountability Final Proposal

24/25 February 2016

Overview

- Plan for ALAC decision
- Review of the Final CCWG Proposal to enhance ICANN Accountability
- Concerns

Chartering Organization (CO) Ratification

- ALAC to consider the Final Proposal (12 recommendations).

- If we choose not to ratify any or all of the Proposal Recommendations, we must notify the CCWG and at a minimum provide reasons for the lack of support and a suggested alternative that would be acceptable, if any.

- There is no requirement that all, or all but one CO ratify.

- ALAC decision required no later than Wednesday, 09 March 2016, but preferably earlier.

- If we ratify, we could also include a statement but that would not alter the Proposal, although it could impact how the overall package is viewed by the US Government.

Documentation

- This presentation
- Full Report (*Supplemental Final Proposal Work Stream 1 Recommendations*) https://community.icann.org/x/8w2AAw
  - Main Report
  - 15 Annexes (1-12 = Recommendation 1-12)
  - 11 Appendices
  - 345 pages!

Accountability – The Problem

- Currently ICANN Board is supreme. We select them, but once there, they have complete control.

- IANA Transition required that there must be *some* level of oversight of the Board.
  - Threat: ICANN Board "goes rogue" and does something really ill-advised.

- The only entity that was realistic (to us!) is the ICANN Community itself.

- An that was the start of this 15 month saga.

Accountability – The Answer

- The Community, as defined by the Supporting Organizations and Advisory Committees, acting in (relative) unison, can have power over the Board

- Various frameworks were investigated and most discarded for one reason or another
  - Complexity
  - Too much power
  - Too much change
  - Fear (a realistic one!) of unexpected outcomes

Work Streams

- ## Work Stream 1
  - Powers required to ensure IANA Transition Accountability and to allow additional accountability issues to be resolved later.

- ## Work Stream 2
  - The rest...

Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers

- Empowered Community (EC)
  - GNSO, ccNSO, ASO, GAC, ALAC
    - GAC has not formally said they would, or would not participate, but the presumption is that they will, although they may not often exercise those powers
  - SSAC, RSSAC have opted to solely maintain their advisory roles and not participate in the community powers. The can still advise other SO/AC with respect to exercising powers.

- The Bylaws will give the EC specific powers and describe how they may be exercised.

Empowered Community

- Technically an <u>Unincorporated Association</u> (UA)used as a grouping of the five SO/ACs, likely using their respective Chairs to formally exercise their powers (implementation)

- The EC has is a legal person and can thus take court action should it ever be necessary.

- The SOs and At-Large will appoint their Directors via the Empowered Community using a construct called the Designator. This one Designator will take instructions from the SOs, At-Large and the Nominating Committee to appoint Directors.

- Since there is only one Designator for the all such appointments, the term "Sole Designator" is used.

- A Designator also has the power to remove Directors.

- Inspection rights and Investigation rights.

Who looks after the Public Interest?

- Board members are required to set aside their personal interests and consider the corporation's interests and the global public interest (both undefined!)

- AC/SO have no such requirement. Each may strongly fight for what it feels is best for ITS constituency.

- The hope is that the EC requires sufficient collaboration that the AC/SO individual interests are balanced.

ALAC Concerns: General

- Most or all of the ALAC concerns to be listed have been well discussed and *in general*, earlier discussions have indicated that each recommendation is probably acceptable, if not optimal to all ALAC Members (and other At-Large participants)

- But the final decision will rest upon ALAC discussions.

ALAC Concerns: Recommendation 1

- It is possible that somehow the interests of parts of the ICANN community can end up exercising control, through the inattention or lack of interest of the other parts; or by somehow co-opting the other communities.

Warning: Recommendations intentionally out of order!

Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

- Currently, there are only one type of Bylaw.

- The Articles of Incorporation (A of I - the Corporate Charter used to establish a Corporation) and the Bylaws may be changed at will by the Board.

  - We have practices in ICANN that constrain the Board, but they are voluntary practices that could be ignored.

The Bylaw Conundrum (def: difficult problem!)

- Since Bylaws will define the community powers, it would not make sense to allow the Board to unilaterally modify them. The same applies to the A of I since they define the essence of the corporation.

- However, Bylaws change relatively often for many reasons, and we do not want to make it too difficult to change them.

ALAC - CCWG-Accountability Final Proposal

Standard vs Fundamental Bylaws

- Standard Bylaws are just like the ones we have now.

- Fundamental Bylaws, which will among others things, include the Bylaws which create the EC and provide its powers as well as ICANN's Mission and Core values and Commitments and core IANA functions

- Fundamental Bylaws require a higher Board voting threshold to change (2/3 → 3/4)

- Fundamental Bylaws can only be changed with the agreement of the EC.

- Public consultation prior to all Bylaw changes mandatory.

ALAC Concerns: Recommendation 3

- Fundamental Bylaw changes which may be "required" to address a changing environment may be difficult to do.
  - Changes "in the global public interest" which are not viewed as being in the interests of parts of the community may allow those parts to block the changes.
    - Note that a single AC/SO cannot block, but combinations of them can.
  - Simple inaction or slow action by sufficient AC/SOs could block change
- No escape clause.

Recommendation #4: Ensuring Community Engagement in ICANN Decision-making: Seven New Community Powers

- Reject ICANN's Budget or Strategy/Operating Plans or IANA Budget
- Reject Changes to ICANN Standard Bylaws
- Remove Individual ICANN Board Directors
- Recall the Entire ICANN Board
- Approve Changes to Fundamental Bylaws and Articles of Incorporation
- Initiate a binding Independent Review Process (IRP) or Request for Reconsideration
- Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of Post-Transition IANA separation

Powers

- 6/7 powers can override/question Board action

- One, approval of Fundamental Bylaws, requires positive action of the EC.

ICANN Budget/Plan Rejection

- ICANN's Five-Year Strategic Plan
- ICANN's Five-Year Operating Plan
- ICANN's Annual Operating Plan & Budget
  - based on perceived inconsistency with the purpose, Mission and role set out in ICANN's Articles and Bylaws; the global public interest; the needs of ICANN stakeholders; financial stability, or other matters of concern to the community.
  - The veto could only concern issues that had been raised in the public consultations conducted before the Board approved the budget or plan.
- Rejected budget → Caretaker budget (basic requirements, no frills or unessential new initiatives)

IANA Budget Rejection

- Rejection will result in a caretaker budget to protect IANA operations.

Reject Standard Bylaws

- All Bylaw changes will require mandatory community consultation prior to being enacted.

- Bylaws changes would require a 30 day delay.

- Further delay if community power is initiated.

- Special case if Bylaw is mandated by a SO PDP Recommendation. In that case, rejection of Bylaw required that SO to support rejection.
  - No known case of such a Bylaw change.

Approve Fundamental Bylaws

- Requires positive action by the EC to change the A of I or Fundamental Bylaws

Remove Individual AC/SO Director

- Action decided by the AC/SO alone, but following wider community discussion/consultation

- Requires a rationale.
  - Not restricted to particular reasons. Wears purple pants is sufficient, albeit potentially embarrassing to the AC/SO and could make it more difficult to recruit future candidates.

- Director may defend/explain their actions/inactions

- AC/SO representatives indemnified for claims related to statements made about director in good faith.

- Only once per term (if proceeds to actual decision)

Removal of NomCom Director

- Similar to removal of AC/SO Director, but requires action of the EC.

Recall of Entire Board

- EC action with high threshold (with one exception)

- Likely highly destabilizing.

- All voting Board members except Ex-Officio CEO.

- At time of power being exercised, each AC/SO would have to name Interim board member(s)

- Interim Board will have same powers of a regular Board, but is required to consult with community if practical (i.e. urgent decision not needed to preserve DNS SSR).

Recall of Entire Board - 2

- AC/SO/NomCom must put in place rules to allow selection of replacement director within 120 days

Initiate Independent Review Process or Board Reconsideration

- Power exercised by EC.

Reject ICANN Board Decisions Relating to Reviews of IANA Functions, Including the Triggering of any Post-Transition IANA Separation Process for the IANA Naming Functions

- Power exercised by EC.

ALAC Concerns: Recommendation 4

- As discussed: Fundamental Bylaw - Inability to change

- Destabilization if Board recall contemplated or effected.

- Unfairness and potential abuse of AC/SO Removal

Recommendation #2: Empowering the Community Through Consensus: Engagement, Escalation, Enforcement

- Individual (anyone) begins a petition
- Supported by AC/SO (21 days from trigger event)
- Conference Call (optional)
- Support (2 or 3) to convene Community Forum (7 days)
- Community Forum (21 days)
- Decision to go to Empowered Community (21 days)
- Community Decision (3 or 4 *For*, <2 *Against*)
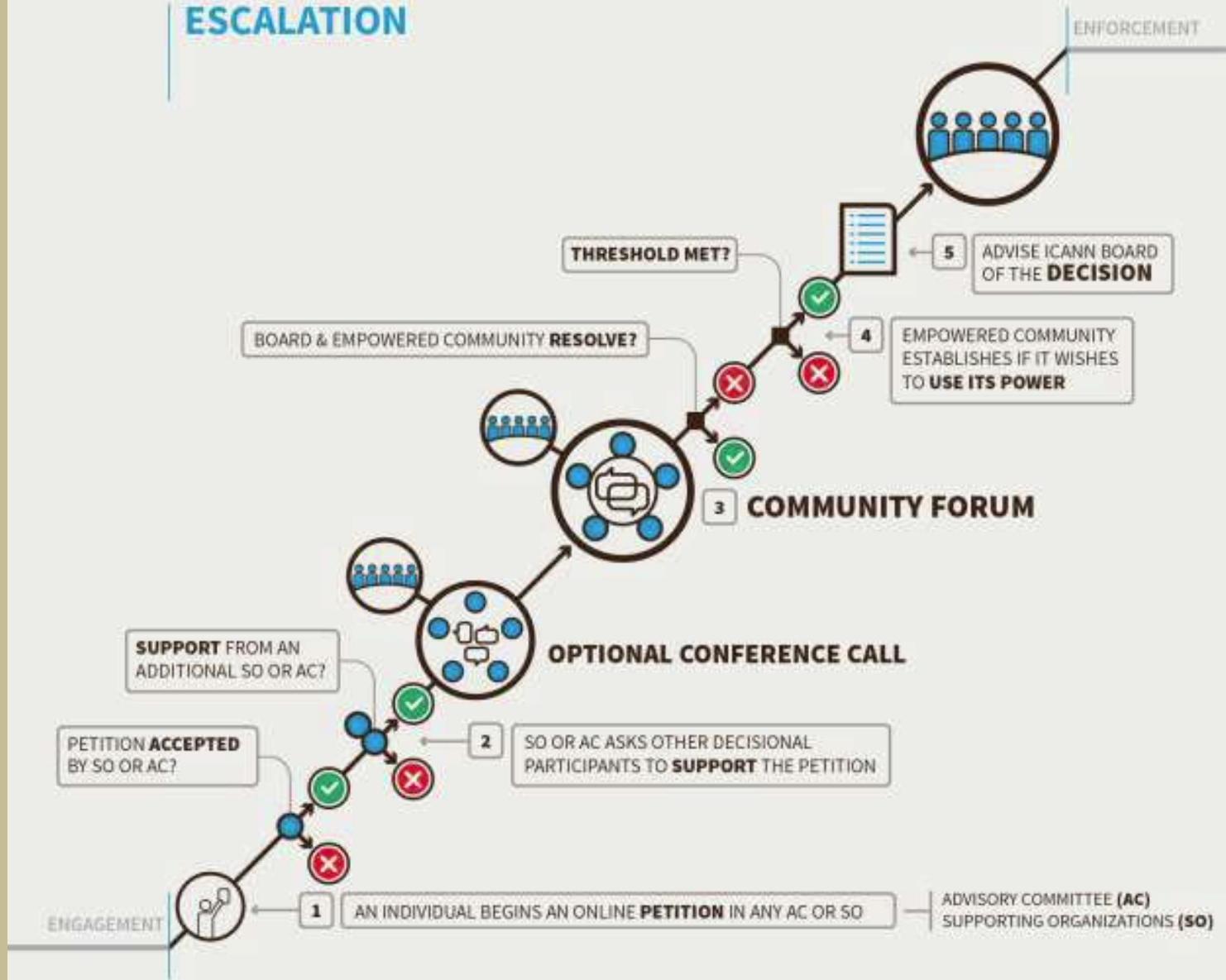
Processes vary

- The exact process is tailored to power

- Thresholds vary based on power (to be discussed)

- No support from other AC/SO required for AC/SO Board member removal

- No petition required for Fundamental Bylaw approval (triggered by Board action to change Bylaw)

Enforcement

- Enforcement for Non-compliance
  - Mediation, IRP, Court or Recall if Board does not comply
  - Board Recall

Enforcement - 2
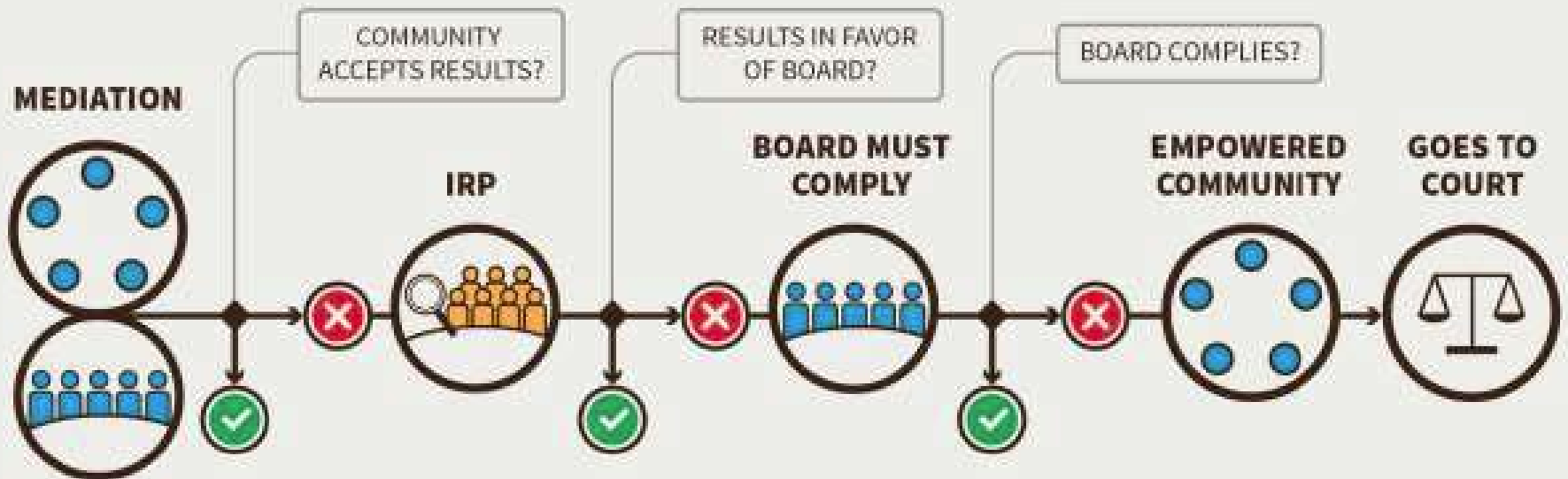
Thresholds

Power	SO/AC -> Comm Forum	Support	Object
Reject a proposed Operating Plan/Strategic Plan/Budget	2	4	<2
Approve changes to Fundamental Bylaws and Articles of Incorporation	N/A	3	<2
Reject changes to regular bylaws	2	3	<2
Remove an individual Board Director appointed by a Supporting Organization or Advisory Committee	1	1	
Remove an individual Board Director appointed by the Nominating Committee	2	3	<2
Recall the entire board of directors	3	4 (or 3)*	<2
Initiate a binding Independent Review Process	2	3	<2
Reject ICANN Board decisions relating IANA	2	4	<2

* Only if an IRP triggered by EC action over GAC advice and IRP rules Board violated Bylaws

ALAC Concerns: Recommendation 2

- Reduction from 4 to 3 for Board recall in exceptional case.

Recommendation #5: Changing Aspects of ICANN's Mission, Commitments and Core Values

- An large set of changes aimed at ensuring that ICANN's mission is well defined and constrained.

- Clarifies ICANN responsibilities related to protocol parameters and Internet Protocol and Autonomous System numbers.

- Divides current Core Values into Core values and Commitments

- Incorporate ICANN's obligation to "operate for the benefit of the Internet community as a whole, and to carry out its activities in accordance with applicable law and international law and conventions through open and transparent processes that enable competition" into the Bylaws. (Currently in A of I.)

ALAC Involvement

- This is a section of the Proposal that the ALAC has been VERY active in.

- We had many problems with earlier draft versions. Many of these concerns were echoed by the Board.

- We were largely successful in having our concerns addressed.

Examples of Changes

- Current Bylaws imply that we have more responsibility with respect to parameters than we actually do. New Bylaws reflect current split responsibilities among ICANN, protocol community and numbers community.

- ICANN shall act strictly in accordance with, and only as reasonably appropriate to achieve its Mission.

- ICANN shall not impose regulations on services that use the Internet's unique identifiers, or the content that such services carry or provide.

Examples of Changes - 2

- ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments ("PICs"), with contracted parties in service of its Mission.

Commitments

In performing its Mission, ICANN must operate in a manner consistent with its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions, and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN's action must:

- (modified) Preserve and enhance its neutral and judgment free operation administration of the DNS, and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;

- (new) Maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet;

- (new) Inclusion of "end users" in definition of stakeholders.

Overview does no adequately address changes

- This is a large and complex set of changes

- Earlier versions attempted to limit ICANN's ability to manage the DNS and particularly gTLDs. We were successful in reversing those changes.

- Annex 5 is mandatory reading for anyone who truly wants to understand the changes.

ALAC Concerns: Recommendation 5

- Such a large set of changes many have unforeseen consequences and interactions between the individual changes.

- Language in Proposal not final. Actual Bylaw language may differ, and careful review of the proposed formal Bylaw language will be very important.

Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission

- Highly contentious section
- No one was against Human Rights (HR)
- But…

Human Rights

- Agreed that the thorough review of HR would occur in WS2.

- Great concern that there was little understanding of what HR were relevant to ICANN's narrow scope, and how these might impact the work we do.

- Concern that the presence of a direct reference to HR in the Bylaws without fully defining the details could attract IRPs and lawsuits.

- Some felt that HR must not be mentioned in Bylaws until WS2 work concluded.

- Some adamant that HR had to be addressed in Bylaws – Now.

Compromise Bylaw

Within its Core Values, ICANN will commit to respect internationally recognized Human Rights as required by applicable law. This provision does not create any additional obligation for ICANN to respond to or consider any complaint, request, or demand seeking the enforcement of Human Rights by ICANN. This Bylaw provision will not enter into force until (1) a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations' approval) and (2) the FOI-HR is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations.

ALAC Concerns: Recommendation 6

- Ongoing concern that inclusion in Bylaws, even with conditional language, could have consequences.

- Some feel that reference to "core values" should be a reference to mission (and other feel just the opposite).

Recommendation #7: Strengthening ICANN's Independent Review Process

- Purpose of the Independent Review Process (IRP) is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws

- Everyone agreed that current IRP has problems

Proposed Revised IRP

- Transparent, efficient and accessible (both financially and from a standing perspective).

- Designed to produce consistent and coherent results that will serve as a guide for future actions.

Hear and resolve claims:

- that ICANN through its Board of Directors or staff has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any AC or SO).

- that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.

- that expert panel decisions are inconsistent with ICANN's Bylaws.

- that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.

- initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.

IRP Panel

- Standing panel: 7; decisional panel: 3

- Independent of ICANN and AC/SOs

- Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration is necessary.

- Reflect some level of diversity (cultural, linguistic, gender, and legal diversity, region)

Standing

- Any person/group/entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress.

- The Board's failure to fully implement an EC decision will be sufficient for the EC to be materially affected.

- ICANN bears costs (including legal costs) for EC use of IRP.

ALAC Concerns: Recommendation 7

Recommendation #8: Improving ICANN's Request for Reconsideration Process

- Requests Board review of an ICANN action or inaction

- Current Reconsideration procedure is accepted as flawed by all parties. Scope, process, transparency all improved.

Reconsideration

- Current process considers whether correct process was followed

- There have been about 150 Reconsideration requests in ICANN's history

- A large percentage of these have been in respect to the New gTLD Process

- Most or all have resulted in a decision to not change anything.

Enhanced Reconsideration

- The scope of permissible requests expanded to include Board/staff actions or inactions that contradict ICANN's Mission, Commitments, and/or Core Values and for reconciling conflicting/inconsistent "expert opinions."

- Time allowed for filing increased

- Opportunity to rebut tentative decision.

- Decisional documentation available to requestor

- Deadlines for decisions

- Ombudsman to make initial evaluation, and not legal staff.

ALAC Concerns: Recommendation 8

Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws

- AoC is can be cancelled on short notice (by both the US Government and ICANN).

- Linkage to USG is not desirable.

AoC

- General agreement to incorporate overall AoC into Bylaws.
- Access to documents improved.
- Review process slowed (3→5 years)
- Some would have preferred to see actual reviews not embedded in Bylaws, but elsewhere to allow more flexibility.
- Some would have preferred that process details of reviews not be in Bylaws.
- Largely incorporated unchanged, but there were some changes…

AoC Changes

- Replacement of references to WHOIS with more applicable terminology, and removal of "requirement" which were counter to both practice and in some cases law (and which never should have been in the AoC in the first place).

- New rules regarding composition of Review Teams and how they are selected.

Review Team Composition/Selection

Now

- Review Teams selected by the Board Chair and GAC Chair (ATRT) or by the CEO and GAC Chair (all other reviews)

- Exact size and number per AC/SO determined by selectors

New process

- Review team up to 21 members from AC/SO.

- Up to 7 per AC/SO

- Selected by AC/SO Chairs

ALAC Concerns: Recommendation 9

- Review Teams will likely be too large (past sizes 11-13)

- Some chairs will be under pressure from their AC/SO to select many from their group.

- Processes which should/could naturally evolve will require Bylaw changes.

Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees

- If AC/SOs to be given power, *their* accountability need to be considered, for same reasons we are considering Board accountability.

- Unclear if and AC/SO should be accountable to their local community or the wider Internet Community of their peers.

- Unclear how one measures this, regardless of which is chosen.

AC/SO Accountability

- Periodic Reviews of AC/SOs should consider accountability and mechanisms to ensure it.

- WS2 will further consider the issue.

- Although the GAC is not subject to periodic reviews, the terms of the AoC inserted into the Bylaws will effectively include an assessment of the role and effectiveness of GAC interaction with the Board and with the broader ICANN community.

ALAC Concerns: Recommendation 10

- Accountability of AC/SOs IS an issue, but it is unclear that WS1 could do any more.

Recommendation #11: Board Obligations with regards to Governmental Advisory Committee Advice (Stress Test 18)

- Principle 47

    The GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.

GAC Advice

- If the GAC provides Advice to the ICANN Board, the Board must either accept the advice, or enter into discussions with the GAC to find a compromise prior to rejecting such advice.

- Under today's rules, the GAC could redefine Principle 47.
  - Curiously, it can be redefined, not by consensus but by a majority vote.

NTIA Requirement

- In order to not measurably increase the influence of the GAC through its advice process, the NTIA has stated (clearly!) that in order for the Board to give such deferential treatment to GAC Advice, the GAC must continue to use the definition of consensus as embodied by the current GAC Principle 47.

- HIGHLY objectionable to some GAC members.

"Dublin Compromise"

- GAC would accept the locked-in definition of consensus for Advice to the Board

- The threshold for the Board rejecting GAC Advice would be raised from 50%+ to 2/3.
  - Symbolic
  - Governments (and many of us) care about symbols!

Response of GNSO

- Not acceptable. The increase threshold was already rejected when it was first suggested over a year ago.

- Proposed a compromise to the compromise
  - Increase threshold to 60% - splitting the difference between 50+ and 2/3
  - If the EC uses a power to object to Board action in response to GAC Advice, the GAC may not participate as a decisional participant in the exercise of that power. (GAC Carve-out)

More negotiations…

- Since in the "GAC-Carve-out" the GAC cannot support or object to the use of a power, there are only 4 AC/SOs left.

- For powers that require 4 in support (Board recall, budget/plan rejection, reject IANA action) requiring 4 would require unanimity, which the CCWG had decided to never do)

- Therefore 4 reduces to 3.

- Board and others objected to Board recall with only 3 AC/SO supporting it.

Compromise to the compromise to the compromise

- For Board Recall, 4 is always required, regardless of whether it implied unanimity
  - UNLESS the Board action following GAC Advice resulted in a EC IRP which agreed that the Board violated the Bylaws.

- Despite the multi-level compromise, a minority report has been files by one GAC Member (Argentina) and has been supported by about 10-12 other governments. Unclear what the long-term effect will be.

ALAC Concerns: Recommendation 11

- Some worry that the GAC Carve-out disadvantages the GAC and will lead to disenchantment with ICANN by some governments.

- The very unlikely situation where 3 AC/SOs can recall the Board is not acceptable to some.

Recommendation #12: Committing to Further Accountability Work in Work Stream 2

- Improving ICANN's transparency with a focus on:
  - Enhancements to ICANN's existing Documentary Information Disclosure policies
  - Transparency of ICANN's interactions with governments
  - Improvements to the existing Whistleblower policy
  - Access rights to ICANN documents
- Considering improvements to ICANN's standards for diversity at all levels
- Addressing jurisdiction related questions, namely: Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements

WS2 - continued

- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw

- Considering enhancements to Ombudsman's role and function.

- Staff accountability

And last but far from least:

- Supporting Organizations and Advisory Committee accountability

ALAC Concerns: Recommendation 12

- The work involved!!!!!!!!!

Questions

(Font gives insight into frazzled mental state of CCWG Members)