



CENTRE FOR COMMUNICATION GOVERNANCE AT
NATIONAL LAW UNIVERSITY, DELHI

BRIEFING NOTE FOR ICANN 54

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1. INTRODUCTION

The 54th International Public Meeting of the Internet Corporation for Assigned Names and Numbers (ICANN) at Dublin is a critical meeting for Internet governance and the institutions involved in it. ICANN is undergoing a transition process that was triggered in March 2014 by NTIA's announcement of its intention to transition key Internet domain name functions to the global multistakeholder community.¹

The announcement by NTIA asked ICANN to “convene global stakeholders to develop a proposal to transition the stewardship role currently played by NTIA in the coordination of the Internet’s domain name system”. In response, ICANN developed two parallel processes:

1. IANA Stewardship Transition Process
2. Enhancing ICANN Accountability

The IANA Stewardship Transition Process is led by the IANA Stewardship Transition Group (ICG) comprised of 30 individuals representing 13 communities. The Enhancing ICANN Accountability process is led by the Cross Community Working Group (CCWG) Accountability. At present, the ICANN Board of Directors is discussing these proposals with the Community.

2. SIGNIFICANT ASPECTS OF THE PROPOSALS

2.1 ICG Transition Proposal

The ICG was tasked with acting as a liaison to all interested parties including the three operational communities i.e. the Domain Names Community, the Number Resources Community and the Protocol Parameters Community.² Each of these communities developed a proposal with the help of a cross-community group. The Domain Names Community developed a Cross Community Working Group (CWG) with its charter adopted by the five Supporting Organisations and Advisory

¹ <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

² See Charter for the ICG: <https://www.icann.org/en/system/files/files/charter-icg-27aug14-en.pdf>.

Committees of the ICANN. The Number Resources Community created the Consolidated RIR IANA Stewardship Proposal Team (CRISP) coordinating with the five regional Internet registries to develop its proposal. The IANA Plan Working Group was created by the Protocol Parameters Community to work on its proposal. The three communities were required to assess their oversight and accountability to the IANA functions and submit a proposal to the ICG. The ICG received these proposals and consolidated it into a single final transition proposal that was sent to the ICANN Board.

The key aspects of the ICG consolidated proposal are as follows:

Names Community Proposal:

1. *Creation of a new entity:* Post Transition IANA (PTI) to perform IANA functions on contract with ICANN. The proposed PTI would be an affiliate (subsidiary) of ICANN that will perform all existing IANA functions. As a separate legal entity the PTI will have a separate Board of Directors. The function of the PTI Board will be to provide oversight of the operations of the PTI and ensure compliance with statutory requirements under the California public benefit corporations law in addition to fulfilment of contractual obligations under its contract with ICANN for performance of IANA functions.
2. *Creation of Customer Standing Committee (CSC):* In addition to the creation of the PTI, the proposal also includes creation of a Customer Standing Committee (CSC) that will be responsible for monitoring the operator's performance as per terms of the contract.
3. *Establishment of IANA Functions Review Process:* The IANA Functions Review Process (IFR) that will conduct periodic reviews of the PTI. The IFR is envisaged as a multi-stakeholder entity. The proposal also provides for a Special IFR that can be scheduled outside periodic reviews once prior escalation mechanisms have failed.

Numbers Community Proposal:

1. *ICANN will continue to be IANA Functions Operator (IFO)* for the IANA numbering services through a Service Level Agreement with the five Regional Internet Registries (RIRs).

2. *Establishment of Review Committee:* This Review Committee is to be composed of representatives from each RIR, to advise the Number Resource Organization Executive Council on the review of the IFO's performance and meeting requirements of identified Service Level Agreements (SLA).
3. *Contract between IANA Numbering Services Operator and the five RIRs- SLA:* This SLA would obligate the IANA Numbering Services Operator to perform the IANA numbering services in accordance to policies developed by the Numbers Community. The agreement would also include specific requirements for performance and reporting that are consistent with current mechanisms. Eleven IANA SLA Principles are provided in the proposal which include separation of policy development and operational roles, dispute resolution, fees etc³.
4. *Intellectual Property Rights (IPR) related to the provisions of the IANA services to remain with the community:* The IPR of related to IANA services include the IANA trademark, IANA.org domain name and public databases including the IANA Numbers Registries. The Numbers Community expects that the data in public registries have free and unrestricted access while the rights to non-public information related to IANA number resource registries and corresponding services be transferred to the RIRs. It also adds that the ownership of the IANA trademark and domain name be transferred to the IETF Trust.

Protocol Parameters Registries Community:

1. *No new organisation or institutional structures are required* however in the absence of the NTIA contract, the following expectations from the IETF community are required to be met:
 - a. The protocol parameters are registries in the public domain.
 - b. If the operations of protocol parameters registries are to be transferred from ICANN to any other operator it may be done with the coordinate efforts of all parties to ensure a smooth transition and minimise disruption in use of the protocol parameters registries.

³ See paragraph 2089 of the ICG Proposal at pg. 160-161.

2.2 The Cross-Community Working Group’s Accountability Proposal (CCWG Accountability Proposal)

The Cross-Community Working Group’s mandate to increase ICANN’s accountability has been divided into two streams: Work Stream 1 deals with accountability-enhancing mechanisms that must be in place before the IANA Transition, while Work Stream 2 focuses on those mechanisms which may be implemented at a later stage, after the transition.

The CCWG has developed several accountability-enhancing mechanisms, which can be broadly classified under the following heads:

2.2.1. Empowered Community:

The overarching theme of this proposal is to enhance the powers of the multistakeholder community in an effort to better the bottom-up model. These *Community Powers* are in place as a replacement for the NTIA oversight that will end once the transition takes place. However, it is made clear that these are not to interfere with the day-to-day operations of ICANN. Further, they do not change the status quo of the community as it operates today; it simply increases the powers available to it, namely:⁴

1. Power to reconsider or reject the Operating Plan and Budget
2. Power to reconsider or reject changes to ICANN “Standard” Bylaws
3. Power to approve changes to “Fundamental” Bylaws
4. Power to appoint and remove individual ICANN Board Directors
5. Power to recall entire ICANN Board

With this goal in mind, CCWG introduced its most significant and contentious proposal: the *Community Mechanism as Sole Member Model* (CMSM). The proposal suggests⁵ that ICANN be converted into a Membership Organization with just one Member: a California unincorporated non-

⁴ CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations, p 54.

⁵ CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations, p 47.

profit association (legal person).⁶ This member relies on SO/ACs to participate, as the cumulative vote of these Chartering Organizations becomes the action of the member. The proposed voting structure gives an equal number of votes (5) to ASO, ccNSO, GNSO and ALAC, with GAC, SSAC and RSSAC having the option to join in as well, getting 2 votes each.⁷ Each decision is made by the respective SO/ACs through their own decision making process. However, before any CMSM power is used, there must be a community-wide debate and discussion in the *Community Forum*.⁸ This provides a public platform for the whole community (including non-voting groups) to provide inputs before the participating SO and AC make decisions through the Community Mechanism.

2.2.2. Principles:

The most significant proposed addition to the Principles is the concept of *Fundamental Bylaws*. At present, the bylaws can be changed by a two-third Board majority. The CCWG-Accountability proposes⁹ creating a new classification of bylaws which can only be changed by a 75% Board majority with prior community approval. The proposed Fundamental Bylaws include:

1. The Mission / Commitments / Core Values;
2. The framework for the Independent Review Process;
3. The manner in which Fundamental Bylaws can be amended;
4. The Community Mechanism as Sole Member Model;
5. The 5 community powers;
6. The IANA Function Review, Customer Standing Committee structures and any other requirement by the CWG-Stewardship's proposal.

⁶ List of Questions, CCWG-ACCOUNTABILITY Webinars on Second Draft Proposal, available at <https://community.icann.org/pages/viewpage.action?pageId=54695403>.

⁷ For the minority view on alternate voting structures, see CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations, p. 51.

⁸ CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations, p 53.

⁹ CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations, p 34.

The *Affirmation of Commitments* is a document signed by the US DOC and ICANN in 2009, which commits ICANN to remaining a private, non-profit organisation, declares it as independent and not controlled by any one entity, and commits ICANN to reviews performed by the community.¹⁰ After the IANA transition, the AoC is the next target for elimination, as it would be the last remaining aspect giving the United States an oversight role for ICANN. The AoC can be terminated by either party, by giving a written notice of 120 days. However, the document contains certain commitments that may warrant preservation, by incorporating them into the ICANN bylaws. The CCWG proposes to do just this, by bringing certain portions of the Affirmation of Commitments (AoC) within the ICANN bylaws, and include a periodic review as well.

2.2.3. Independent Appeals and Review Mechanism:

In an effort to improve the “judiciary” block the CCWG proposes reforms to the *Independent Review Process (IRP)*.¹¹ It recommends a Standing Panel of at least 7 members, which acts as an independent dispute resolution mechanism for the Community. In case of a review, 3 members from the Standing Panel shall be selected to form the Review Panel. The IRP is tasked with determining whether ICANN has acted (or has failed to act) in violation of its Bylaws, reconcile conflicting decisions in process specific “expert panels” and hear claims involving rights of the Sole Member.

Any party materially affected by an action (or inaction) in breach of ICANN’s Bylaws by ICANN’s Board may initiate an independent third-party review of that action before the Panel, the decision of which is binding on the ICANN Board.

CCWG has also proposed several reforms to the *Request for Reconsideration* process,¹² which enables a person materially affected by an action (or inaction) of ICANN to request review or reconsideration of that action by the Board. These include:

1. Expanding the scope of permissible requests
2. Extending the time for filing a Request for Reconsideration (from 15 to 30 days)

¹⁰ Affirmation of Commitments between the US and ICANN, available at <https://www.icann.org/en/system/files/files/affirmation-of-commitments-30sep09-en.pdf>.

¹¹ CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations, p 38.

¹² CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations, p 43.

3. Narrowing the grounds for summary dismissal
4. Requiring ICANN Board of Directors to make determinations on all requests after receiving a recommendation from the Board Governance Committee (rather than the BGC deciding)
5. Tasking ICANN's Ombudsman with initial substantive evaluation of the requests
6. Providing requesters an opportunity to rebut the Board Governance Committee's recommendation before a final decision by the entire Board.
7. Providing enhanced transparency requirements and firm deadlines in issuing determinations.

3. Highlights of Public Comments on the Proposals

3.1. IANA Stewardship Transition Proposal:

The ICG Proposal received 158 comments. Some addressed the proposal in detail with a nuanced response to parts of the proposal, while others were either in complete support of the proposal or absolutely opposed to it. The key areas of concern raised in the public comments are as follows:

Ambiguity surrounding contractual relations between newly created PTI, operational communities and ICANN:

The PTI is a new entity proposed, however only the names community will be in a contractual relation with the PTI, while the numbers and protocol parameters community seeks to continue to contract with ICANN. Clarity in this matter is critical to smooth performance of IANA functions and affects the compatibility, interoperability, accountability and workability of the combined proposal.

Incompleteness of proposal due to dependence on work of CCWG-Accountability work on enhancing ICANN Accountability: The ICG proposal is contingent upon the completion and implementation of accountability enhancements under the CCWG Accountability proposal. These dependencies are specifically listed under the following heads:¹³

1. ICANN Budget and IANA Budget

¹³ See paragraph 1106 of the ICG Proposal at pg. 40-41.

2. Community Empower Mechanisms: empower the multistakeholder community to have the following powers with respect to the ICANN Board:
 - a. The ability to appoint and remove members of the ICANN Board and to recall the entire ICANN Board;
 - b. The ability to exercise oversight with respect to key ICANN Board decisions (including with respect to the ICANN Board's oversight of the IANA functions) by reviewing and approving (i) ICANN Board decisions with respect to recommendations resulting from an IFR or Special IFR and (ii) the ICANN budget; and
 - c. The ability to approve amendments to ICANN's proposed fundamental bylaws
3. Creation of IFR
4. Creation of CSC
5. Separation Process
6. Appeal Mechanism: Independent Review Panel
7. Fundamental Bylaws: all the foregoing mechanisms be incorporated as fundamental bylaws that require a higher threshold

Root Zone Management: There is little clarity on issues surrounding root zone management. The separate proposal¹⁴ in by ICANN and Verisign in response to the NTIA request is outside the scope of public comment and not included as part of the ICG proposal. This critical area that is most controversial receives hardly any attention in the proposal.

¹⁴ Available at http://www.ntia.doc.gov/files/ntia/publications/root_zone_administrator_proposal-relatedtoiana_functionsste-final.pdf.

Intellectual Property Rights over IANA Trademarks and domain name: While the proposal has attempted to address this concern,¹⁵ it has failed to achieve clarity on which body shall own the IPR related to IANA.

Separation of IANA Functions: The proposal does not adequately address the possible separation of IANA functions and this also affects the possibility of any change of the IFO.

Global Public Interest Mandate: The global public interest mandate is an integral part of ICANN's activities. While ICANN is currently studying this mandate and its meaning in a separate working group, the proposal does not address this aspect nor mentions it.

3.2. Accountability Proposal

Unlike the ICG proposal, the Accountability Proposal has faced resistance on various fronts. The ICANN Board has raised several objections even after the comment period ended.¹⁶ The comments submitted criticised certain aspects of the proposal, and sought clarification over others, the most common of which are:¹⁷

Sole Member: As mentioned above, *CMSM* has proved to be most contentious proposal for two major reasons: one, the proposed model is quite complex and comments indicate a preference for simplicity. This complexity has resulted in a lack of clarity regarding who exactly comprises the Sole Member. The proposal states that voting SO/AC participate in the member, but are not a part of the member. Confusing language such as this resulted in requests for greater clarity and explanation.¹⁸

Second, there is great opposition to the voting allocation and structure of the member proposed. There has been some debate over whether ACs should be given voting rights (equal or any). The ICANN bylaws (Article XI) establish the role of Advisory Committees as recommendatory in

¹⁵ See P2.III.A.2 of the Numbers Community Proposal in the Consolidated ICG Proposal.

¹⁶ <http://www.internetgovernance.org/2015/09/26/icann-board-mobilizes-against-accountability-plan/>.

¹⁷ Comments submitted to the CCWG-Accountability Proposal, available at <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/>.

¹⁸ For a more detailed analysis of this criticism, see the comments submitted by the Centre for Communication Governance available at [http://ccgdelhi.org/doc/\(CCG-NLUD\)%20Comments%20on%20the%20CCWG%20-%20Accountability%20nd%20Draft%20Proposal%20on%20WS1%20Reccomendations.pdf](http://ccgdelhi.org/doc/(CCG-NLUD)%20Comments%20on%20the%20CCWG%20-%20Accountability%20nd%20Draft%20Proposal%20on%20WS1%20Reccomendations.pdf).

nature. By giving them voting rights, their powers become dual- recommendatory and voting, which significantly changes the power structure within ICANN.

This point has been raised in particular over GAC, since it currently has a privileged advisory status. Should it choose to join the Community Mechanism, it would wield an extremely powerful position. Consequently, *Stress Test 18* has received wide attention. This test proposes measures to limit the exercise of GAC's privileged status. However, even with the changes, it still retains this 'privileged status', which is problematic to many. Finally, further detail has been sought over the functioning of the Community Forum, and its interplay with CMSM.

Some comments have also indicated a preference for a true membership model, with multiple members instead.

Human Rights: There is some criticism over the brevity of discussion of human rights in the proposal. The comments indicate a general support for inclusion of a commitment to Human Rights in ICANN's mandate, but there is a lack of consensus over the exact details. Some call for the special mention of free expression and free flow of information in the bylaws. Comments also reflect disagreement over whether this should form a part of WS1 or WS2.

Independent Appeals and Review Mechanism: Concerns have been raised about the IRP being too expensive, as well as too technical for the common man. Further details have been sought for elements such as scope, timing and standard of review. There has been general satisfaction with the enhancements made to the Reconsideration Request process.

ACRONYMS

AC: Advisory Committee

ALAC: At-Large Advisory Committee

AoC: Affirmation of Commitments

ASO: Address Supporting Organisation

ccNSO: Country Code Names Supporting Organisation

CCWG Accountability: Cross Community Working Group Accountability

CMSM: Community Mechanism as Sole Member

CRISP: Consolidated RIR IANA Stewardship Proposal

CSC: Customer Standing Committee

GAC: Governmental Advisory Committee

GNSO: Generic Names Supporting Organisation

IANA: Internet Assigned Numbers Authority

ICANN: Internet Corporation for Assigned Names and Numbers

ICG: IANA stewardship transition Coordination Group

IETF: Internet Engineering Task Force

IFO: IANA Functions Operator

IFR: IANA Functions Review

IPR: Intellectual Property Rights

IRP: Independent Review Panel

NTIA: National Telecommunications and Information Administration

PTI: Post Transition IANA

RIR: Regional Internet Registry

RSSAC: Root Server System Advisory Committee

SLA: Service Level Agreement

SO: Supporting Organisations

SSAC: Security and Stability Advisory Committee

WS1/WS2: Work Stream 1/Work Stream 2