

## ICANN CCWG-Accountability, Work Stream 2 project on SO/AC Accountability

First Draft of Report, as of 21-Aug-2016

### Background for SO/AC Accountability in Work Stream 2

ICANN's new bylaws reflect the CCWG Supplemental Final Proposal<sup>1</sup>, regarding Work Stream 2 (WS2):

ARTICLE 27 TRANSITION ARTICLE

Section 27.1. WORK STREAM 2

(b) The CCWG-Accountability recommended in its Supplemental Final Proposal on Work Stream 1 Recommendations to the Board, dated 23 February 2016 ("CCWG-Accountability Final Report") that the below matters be reviewed and developed following the adoption date of these Bylaws ("Work Stream 2 Matters"), in each case, to the extent set forth in the CCWG-Accountability Final Report:

(iii) Supporting Organization and Advisory Committee accountability, including but not limited to improved processes for accountability, transparency, and participation that are helpful to prevent capture;<sup>2</sup>

This WS2 item was described in greater detail in the CCWG Final Proposal, Recommendation 12<sup>3</sup>:

Supporting Organizations and Advisory Committee accountability, as part of WS2. □

- Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.
- Evaluate the proposed "Mutual Accountability Roundtable" to assess viability.
- Propose a detailed working plan on enhancing SO and AC accountability as part of WS2.
- Assess whether the IRP would also be applicable to SO and AC activities.

Regarding the first bullet above, Recommendation 9 of the CCWG Final Proposal noted that further enhancements to SO/AC accountability should be driven by the accountability review process (ATRT), which has always suggested that ATRT look at:

d) assessing the extent to which ICANN's decisions are embraced, supported, and accepted by the public and the Internet community<sup>4</sup>

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<sup>1</sup> CCWG Final Proposal, 23-Feb-2016, at <https://community.icann.org/pages/viewpage.action?pageId=58723827>

<sup>2</sup> New ICANN Bylaws, adopted 27-May-2016, p. 135, at <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>

<sup>3</sup> Annex 12 of CCWG Final Report, 23-Feb-2016, pp. 5-6, at <https://community.icann.org/pages/viewpage.action?pageId=58723827&preview=/58723827/58726378/Annex%2012%20-%20FINAL-Revised.pdf>

<sup>4</sup> Annex 9 of CCW Final Report, 23-Feb-2016, p. 11, at <https://community.icann.org/pages/viewpage.action?pageId=58723827&preview=/58723827/58726375/Annex%2009%20-%20FINAL-Revised.pdf>

In addition, Recommendation 10 of the CCWG Final Proposal noted that further enhancements to SO/AC accountability can be accommodated through the accountability review process.<sup>5</sup>

The CCWG-Accountability recommends addressing the accountability of Supporting Organizations (SOs) and Advisory Committees (ACs) in a two-stage approach:

- In Work Stream 1: Include the review of SO and AC accountability mechanisms in the independent structural reviews performed on a regular basis.
- In Work Stream 2: Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process

**Work Stream 2:**

Include the subject of SO and AC accountability as part of the Accountability and Transparency Review process.

- Evaluate the proposed “Mutual Accountability Roundtable” to assess its viability and, if viable, undertake the necessary actions to implement it.
- Develop a detailed working plan on enhancing SO and AC accountability taking into consideration the comments made during the public comment period on the Third Draft Proposal.
- Assess whether the Independent Review Process (IRP) would also be applicable to SO and AC activities.

To address our Work Stream 2 project, Steve DelBianco suggested at the ICANN meeting in Helsinki that we begin with Stress Tests that address failure of AC/SO accountability<sup>6</sup>.

ST 31 on *Rogue Voting* by an AC/SO rep (remember that?)

Response: If an AC/SO rep expressed support/oppose against the instructions of their AC/SO, the decision rules for Empowered Community could have procedures to invalidate the consensus call, and do-over.

ST 32-34 suggested by NTIA Secretary Strickling

ST 33 on **internal capture** by a subset of AC/SO members

ST 34 on incumbent members **excluding new entrants** to an AC/SO.

CCWG proposed two mechanisms to answer these Stress Tests:

1. The key response to these STs was that a disenfranchised AC/SO member could challenge the Board decision to follow that advice/policy, using reconsideration or IRP.

The standard of review would be ICANN’s Articles of Incorporation and amended Bylaws, including Core Values requiring “open, transparent and bottom-up, multistakeholder policy development processes”

2. Another ST response was that the required periodic Organizational Reviews (Bylaws Sec 4.4) require 5-year cycle of review of each SO, Council, and AC to determine:

(ii) whether any change in structure or operations is desirable to improve its effectiveness and

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<sup>5</sup> Annex 10 of CCW Final Report, 23-Feb-2016, pp. 1-4, at <https://community.icann.org/pages/viewpage.action?pagelD=58723827&preview=/58723827/58726376/Annex%2010%20-%20FINAL-Revised.pdf>

<sup>6</sup> Annex 15 of CCW Final Report, 23-Feb-2016, at <https://community.icann.org/pages/viewpage.action?pagelD=58723827&preview=/58723827/58726384/Annex%2015%20-%20FINAL-Revised.pdf>

(iii) whether that organization, council or AC is accountable to its constituencies, stakeholder groups, organizations. □

Two other Stress Tests (ST 33 and 34) address challenging Board acceptance of a tainted AC/SO decision. This is important to respond to the 4<sup>th</sup> bullet in our Recommendation 12: *Assess whether the IRP would also be applicable to SO and AC activities.*

A key term in the Organizational Review described above is “effectiveness” of each SOAC, though the Bylaws have never defined that term. Our group could develop guidance for effectiveness of SO/AC outreach and representation.

Please see the table below to compare present reviews required to assess accountability of SO/ACs.

**Existing requirements for reviews of SO/AC Accountability**

SO/AC	Community Represented and role within ICANN (per bylaws)	SO/AC Accountability Mechanisms
All		<p>AoC [2009] includes “(d) assessing the extent to which ICANN’s decisions are embraced, supported and accepted by the public and the Internet community”</p> <p>Bylaws Section 4.4 requires the Board to cause an independent, periodic review (every 5 years) of each SO/AC, except that the GAC “shall provide its own review mechanisms”</p>
ALAC	<p>“the primary organizational home within ICANN for individual internet users”</p> <p>“to consider and provide advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users”</p>	<p>Every 5 years, the Bylaws require a review to determine (i) whether ALAC has a continuing purpose in the ICANN structure, (ii) if so, whether any change in structure or operations is desirable to improve its <b>effectiveness</b> and (iii) whether ALAC is <b>accountable</b> to its constituencies, stakeholder groups, organizations and other stakeholders.</p>
ASO	<p>“ASO shall be the entity established by the Memorandum of Understanding [2004] between ICANN and the Number Resource Organization (“NRO”), an organization of the existing RIRs”</p> <p>“ASO shall advise the Board with respect to policy issues relating to the operation, assignment, and management of Internet addresses”</p>	<p>Every 5 years, the Bylaws require a review to determine (i) whether ASO has a continuing purpose in the ICANN structure, (ii) if so, whether any change in structure or operations is desirable to improve its <b>effectiveness</b> and (iii) whether ASO is <b>accountable</b> to its constituencies, stakeholder groups, organizations and other stakeholders.</p>
ccNSO	<p>ccTLD managers that have agreed to be members of ccNSO.</p> <p>(a) develop and recommend to the Board global policies relating to country-code top-level domains;</p>	<p>Every 5 years, the Bylaws require a review to determine (i) whether CCNSO has a continuing purpose in the ICANN structure, (ii) if so, whether any change in structure or operations is desirable to improve its <b>effectiveness</b> and (iii) whether CCNSO is <b>accountable</b> to</p>

	<p>(b) Nurture consensus across the ccNSO’s community, including the name-related activities of ccTLDs;</p> <p>(c) Coordinate with other ICANN Supporting Organizations, committees, and constituencies under ICANN</p>	<p>its constituencies, stakeholder groups, organizations and other stakeholders.</p>
GAC	<p>Open to all national governments (and Distinct Economies upon invitation).</p> <p>“concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues”</p>	<p>AoC [2009] includes “(b) assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS”</p> <p>New Bylaws put it differently “(B) assessing the role and effectiveness of the GAC’s interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;</p> <p>GAC is not required to undergo independent review.</p>
GNSO	<p>Open to registries, registrars, commercial stakeholders (BC, I/C, ISPCP), non-commercial stakeholders.</p> <p>develop and recommend to the Board substantive policies relating to generic top-level domains</p>	<p>Every 5 years, the Bylaws require a review to determine (i) whether GNSO has a continuing purpose in the ICANN structure, (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness and (iii) whether GNSO is accountable to its constituencies, stakeholder groups, organizations and other stakeholders.</p>
RSSAC	<p>chairs and members shall be appointed by the Board.</p> <p>“advise the ICANN community and Board on matters relating to the operation, administration, security, and integrity of the Internet’s Root Server System”</p>	<p>Every 5 years, the Bylaws require a review to determine (i) whether RSSAC has a continuing purpose in the ICANN structure, (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness and (iii) whether RSSAC is accountable to its constituencies, stakeholder groups, organizations and other stakeholders.</p>
SSAC	<p>Chair and members appointed by ICANN board.</p> <p>“advise the ICANN community and Board on matters relating to the security and integrity of the Internet’s naming and address allocation systems.”</p>	<p>Every 5 years, the Bylaws require a review to determine (i) whether SSAC has a continuing purpose in the ICANN structure, (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness and (iii) whether SSAC is accountable to its constituencies, stakeholder groups, organizations and other stakeholders.</p>

### **Effectiveness of SO/AC Outreach**

At the Helsinki meeting and on our group's first call, Steve DelBianco proposed that representation and outreach should be measured **by results and by efforts** of the SO/AC.

Outreach *results* – such as statistical analysis of representation -- are appropriate to measure outreach. But this should not be the only measure of effective outreach. Such results are not often obtained, even when an SO/AC is open and accessible to new entrants and does proactive marketing and recruiting from portions of the targeted community that are not well-represented in the SO/AC.

For that reason, we could design measures of effort at outreach and recruiting. And if there are complaints from someone excluded or disenfranchised by an SO/AC, we should measure the effort to respond to that complaint and to reform SO/AC practices.

### **Effectiveness of Community Representation in SO/AC decisions**

Another aspect of effectiveness could be whether decisions of an SO/AC reflect what the represented community *actually wanted*. The ATRT was drafted in 2009 to assess “the extent to which ICANN’s decisions are embraced, supported, and accepted by the public and the Internet community”. However, this could be difficult and arbitrary to determine, so Steve recommended against second-guessing SO/AC decisions and votes.

Ultimately, an SO/AC is accountable to the stakeholders *who decide that it is worthwhile to participate and assert their views*. Who participates will change over time, depending upon the impact and relevance of being developed or debated.

## Mutual Accountability Roundtable

The “Mutual Accountability Roundtable” noted in the CCWG Final Proposal originated from advisor Willie Currie in 2015:

*a roundtable of the Board, CEO and all supporting AC/SO chairs. Pick a key issue to examine. Each describes how their constituency addressed the issue, indicating what worked and didn't work. Then a discussion to create a space for mutual accountability and a learning space for improvement.*

Willie Currie's May-2015 email:

The idea of mutual accountability is that multiple actors are accountable to each other<sup>7</sup>. How might this work in ICANN? It would be necessary to carve out a space within the various forms of accountability undertaken within ICANN that are of the principal-agent variety. So where the new community powers and possibly a Public Accountability Forum construct the community as a principal who calls the Board as agent to account, a line of mutual accountability would enable all ICANN structures to call one another to account.

So one could imagine a Mutual Accountability Roundtable that meets once a year at the ICANN meeting that constitutes the annual general meeting. The form would be a roundtable of the Board, CEO and all supporting organisations and advisory committees, represented by their chairpersons. The roundtable would designate a chairperson for the roundtable from year to year at the end of each AGM who would be responsible for the next Mutual Accountability Roundtable. There could be a round of each structure giving an account of what worked and didn't work in the year under review, following by a discussion on how to improve matters of performance. The purpose would be to create a space for mutual accountability as well as a learning space for improvement.

It could be argued that this form of mutual accountability would contradict and undermine the 'linear chain of accountability' established in the new community powers and cause confusion. The answer to this is that ICANN needs a combination of accountabilities to manage its complexity as an organisation. In the IANA transition, it is critically important for ICANN to have a strong principal-agent relationship at the centre of its accountability system to replace that of the NTIA. However, that system is vulnerable to charges that the community assuming the role of accountability holder or forum is itself not representatively accountable to the global public of Internet users. To address this requires a way of introducing a system of mutual accountability as well as a recognition that ICANN is accountable as a whole ecosystem to a set of democratic standards and values captured in its Bylaws.

Willie Currie, Advisor to the CCWG-Accountability

May 26 2015

Our group discussed the idea of a Mutual Accountability Roundtable (MAR) on our 11-Aug-2016 call.

### 1. What is the idea of MAR

Willie Currie, the adviser to ccwg-accountability made the opening remarks on the MAR. He argued that the idea of MAR was an *informal* structure of accountability that could be developed.

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<sup>7</sup> L. David Brown: 'Multiparty social action and mutual accountability' in *Global Accountabilities: Participation, Pluralism and Public Ethics* Cambridge University Press, 2007.

*The SO/ACs hold each other into account* annually using the MAR. MAR can be developed as a meeting of SO/ACs with a limited agenda focusing on how they account to each other.

## **2. The questions that we should ask are (based on the overall discussion, please add if your question has not been addressed)**

- Should the leaders of SO/ACs take each other into account? (Kavouss disagreed with this idea )
- Or does the MAR extend to holding the members of SO/ACs accountable so that their actions are accountable to that stakeholder group?
- Another question, not considered here: if we were to get the SOAC chairs together, or the SOACSGCRALO chairs together, what is the best use of their time? (by Greg)
- In what way should SOACs be accountable?
- Who are SOACs accountable to?
- Kavouss asked: Mutual accountability with respect to each other or accountability to underlying SO/AC members.
- Is MAR a good starting point for our discussion?

## **3. How to persuade SO/ACs to participate**

Greg argued that the MAR sounds like a finger pointing contest and Robin shared his concern and Tatiana agreed.

Willie said it's important to have a narrow agenda for the MAR so that it does not lead to a space where people attack each other. MAR is not necessarily SO/AC accountability back to the global community. That's a more complex question.

## **4. Accountability to external community**

Steve Said, SO/AC is committed to its underlying community. We need to work on AC/SO being accountable to external community.

## **5. A Best Practice idea?**

The leaders of AC/SOs take a single issue and have a best practices discussion and learn lessons from each other mistakes. But is this still what we are talking about? Tatiana asked if this is a best practice forum or an accountability forum?

Greg said sharing best practices might be a safe space and it should be better structured but doubt that if it's an accountability issue and if it's within our remit and he said he does not know if this is our job. We need to know, what are we here for, what are we here to accomplish and what would be like to live under such a regime.

Jorge villa (ASO): any SO/AC is different to the rest of the SO/AC. Accordingly is different to try to compare which one is doing it better. I think that the most interesting thing is to know that each SO/AC is accountable (respect to any specific topic) or is doing good steps to be accountable.

## **6. Organizational reviews not effective**

Organizational reviews do not do a good job for holding the SO/ACs accountable (Steve and Alan said)

## 7. Mutual respect

Alan argued that there should be a mutual respect that SO/ACs represent their community

## 8. The problem statement and clarifying the concepts

- John Curran : is not necessarily opposed the MAR idea –

Mutual accountability could be good but we cannot decide on that until we have a problem statement:

Improve best practices of accountability SO/AC ?

Be an organization that accredits all the SO/ACs serving accountably to their respective communities?

Or if it is set up to allow the SO/AC to present their progress in accountability

- Kavouss expressed that we need to differentiate between mutual accountability (SO/ACs): accountable to each other and to their community. He mentioned that he does not know how SO/ACs can be accountable to their community especially for GAC Because GAC members are accountable to their governments not to other governments. It is difficult to implement the MAR and he is opposed to get together of SO/AC chairs in MAR.

- Alan also asked: What are we trying to solve?

- Robin: I agree that we need to discuss the "problem" or the issue before we propose specific solutions. Perhaps a roundtable is best, but maybe there is something better.

- Greg: We have not established whether there is such a thing called MA and we haven't worked out how it works. Robin and Tatiana agreed

- John Curran: The term "Mutual Accountability" may be part of the problem. If one considers the SO/AC's as accountable representatives of segments of the global community, and that it is valid to ask the SO/AC's to positively assert periodically that they are indeed accountable to same, then when would such representations be made at ICANN, and what would we call that session?

## 10. The goal in MAR

Steve: Our goal (in Willie's word) to improve performance, by sharing what worked and did not work with regards to accountability

## 11. Are we starting from a wrong starting point?

Greg Shatan 2: Starting with mutual accountability strikes me as the wrong starting point, much less starting with a roundtable to deal with it, whatever it is. We may get there, but not yet. And when we get there, we should know more than we do now. (Others supported the idea)

## 12. What should we be discussing?

Robin Gross said we should discuss topics such as transparency, representativeness, etc. To which Steve responded: @Robin -- that was the focus of what I presented on our first call, and the Lightning Talk in Helsinki. Just getting that started.

Kavouss Arasteh offered his own view of the Mutual Accountability Roundtable in an email on 13-Aug:



The Round Table Mutual Accountability concept is purely a theory which does not work

I do not see the benefit that few people non formally repetitive by any SO /AC getting together without any authority, clear responsibility legal mandate exchange views among themselves to do what?

Those individual could merely express their own personal views and do not have any right to represent their corresponding SO/AC unless they go back and discuss with them and bring back a consensus proposal. What would be the status of such discussion?

THE ISSUE HAS TWO ASPECTS

1. Mutual accountability of SO/AC with respect to each other
  1. How one AC or SO should be held accountable with respect of other SOs/ACs?
  2. Based on that exchange of views of limited number of people without any delegation of authority by their corresponding constituencies?
  3. Imagine that there would be some criteria to determine one or more SO or AC must be accountable in certain areas but the convincing evidence reveal that such terms and conditions of accountability were not observed.
  4. Do we have a mechanism to escalate that?
  5. How to escalate that, and to whom we escalate
  6. If a judgment mechanism entity is created, how the decision would be implemented by SO/ Ac which were not complying with the yet to be established criteria ?
  7. If after the decision made by the judgement entity those AC/ SO ignore the decision what we would do?
  8. Do we sanction those mentioned SO/AC? How?
1. Accountability of each SO/ AC with respect to their greater community
  1. GAC composed of delegations that are accountable to their own government
  2. NO Rules or procedure could make a GAC member accountable to other countries
  3. This is in full contradiction of sovereignty of countries.
  4. Thus no one could make any individual GAC members or collective GAN members to be accountable to any other government than those who nominated them
  5. ALAC, How the chair or members of ALAC could be accountable to 4 billion users
  6. Similarly GNSO composing many communities, commercial, non-commercial, contract, non-contract, and so could be accountable to each other?
  7. How registry community could be accountable to registrar community
  8. How contracting house could be made accountable to non-contracting house where their domain of activities and mandates are different
  9. I can give more and more examples
2. The concept is not clear.
  1. The objectives are not clear
  2. The applicable criteria's are not clear
  3. The composition and representation with delegation of authority are not clear
  4. The accountability mechanism and its associated escalation criteria are not clear
  5. the objection process and reconsiderations are not clear