

MANDATE OF THE CCWG-ACCOUNTABILITY JURISDICTION SUBGROUP (STRAWMAN DRAFT)

The Jurisdiction Subgroup is part of the CCWG-Accountability, and specifically part of Work Stream 2. Since the mandate of the Jurisdiction Subgroup is a subset of the mandate of the CCWG (and specifically, Work Stream 2), understanding the parameters of the CCWG is critical to understanding the mandate of the Subgroup. This document examines first the mandate of the CCWG generally, then the mandate of Work Stream 2 more specifically, and finally, the mandate of the Jurisdiction Subgroup most specifically.

The mandate of the CCWG is stated in the CCWG Charter, the CCWG Final Proposal and Article 27 of the ICANN Bylaws (the Transition Bylaw). The purpose of this document is to collect the pertinent portions of these documents to aid the Subgroup-in understanding the Jurisdiction Subgroup's mandate and to resolve different understandings of the Subgroup's mandate, scope, etc.

The intent is that the Subgroup will document its understanding of the mandate through an analysis of this document, which is then produced in written form as a complement to this document.

Except for text in italics, all text is taken directly from the three primary sources.

I. Mandate of the CCWG

As stated in the Final Proposal, when the NTIA “announced its intent to transition its stewardship of the [IANA Functions] to the global multistakeholder community,” “the ICANN multistakeholder community ... raised concerns about the impact of the transition on ICANN's accountability.” “[T]he ICANN community requested that ICANN's existing accountability mechanisms be reviewed and enhanced as a key part of the transition process.”¹

The CCWG Charter states that the CCWG must satisfy the NTIA Criteria:

[T]he NTIA specified that the transition proposal must have broad community support and meet the following principles:

- Support and enhance the multistakeholder model
- Maintain the security, stability, and resiliency of the Internet DNS
- Meet the needs and expectation of the global customers and partners of the IANA services
- Maintain the openness of the Internet.

NTIA also specified that it would not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution.²

The CCWG was created “[d]uring discussions around the transition process, [when] 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.”

“The concerns raised during these discussions around the transition process indicate that the existing ICANN accountability mechanisms do not yet meet stakeholder expectations. Recent statements made

¹ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendation (Final Proposal), Background, ¶¶ 10-14.

² CCWG-Accountability Charter, Problem Statement.

by various stakeholders suggest that current accountability mechanisms need to be reviewed and, if need be, improved, amended, replaced, or supplemented with new mechanisms ... reviewing ICANN's accountability mechanisms was considered to be crucial for the transition process."

*The CCWG results are summarized in the Final Proposal:*³ The CCWG "developed ... proposed enhancements to ICANN's accountability to the global Internet community. The accountability improvements set out in this document are not designed to change ICANN's multistakeholder model, the bottom-up nature of policy development, or significantly alter ICANN's day-to-day operations. Together with ICANN's existing structures and groups, these accountability enhancements will ensure ICANN remains accountable to the global Internet community.

*The Charter sets out the "Goals and Objectives" of the CCWG:*⁴ "The CCWG-Accountability is expected to deliver proposals that would enhance ICANN's accountability towards all stakeholders."⁵ [T]he CCWG-Accountability is expected to provide a detailed description on how its proposals would provide an adequate level of resistance to contingencies ("stress tests"), within the scope of each Work Stream."

*The Charter also sets out the CCWG's "Scope":*⁶ The CCWG-Accountability will investigate accountability mechanisms regarding all of the functions provided by ICANN."

The Scope section goes on: "Suggested questions to be considered as part of both Work Stream 1 and 2 include, but are not limited to: What mechanisms are needed to ensure ICANN's accountability to the multi-stakeholder community once NTIA has disengaged from its stewardship role?," "What enhancements or reforms are needed to ICANN's existing accountability mechanisms?," and "What new accountability reforms or mechanisms are needed?"

The CCWG's goal mandate is also stated in Appendix C of the Final Proposal: "The primary goal of the CCWG-Accountability is to deliver proposals that would enhance ICANN's accountability towards all stakeholders."⁷

II. Mandate of Work Stream 2

According to the Scope section of the Charter, Work Stream 2 is "focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition." "Suggested questions to be considered as part of Work Stream 2 include, but are not limited to: What enhancements or reforms can be addressed after the NTIA Stewardship Transition?" and "How will these enhancement or reforms be stress-tested?"

*The Final Proposal reiterates*⁸ that the "CCWG-Accountability's work consists of two tracks." "The CCWG-Accountability Work Stream 2 is focused on ... accountability topics [that] extend beyond the IANA Stewardship Transition." *The second track is* "Work Stream 2: Focused on addressing accountability topics...." *Recommendation 12 also states that* "further proposed changes include ... A commitment to discuss additional accountability improvements and broader accountability enhancements."

³ CCWG-Accountability Final Proposal, Summary, ¶¶ 1-3.

⁴ CCWG-Accountability Charter, "Goals and Objectives."

⁵ A *stakeholder* is "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." *Id.*

⁶ CCWG-Accountability Charter, "Scope."

⁷ Final Proposal, Appendix C ("Methodology"), ¶ 23.

⁸ Final Proposal, Recommendation 12 and Annex 12.

The ICANN Bylaws Transition Article⁹ states the Board will use the same process and criteria in considering Work Stream 2 proposals as it did for Work Stream 1:

(c) ...the Board shall consider consensus-based recommendations from the CCWG-Accountability on Work Stream 2 Matters ("Work Stream 2 Recommendations") with the same process and criteria it committed to using to consider the CCWG-Accountability recommendations in the CCWG-Accountability Final Report ("Work Stream 1 Recommendations"). For the avoidance of doubt, that process and criteria includes:

(i) All Work Stream 2 Recommendations must further the following principles:

- (A) Support and enhance the multistakeholder model;
- (B) Maintain the security, stability and resiliency of the DNS;
- (C) Meet the needs and expectations of the global customers and partners of the IANA services;
- (D) Maintain the openness of the Internet; and
- (E) Not result in ICANN becoming a government-led or an inter-governmental organization.

(ii) If the Board determines, by a vote of a two-thirds majority of the Board, that it is not in the global public interest to implement a Work Stream 2 Recommendation, it must initiate a dialogue with the CCWG-Accountability.

III. Mandate of the Jurisdiction Subgroup

The Final Proposal Summary briefly states the Jurisdiction Subgroup's mandate in the Summary's list of Work Stream 2 topics: "Addressing questions focused on jurisdiction of contracts and dispute settlements."

The Summary in Recommendation #12 of the Final Proposal sets out the mandate in more detail:¹⁰ "As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms:...

- 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.

This description is repeated verbatim in the Recommendation that ICANN adopt a "Bylaw would task the group with creating further enhancements to ICANN's accountability limited to the Work Stream 2 list of issues."¹¹ The description is repeated twice more in Annex 12, first in the Summary and again in the Recommendations section.¹²

This Bylaw¹³ states that "The CCWG-Accountability recommended ... that the below matters be reviewed and developed ... to the extent set forth in the CCWG-Accountability Final Report: ...

- (vi) Addressing jurisdiction-related questions, including how choice of jurisdiction and applicable laws for dispute settlement impact ICANN's accountability;

⁹ ICANN Bylaws, Article 27 (Transition Article), Section 27.1 (Work Stream 2), Section 27.1©.

¹⁰ Recommendation #12, ¶¶ 232, 234.

¹¹ Recommendation #12, ¶ 238.

¹² Annex 12, ¶¶ 2 and 5.

¹³ ICANN Bylaw, Section 27.1(b).

The Jurisdiction section of Annex 12 sets out the mandate of the Jurisdiction Subgroup in the greatest detail.¹⁴ The section begins with some observations, noting that “Jurisdiction directly influences the way ICANN’s accountability processes are structured and operationalized.”¹⁵ ICANN’s incorporation under California law “grants the corporation certain rights and implies the existence of certain accountability mechanisms. It also imposes some limits with respect to the accountability mechanisms it can adopt. The topic of jurisdiction is, as a consequence, very relevant for the CCWG-Accountability.”¹⁶

The section goes on to set the stage with some relevant facts: ICANN is a nonprofit public benefit corporation incorporated in California and subject to applicable California state laws, applicable U.S. federal laws and both state and federal court jurisdiction. ICANN is subject to a provision in paragraph eight of the Affirmation of Commitments, signed in 2009 between ICANN and the U.S. Government,” in which “ICANN affirms its commitments to ... (b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community... ICANN’s Bylaws (Article XVIII) also state that its principal offices shall be in California.”¹⁷

The section then states the “multiple layers of jurisdiction” identified by the CCWG:

- Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.
- Jurisdiction of places of physical presence.
- Governing law for contracts with registrars and registries and the ability to sue and be sued in a specific jurisdiction about contractual relationships.
- Ability to sue and be sued in a specific jurisdiction for action or inaction of staff and for redress and review of Board action or inaction, including as relates to IRP outcomes and other accountability and transparency issues, including the Affirmation of Commitments.
- Relationships with the national jurisdictions for particular domestic issues (ccTLDs managers, protected names either for international institutions or country and other geographic names, national security, etc.), privacy, freedom of expression.
- Meeting NTIA requirements.

The section finally turns to the “main issues” to be investigated by the Subgroup. This is, in essence, the Subgroup’s “assignment” to be carried out within the mandate of the Subgroup: “the influence that ICANN’s existing jurisdiction may have on the actual operation of policies and accountability mechanisms. This refers primarily to the process for the settlement of disputes within ICANN, involving the choice of jurisdiction and of the applicable laws, but not necessarily the location where ICANN is incorporated.” The section then declares that “Consideration of jurisdiction in Work Stream 2 will focus on the settlement of dispute jurisdiction issues and include:

- Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue.
- Identifying potential alternatives and benchmarking their ability to match all CCWG-Accountability requirements using the current framework.

¹⁴ Annex 12, ¶¶ 25-30.

¹⁵ Annex 12, ¶ 26.

¹⁶ Id. ¶ 26-27.

¹⁷ Id. ¶ 27-28 and footnote.

- Consider[ing] potential Work Stream 2 recommendations based on the conclusions of this analysis.

IV. Material of Specific Interest to the Jurisdiction Subgroup

In addition to the preceding materials, which directly address the Subgroup’s mandate, the following materials within the Final Proposal and Charter are very useful in clarifying the Subgroup’s mandate.

Appendix E1 describes the earlier work of the CCWG. The CCWG first looked at the status quo, and made an “Inventory of Existing ICANN Accountability Mechanisms.” The location of ICANN’s headquarters and its incorporation in California is listed as one of the “existing ICANN accountability mechanisms.” It describes the following attributes of this accountability mechanism:

- “ICANN, as a California Not-for-Profit Public Benefit Corporation, is obligated to follow the laws of the State of California.”
- “ICANN is also subject to both California and U.S. laws and regulations regarding ICANN's tax-exempt, public benefit status” which “require ICANN to act in furtherance of its stated public benefit purposes.”
- *Under these laws*, “all ICANN Directors hold a fiduciary duty to act in the best interests of ICANN, and not for their own personal (or business) benefit.”
- *Also under these laws*, “ICANN has the ability to sue and be sued for its actions and to be held responsible in a court of proper jurisdiction for its dealings with the global community.

The **Final Proposal Summary** notes the following attributes of the proposed accountability measures relevant to the Jurisdiction Subgroup:

- “An enhanced Independent Review Process and redress process,”
- “New specific powers for the ICANN community that can be enforced when the usual methods of discussion and dialogue have not effectively built consensus, including the [power to] initiate a binding Independent Review Process (where a panel decision is enforceable in any court recognizing international arbitration results).
- *The Empowered Community uses the “Designator” status created by California law and the “Unincorporated Association,” which is treated as a “legal person” under California law (i.e., the “simple legal vehicle”):* The accountability elements outlined above will be supported through the... **Empowered Community**, [which] is based on a simple legal vehicle [and] granted the status of a Designator (a recognized role in [California] law) and has the standing to enforce the Community Powers if needed.
- *Articles of Incorporation, like “Fundamental Bylaws,” that can only be changed if both the Empowered Community and the ICANN Board agree:* “the Articles of Incorporation ... can only be changed with agreement between the ICANN community and the ICANN Board.”

Annex 14 demonstrates how the Final Proposal meets the NTIA’s criteria for the IANA Stewardship Transition. Annex 14 states that the Final Proposal satisfies the criterion of “Meet the needs and expectation of the global customers and partners of the IANA services” in two ways:

- Legally enforceable powers...
- Maintaining Bylaw Article XVIII, which states that ICANN has its principal office in Los Angeles, California, USA.