CCWG-Accountability WS2 – Final Report

24 June 2018

ICANN

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Executive Summary

The CCWG-Accountability WS2 Final Report is a compilation of eight reports generated through individual sub-groups of the CCWG-Accountability, each of which has already been the subject of Public Comment. These eight reports are on the topics identified at Section 27.1. of the ICANN Bylaws, which defined WS2.

The CCWG-Accountability organized WS2 into nine[1] independent topics, which continued to require significant effort by the community over close to two years from WS2 beginning in June 2016:

⊙ Diversity

⊙ Guidelines for Standards of Conduct Presumed to be in Good Faith Associated with Exercising Removal of Individual ICANN Board Directors (Guidelines for Good Faith)

⊙ Human Rights Framework of Interpretation (HR-FOI)

⊙ Jurisdiction

⊙ Ombuds (or Office of the Ombuds, or IOO)

⊙ Reviewing the Cooperative Engagement Process (CEP) – (Merged into the Independent Review Process – Implementation Oversight Team (IRP-IOT) in June 2017)

⊙ SO/AC Accountability

⊙ Staff Accountability

⊙ Transparency

It should be noted that WS1 Recommendation 7 (IRP) also included requirements for additional work, which was not included in the implementation of Recommendation 12 (through which the CCWG-Accountability defined the scope of WS2). The IRP update requirements led, for reasons of administrative simplicity, to the creation of the IRP-IOT, which although covered by the same budget and general operating requirements of WS2, is otherwise independent of WS2 and its completion dates.

The expectation was that the WS2 sub-groups would self-organize over the summer of 2016 and deliver their final recommendations, after completing at least one public consultation, to the plenary in time to conclude WS2 by June 2017. This expectation was in large part based on the experience of WS1 and did not factor in the complexity of some of the remaining work nor the community fatigue experienced after the grueling pace of WS1.

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[1] Section 27.1 of the Bylaws defines nine topics for inclusion within WS2. However, the Cooperative Engagement Process was identified as better suited for coordination with the work on updating ICANN's Independent Review Process (the IRP-IOT), as opposed to handling with WS2. By agreement with the CCWG-Accountability and the community group supporting the updates to the Independent Review Process, the CEP was removed from WS2.

By ICANN 58 (Copenhagen, Denmark, March 2017) it was clear that few if any of the sub-groups would be ready to deliver their work so that WS2 could be completed by June 2017. As such, the CCWG-Accountability proposed to extend WS2 to June 2018 while keeping to its original budget. This was accepted by the CCWG-Accountability Chartering Organizations and confirmed by the ICANN Board at ICANN 59 (Johannesburg, South Africa, June 2017).

By ICANN61 (San Juan, Puerto Rico, March 2018) all eight WS2 sub-groups had completed a public consultation on their draft recommendations and submitted their final reports and recommendations to the CCWG-Accountability plenary, which approved each of these reports.

During the ICANN61 Puerto Rico meeting there was also a face-to-face meeting between the Board and CCWG Co-chairs and Rapporteurs to discuss potential areas within the final WS2 recommendations where the Board had concerns. Following this meeting the ICANN Board and org agreed to send a response to the CCWG Co-Chairs regarding these areas of contention so the CCWG-Accountability could look at addressing these via Implementation Guidance which would not require changing its recommendations.

On May 14 2018 the CCWG-Accountability received the response from the Board listing four areas of concern. The CCWG-Accountability then proceeded to develop Implementation Guidance which addressed all of the Board concerns. The Implementation Guidance was approved at the CCWG-Accountability face-to-face meeting on June 24 2018 (Annex 9 of this report).

The final reports from the eight sub-groups comprise nearly 100 recommendations, most of which are not anticipated to require Bylaws modifications for implementation. Many of these recommendations are either suggestions of Good Practices or simply optional while many others offer flexibility in how they can be implemented.

In considering the final WS2 report the CCWG-Accountability WS2 agreed at its 9 March 2018 face to face meeting that:

> *"Prioritization and funding for implementation of recommendations is beyond the scope and capacity of WS2 and rests with ICANN (Board and Organization) and the community. The CCWG-Accountability WS2 proposes to establish a small implementation team to assist ICANN (the Organization) and the community to ensure the implementation plan preserves the spirit of the recommendations and provide any interpretation advice as required."*

The CCWG-Accountability understands that the implementation of its WS2 recommendations cannot proceed in a similar fashion as the implementation of its WS1 recommendations. If all recommendations are endorsed by the Chartering Organizations and then approved by the ICANN Board, implementation of the nearly 100 recommendations contained in the WS2 report will be a multi-year project based on a detailed implementation plan agreed to by the ICANN organization and the broader ICANN community, after public consultation on the implementation plan.

Overall, the CCWG-Accountability's WS2 represents a significant effort by the community of 272 meetings, more than 5,000 emails, and 10,000 hours of volunteer meeting time, which does not include individual time for reading and writing, over a period of two years while remaining well within its original one-year cost estimates.

As such, the CCWG-Accountability WS2 believes it has met all of the expectations and requirements of section 27.1 of the ICANN Bylaws on WS2 and delivers these recommendations to the ICANN Board and its Chartering Organizations in accordance with its Charter and the Bylaws.

Background

Beginning in December 2014, a working group of ICANN community members developed a set of proposed enhancements to ICANN's accountability to the global Internet community. The first phase of this work culminated with the CCWG-Accountability handing in its Work Stream 1 (WS1) recommendations in February 2016 for approval by the Chartering Organizations and by the ICANN Board. These recommendations were approved by the ICANN Board in March 2016 and incorporated into the ICANN Bylaws effective 1 October 2016.

The Background section of the CCWG-Accountability's WS1 Final Report also defined the requirement for WS2 as follows:

> *"Work Stream 2: Focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.*
>
> *Any other consensus items that are not required to be in place within the IANA Stewardship Transition timeframe can be addressed in Work Stream 2. There are mechanisms in Work Stream 1 to adequately enforce implementation of Work Stream 2 items, even if they were to encounter resistance from ICANN Management or others."*

The CCWG-Accountability specified topics for consideration in WS2, and ICANN's commitment to WS2, in recommendation 12 of the WS1 Final Report and this was incorporated into the ICANN Bylaws at Section 27.1:

> *"Section 27.1. WORK STREAM 2*
>
> *(a) The Cross-Community Working Group on Enhancing ICANN Accountability ("CCWG-Accountability") was established pursuant to a charter dated 3 November 2014 ("CCWG-Accountability Charter"). The CCWG-Accountability Charter was subsequently adopted by the GNSO, ALAC, ccNSO, GAC, ASO and SSAC ("CCWG Chartering Organizations"). The CCWG-Accountability Charter as in effect on 3 November 2014 shall remain in effect throughout Work Stream 2 (as defined therein).*
>
> *(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:*
>
> *(i) Improvements to ICANN's standards for diversity at all levels;*
>
> *(ii) ICANN staff accountability;*

(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;

(iv) Improvements to ICANN's transparency, focusing on enhancements to ICANN's existing DIDP, transparency of ICANN's interactions with governments, improvements to ICANN's whistleblower policy and transparency of Board deliberations;

(v) Developing and clarifying the FOI-HR (as defined in Section 27.2);

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

(vii) Considering enhancements to the Ombudsman's role and function;

(viii) Guidelines for standards of conduct presumed to be in good faith associated with exercising removal of individual Directors; and

(ix) Reviewing the CEP (as set forth in Section 4.3)."

The CCWG-Accountability WS2 initiative was officially launched at ICANN 56 (Helsinki, Finland, June 2016) and work started in earnest in the fall of that year.

Given the diversity of the work to be undertaken, the CCWG-Accountability plenary agreed that it should be organized into nine[2] sub-groups, each undertaking a specific task outlined in WS2 ICANN Bylaws at Section 27., and each with at least one rapporteur to lead the work. The nine sub-groups were:

- ⊙ Diversity

- ⊙ Guidelines for Standards of Conduct Presumed to be in Good Faith Associated with Exercising Removal of Individual ICANN Board Directors (Guidelines for Good Faith)

- ⊙ Human Rights Framework of Interpretation (HR-FOI)

- ⊙ Jurisdiction

- ⊙ Ombuds (or Office of the Ombuds, or IOO)

- ⊙ Reviewing the CEP (Merged into IRP-IOT in June 2017)

- ⊙ SO/AC Accountability

- ⊙ Staff Accountability

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[2] Section 27.1 of the Bylaws defines nine topics for inclusion within WS2. However, the Cooperative Engagement Process was identified as better suited for coordination with the work on updating ICANN's Independent Review Process, as opposed to handling with WS2. By agreement with the CCWG-Accountability and the community group supporting the updates to the Independent Review Process, the CEP was removed from WS2.

⊙ Transparency

It should be noted that WS1 Recommendation 7 (IRP) also included requirements for additional work, which was not included in the implementation of Recommendation 12:

> *Implementation: The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. The functional processes by which the Empowered Community will act, such as through a council of the chairs of the ACs and SOs, should also be developed. These processes may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, the CCWG-Accountability proposes to subject the IRP to periodic community review.*

This requirement led, for reasons of administrative simplicity, to the creation of the IRP-IOT, which although covered by the same budget and general operating requirements of WS2, was otherwise independent of WS2 and its completion dates.

The expectation was that the WS2 sub-groups would self-organize over the summer of 2016 and deliver their final recommendations, after completing at least one public consultation, to the plenary in time to conclude WS2 by June 2017. This expectation was in large part based on the experience of WS1 and did not factor in the complexity of some of the remaining work nor the community fatigue experienced after the grueling pace of WS1.

By ICANN 58 (Copenhagen, Denmark, March 2017) it was clear that few if any of the sub-groups would be ready to deliver their work so that WS2 could be completed by June 2017. As such, the CCWG-Accountability proposed to extend WS2 to June 2018 while keeping to its original budget. This was accepted by the CCWG-Accountability Chartering Organizations and confirmed by the ICANN Board at ICANN 59 (Johannesburg, South Africa, June 2017).

By ICANN 61 (San Juan, Puerto Rico, March 2018) all eight WS2 sub-groups had completed a public consultation on their draft recommendations and submitted their final reports and recommendations to the CCWG-Accountability plenary, which approved each of these reports.

During the ICANN61 Puerto Rico meeting there was also a face-to-face meeting between the Board and CCWG Co-chairs and Rapporteurs to discuss potential areas within the final WS2 recommendations where the Board had concerns. Following this meeting the ICANN Board and org agreed to send a response to the CCWG Co-Chairs regarding these areas of contention so the CCWG-Accountability could look at addressing these via Implementation Guidance which would not require changing its recommendations.

On May 14 2018 the CCWG-Accountability received the response from the Board listing four areas of concern. The CCWG-Accountability then proceeded to develop Implementation Guidance which addressed all of the Board concerns. The Implementation Guidance was approved at the CCWG-Accountability face-to-face meeting on June 24 2018 (Annex 9 of this report).

Final Report

With this report and its recommendations, the CCWG-Accountability has completed its work as outlined in Section 27.1. of the ICANN Bylaws on Work Stream 2 (WS2) based on recommendation 12 of the CCWG-Accountability WS1 Final Report.

Work Stream 2 (WS2) was organized into eight[3] independent topics which continued to require significant effort by the community over almost two years from its beginning in June 2016:

Diversity

The final diversity report presents a discussion of diversity at ICANN and identifies a number of diversity elements by which diversity may be characterized, measured, and reported. It provides a summary of diversity provisions in the ICANN Bylaws, and was informed by feedback from ICANN SO/AC/Groups through a Diversity Questionnaire. Finally, it proposes a number of recommendations by which ICANN may define, measure, report, support, and promote diversity.

The Diversity Sub-Group[4] of WS2 met 34 times between August 2016 and February 2018 for a total of 638 volunteer meeting hours. It held a public consultation[5] on its draft recommendations from 26 October 2017 to 14 January 2018 and received 16 responses from the ICANN Board, SO/ACs, governments, organizations, and individuals. Following the public consultation, the responses were analyzed, and the recommendations were amended in a number of areas (detailed responses to all comments and a list of changes to the report can be found in the ICANN Public Comment Forum website[6]). The final report presents eight recommendations in the three categories of Defining Diversity, Measuring Diversity, and Supporting Diversity (the individual recommendations are listed in the section Recommendations by Topic in this report and the complete Diversity Report can be found as Annex 1). The final report and recommendations was delivered to the WS2 Plenary for its 28 February 2018 meeting[7] where it was approved for a first reading with no amendments. It was presented for a second reading at the WS2 face-to-face plenary meeting[8] on 9 March 2018 where it was approved for a second reading with no amendments.

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[3] Section 27.1 of the Bylaws presents 9 topics for consideration however the CCWG-Accountability and the IRP-IOT agreed in June 2017 that the Cooperative Engagement Process (CEP) topic would be best handled by the IRP-IOT and as such was merged with the IRP-IOT leaving only 8 topics for WS2 to address.
[4] https://community.icann.org/display/WEIA/Diversity
[5] https://www.icann.org/public-comments/accountability-diversity-2017-10-26-en
[6] https://www.icann.org/en/system/files/files/responses-comments-accountability-diversity-21mar18-en.pdf
[7] https://community.icann.org/pages/viewpage.action?pageId=77529370
[8] https://community.icann.org/pages/viewpage.action?pageId=74580727

Guidelines for Standards of Conduct Presumed to be in Good Faith Associated with Exercising Removal of Individual ICANN Board Directors (Guidelines for Good Faith)

The Empowered Community (EC), through the Decisional Participants, has the right to appoint and remove individual Directors. In the event that a Decisional Participant endeavors to remove an individual Board Member, those individuals participating in the process may be indemnified by ICANN provided individuals acted in "good faith" during the removal process. The purpose of this sub-group was to draft guidelines for conduct that would be considered good faith actions on the part of the individuals participating on behalf of the Decisional Participants in order for the indemnification to apply.

The Good Faith Sub-Group[9] met 12 times between September 2016 and May 2017 for a total of 129 volunteer meeting hours. It held a public consultation[10] on its draft recommendations from 7 March to 24 April 2017 and received four responses from SO/ACs and individuals. Following the public consultation, the responses were analyzed, and the main concern identified was from the ASO. Minor amendments were brought to the recommendations, which were accepted by the ASO late in 2017. The final report presents two recommendations directly related to its topic and also provides two additional recommendations, which should be considered as general Good Practices for SO/ACs (the individual recommendations are listed in the section Recommendations by Topic in this report and the complete Good Faith Report can be found as Annex 2). The Good Faith Final Report and Recommendations were approved by email on the WS2 list and confirmed in an email to the list on 14 November 2017[11].

Human Rights Framework of Interpretation (HR-FOI)

With ICANN's October 2016 Bylaws change, a Human Rights Core Value was added to ICANN's Bylaws. In order for this Core Value to come into effect, a Framework of Interpretation was required as part of WS2.

The Human Rights Sub-Group[12] of WS2 met 32 times between August 2016 and August 2017 for a total of 737 volunteer meeting hours. It held a public consultation[13] on its draft HR FOI from 5 May 2017 to 16 June 2017 and received 11 responses from SO/ACs, governments, and individuals. The main issue from the public consultation centered around a number of governments requesting that the UN Guiding Principles on Businesses and Human Rights (also known as the Ruggie Principles), as well as other instruments, be included or have a more

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[9] https://community.icann.org/display/WEIA/Guidelines+for+Good+Faith+Conduct
[10] https://www.icann.org/public-comments/enhancing-accountability-guidelines-good-faith-2017-03-07-en
[11] https://mm.icann.org/pipermail/accountability-cross-community/2017-November/014352.html
[12] https://community.icann.org/display/WEIA/Human+Rights
[13] https://www.icann.org/public-comments/foi-hr-2017-05-05-en

prominent place in the report. Eventually, a compromise was achieved, and the report was amended accordingly.

The first part of the final report is the proposed Framework of Interpretation for the Core Value on Human Rights. The second part addresses the "considerations" listed in paragraph 24 of Annex 12 of the CCWG-Accountability Final Report (the complete HR-FOI Final Report can be found as Annex 3). The final report was delivered to the WS2 Plenary for its 11 October 2017 meeting[14] where it was approved for a first reading with bracketed compromise language. It was presented for a second reading, with the compromise text, at the WS2 Plenary meeting[15] on 18 October 2017 where it was approved for a second reading with no amendments.

Jurisdiction

Developing the work plan for the Jurisdiction Sub-Group based on Recommendation 12 of the WS1 report proved somewhat challenging, as there were ambiguities in this text that led to some lack of clarity regarding both the scope and goals of the sub-group.

The sub-group proceeded to:

⊙ Discuss the topics of "confirming and assessing the gap analysis" and of changing ICANN's headquarters or jurisdiction of incorporation.

⊙ Work on refining the Multiple Layers of jurisdiction.

⊙ Prepare several working documents. These included one exploring the question: "What is the influence of ICANN's existing jurisdiction(s) relating to resolution of disputes (i.e., governing law and venue) on the actual operation of ICANN's policies and accountability mechanisms?"

⊙ Publish a questionnaire to allow the community to submit jurisdiction related issues for consideration by the subgroup.

⊙ Develop a series of jurisdiction-related questions for ICANN Legal, which were formally answered.

⊙ Undertake a comprehensive review of the litigations in which ICANN has been a party.

Based on this work, the sub-group developed a master list of "proposed issues." From this list, the sub-group prioritized, in the time remaining, the issues relating to the Office of Foreign Assets Control (OFAC) Sanctions and to the Choice of Governing Law and Venue Clauses in certain ICANN contracts. After careful consideration of these issues, the sub-group reached consensus on recommendations for each of these.

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[14] https://community.icann.org/pages/viewpage.action?pageId=71598556
[15] https://community.icann.org/pages/viewpage.action?pageId=69281223

The Jurisdiction Sub-Group[16] of WS2 met 57 times between August 2016 and February 2018 for a total of 1,377 volunteer meeting hours, and more than 2,000 emails on its list. It held a public consultation[17] on its draft recommendations from 14 November 2017 to 14 January 2018 and received 14 responses from the ICANN Board, SO/ACs, governments, organizations and individuals. Following the public consultation, the responses were analyzed, and the recommendations were amended in a number of areas (detailed responses to all comments and a list of changes to the report can be found in the ICANN Public Comment Forum website[18]). The final report presents four recommendations as well as a number of suggestions (the individual recommendations and suggestions are listed in the section Recommendations by Topic in this report and the complete Jurisdiction Report can be found as Annex 4.1). The final report was delivered to the WS2 Plenary for its face-to-face plenary meeting[19] on 9 March 2018 where it was approved for a first and second reading with no amendments.

The final report includes a Minority Statement by the Government of Brazil, which was supported by several governments (see Annex 4.2), as well as the transcript of the discussion of issues associated with ICANN's jurisdiction not covered by the Jurisdiction Report, which was held at the WS2 face-to-face meeting at ICANN 60 Abu Dhabi (see Annex 4.3).

Ombuds (IOO)

In organizing the work of the Ombuds Sub-Group, it came to light that there was significant overlap with the upcoming implementation of an earlier recommendation from the second Accountability and Transparency Review Team (ATRT 2) requiring an external review of the office of the Ombuds. After discussion of the issue by the concerned parties, it was agreed that the WS2 Ombuds Sub-Group would take on the responsibility for the external review of the Office of the Ombuds as part of its work.

Once the external review was completed, the Ombuds Sub-Group agreed that given the breadth and the depth of the review, that it would base its work on the results of that review and would accept all the recommendations from that report with minor amendments relative to implementation (the complete report from the external evaluator can be found in Annex 5.2).

The Ombuds Sub-Group[20] of WS2 met 34 times between August 2016 and February 2018 for a total of 249 volunteer meeting hours. It held a public consultation[21] on its draft recommendations from 10 November 2017 to 14 January 2018 and received seven responses from the ICANN Board, SO/ACs, and organizations. Following the public consultation, the responses were analyzed, and the recommendations were amended in a number of areas (detailed responses to all comments and a list of changes to the report can be found in the ICANN Public Comment

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[16] https://community.icann.org/display/WEIA/Jurisdiction
[17] https://www.icann.org/public-comments/recommendations-on-icann-jurisdiction-2017-11-14-en
[18] https://www.icann.org/en/system/files/files/responses-comments-recommendations-on-icann-jurisdiction-20mar18-en.pdf
[19] https://community.icann.org/pages/viewpage.action?pageId=74580727
[20] https://community.icann.org/display/WEIA/Ombudsman
[21] https://www.icann.org/public-comments/ioo-recs-2017-11-10-en

Forum website[22]). The final report presents 11 recommendations[23] (the individual recommendations are listed in the section <u>Recommendations by Topic</u> in this report and the final Ombuds Report and Recommendations can be found as Annex 5.1). The final report and recommendations was delivered to the WS2 Plenary for its 28 February 2018 meeting[24] where it was approved for a first reading with no amendments. It was presented for a second reading at the WS2 face-to-face plenary meeting[25] on 9 March 2018 where it was approved for a second reading with no amendments.

SO/AC Accountability

The SO/AC Accountability Sub-Group undertook three tasks based on the requirements of section 27.1 of the ICANN Bylaws:

1. Review and develop recommendations to improve SO and AC processes for accountability, transparency, and participation that are helpful to prevent capture. (Note that the sub-group looked only at SO/AC accountability within the scope of ICANN activities)

2. Evaluate the proposed "Mutual Accountability Roundtable" to assess its viability and, if viable, undertake the necessary actions to implement it.

3. Assess whether the Independent Review Process (IRP) should be applied to SO/AC activities. The recommendations for each track are described next.

The SO/AC Accountability Sub-Group[26] met 33 times between August 2016 and September 2017 for a total of 239 volunteer meeting hours. It undertook a review of all SO/AC accountability mechanisms and held a public consultation[27] on its draft recommendations from 14 April to 26 May 2017. It received 10 responses from the ICANN Board, SO/ACs, organizations, governments, and individuals. Following the public consultation, the responses were analyzed, and the recommendations were amended in a number of areas. The final report presents 29 recommendations or Good Practices SO/ACs should implement in the areas of accountability, transparency, participation, outreach, and updates to policies and procedures. It also includes recommendations on the Mutual Accountability Roundtable and the applicability of the IRP to SO/AC activities (the individual recommendations are listed in the section <u>Recommendations by Topic</u> in this report and the complete SO/AC Accountability report can be found as Annex 6). The SO/AC Accountability Final Report and Recommendations was delivered to the WS2 Plenary for its 27 September 2017 meeting[28] where it was approved for a first reading with no amendments. It was presented for a second reading at the WS2 Plenary at its 11 October 2017 meeting[29] where it was approved for a second reading with no amendments.

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[22] https://www.icann.org/en/system/files/files/responses-comments-ioo-recs-20mar18-en.pdf

[23] "This recommendation is the subject of additional considerations provided in Implementation Guidance in Annex 9"

[24] https://community.icann.org/pages/viewpage.action?pageId=77529370

[25] https://community.icann.org/pages/viewpage.action?pageId=74580727

[26] https://community.icann.org/pages/viewpage.action?pageId=59643284

[27] https://www.icann.org/public-comments/soac-accountability-2017-04-14-en

[28] https://community.icann.org/pages/viewpage.action?pageId=69273069

[29] https://community.icann.org/pages/viewpage.action?pageId=71598556

Staff Accountability

The focus of this group was to assess "staff accountability" and performance at the service delivery, departmental, or organizational level, and not at the individual, personnel level.

The group's work was a combination of problem-centered analysis as well as solution-focused exploration, with the goal of identifying any gaps to address as part of an effort to create a comprehensive system of checks and balances, based on the assessment of tools and systems currently or newly in place. The group considered the roles and responsibilities of ICANN's Board, staff, and community members and the links between them, sought input on issues or challenges relating to staff accountability matters, and assessed existing staff accountability processes in ICANN.

The Staff Accountability Sub-Group[30] of WS2 met 29 times between August 2016 and January 2018 for a total of 310 volunteer meeting hours. It held a public consultation[31] on its draft recommendations from 13 November 2017 to 14 January 2018 and received eight responses from the ICANN Board, SO/ACs, organizations, and individuals. Following the public consultation, the responses were analyzed, and the recommendations were amended in a number of areas (detailed responses to all comments and a list of changes to the report can be found in the ICANN Public Comment Forum website[32]). The final report presents three recommendations (the individual recommendations are listed in the section Recommendations by Topic in this report and the Staff Accountability Final Report and Recommendations can be found as Annex 7). The final report and recommendations was delivered to the WS2 Plenary for its 28 February 2018 meeting[33] where it was approved for a first reading with no amendments. It was presented for a second reading at the WS2 face-to-face plenary meeting[34] on 9 March 2018 where it was approved for a second reading with no amendments.

Transparency

The Transparency Sub-Group makes recommendations[35] in four areas:

1. Improving ICANN's Documentary Information Disclosure Policy (DIDP)

2. Documenting and Reporting on ICANN's Interactions with Governments

3. Improving Transparency of Board Deliberations

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[30] https://community.icann.org/display/WEIA/Staff+Accountability
[31] https://www.icann.org/public-comments/accountability-recs-2017-11-13-en
[32] https://www.icann.org/en/system/files/files/responses-comments-accountability-recs-21mar18-en.pdf
[33] https://community.icann.org/pages/viewpage.action?pageId=77529370
[34] https://community.icann.org/pages/viewpage.action?pageId=74580727
[35] This recommendation is the subject of additional considerations provided in Implementation Guidance in Annex 9"

4. Improving ICANN's Anonymous Hotline (Whistleblower Protection)

The Transparency Sub-Group[36] met 13 times between August 2016 and October 2017 for a total of 158 volunteer meeting hours. It held a public consultation[37] on its draft recommendations from 21 February to 10 April 2017 and received 10 responses from the ICANN organization, SO/ACs, and organizations. Following the public consultation, the responses were analyzed, and the recommendations were amended in a number of areas. The final report presents 21 recommendations for improving ICANN's Documentary Information Disclosure Policy (DIDP), one recommendation on documenting and reporting on ICANN's interactions with governments, three recommendations on improving the transparency of Board deliberations and eight recommendations on improving ICANN's Anonymous Hotline (the individual recommendations are listed in the section Recommendations by Topic in this report and the complete Transparency Report can be found as Annex 8.1). The Transparency Final Report and Recommendations was delivered to the WS2 Plenary for its 18 October 2017 meeting[38] where it was approved for a first reading with no amendments. It was presented for a second reading at the WS2 face-to-face plenary meeting[39] on 27 October 2017 where it was approved for a second reading with no objections, but certain edits were required to the recommendations on DIDP with respect to Open Contracting.

The final report also includes a Minority Statement (see Annex 8.2).

In considering the complete report the CCWG-Accountability WS2 agreed at its 9 March 2018 face-to-face meeting that:

> *"Prioritization and funding for implementation of recommendations is beyond the scope and capacity of WS2 and rests with ICANN (Board and Organization) and the community. The CCWG-Accountability WS2 proposes to establish a small implementation team to assist ICANN (the Organization) and the community to ensure the implementation plan preserves the spirit of the recommendations and provide any interpretation advice as required."*

The CCWG-Accountability understands that the implementation of its WS2 recommendations cannot proceed in a similar fashion as the implementation of its WS1 recommendations. If all recommendations are endorsed by the Chartering Organizations and then approved by the ICANN Board, implementation of the nearly 100 recommendations contained in the WS2 Report will be a multi-year project based on a detailed implementation plan agreed to by the ICANN organization and the broader ICANN Community, after public consultation on the implementation plan.

Overall, the CCWG-Accountability's WS2 represents a significant effort by the Community of 272 meetings, more than 5,000 emails, and 10,000 hours of volunteer meeting time, which does not include individual time for reading and writing, over a period of two years while remaining well within its original its original one-year cost estimates.

As such the CCWG-Accountability WS2 believes it has met all of the expectations and

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[36] https://community.icann.org/display/WEIA/Transparency
[37] https://www.icann.org/public-comments/ccwg-acct-draft-recs-2017-02-21-en
[38] https://community.icann.org/pages/viewpage.action?pageId=69281223
[39] https://community.icann.org/display/WEIA/CCWG+ACCT+WS2+F2F+Meeting+%2325+at+ICANN60+-+Abu+Dhabi+-+27+October+2017

requirements of section 27.1 of the ICANN Bylaws on WS2 and delivers these recommendations to the ICANN Board and its Chartering Organizations in accordance with its Charter and the Bylaws.

Implementation of Recommendations

The WS2 Final Report presents nearly 100 recommendations applicable to ICANN the organization and SO/AC/groups. Few, if any, of these require Bylaws modifications, and many of these are either suggestions of Good Practices or simply optional while many others offer flexibility in how they can be implemented.

The CCWG-Accountability understands that the implementation of the nearly 100 recommendations contained in the WS2 Final Report is a significant undertaking that will require a detailed implementation plan and will take a number of years to complete.

When considering the diversity of the types of recommendations, the breadth of subjects covered, and the significant undertaking implementation will involve, the CCWG-Accountability concluded it would be useful to offer the ICANN organization, Board, as well as the SO/ACs formal support in developing an implementation plan.

As noted in the previous section, the CCWG-Accountability confirmed this by approving the following recommendation:

> *"Prioritization and funding for implementation of recommendations is beyond the scope and capacity of WS2 and rests with ICANN (Board and Organization) and the community. The CCWG-Accountability-WS2 proposes to establish a small implementation team to assist ICANN (the Organization) and the community to ensure the implementation plan preserves the spirit of the recommendations and provide any interpretation advice as required."*

The CCWG-Accountability also confirmed that the members of the WS2 Implementation Team would only be composed of the Co-Chairs and the rapporteurs from the WS2 sub-groups. The mandate of this team would be to act as described in the recommendation above. It is expected that the WS2 Implementation Team would only meet online or as needed during regularly scheduled ICANN public meetings to minimize the use of community time and resources.

Recommendations by Sub-Group

1   Recommendations to Improve Diversity

Defining Diversity

1.1.   Recommendation 1: SO/AC/Groups should agree that the following seven key elements of diversity should be used as a common starting point for all diversity considerations within ICANN:
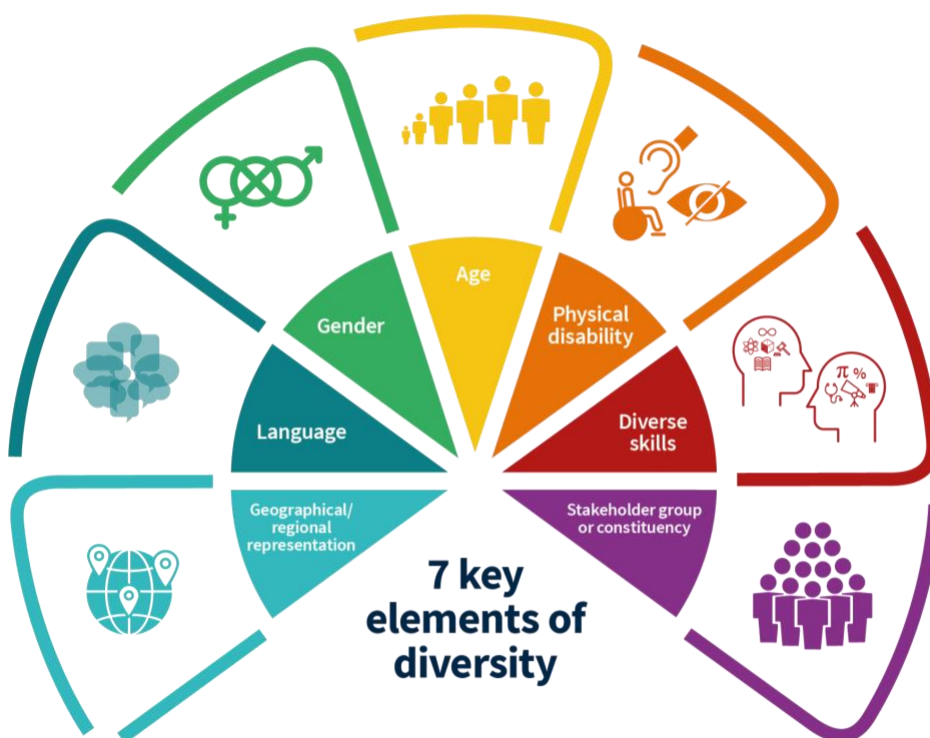
1.2.   Recommendation 2: Each SO/AC/Group should identify which elements of diversity are mandated in their charters or ICANN Bylaws and any other elements that are relevant and applicable to each of its levels including leadership (Diversity Criteria) and publish the results of the exercise on their official websites.

Measuring and Promoting Diversity

1.3.   Recommendation 3: Each SO/AC/Group, supported by ICANN staff, should undertake an initial assessment of their diversity for all of their structures including leadership

based on their Diversity Criteria and publish the results on their official website.

1.4. Recommendation 4: Each SO/AC/Group should use the information from their initial assessment to define and publish on their official website their Diversity Criteria objectives and strategies for achieving these, as well as a timeline for doing so.

1.5. Recommendation 5: Each SO/AC/Group, supported by ICANN staff, should undertake a regular update of their diversity assessment against their Diversity Criteria and objectives at all levels including leadership. Ideally this update should be carried out annually but not less than every three years. They should publish the results on their official website and use this information to review and update their objectives, strategies, and timelines.

Supporting Diversity

1.6. Recommendation 6: ICANN staff should provide support and tools for the SO/AC/Groups to assist them in assessing their diversity in an appropriate manner. ICANN should also identify staff or community resources that can assist SO/ACs or other components of the community with diversity-related activities and strategies.

1.7. Recommendation 7: ICANN staff should support SO/AC/Groups in developing and publishing a process for dealing with diversity-related complaints and issues.

1.8. Recommendation 8: ICANN staff should support the capture, analysis, and communication of diversity information, seeking external expertise if needed, in the following ways:

1.8.1. Create a Diversity section on the ICANN website.

1.8.2. Gather and maintain all relevant diversity information in one place.

1.8.3. Produce an Annual Diversity Report for ICANN based on all the annual information and provide a global analysis of trends and summarize SO/AC/Groups recommendations for improvement, where appropriate. This should also include some form of reporting on diversity complaints.

1.8.4. Include diversity information derived from the Annual Diversity Report in ICANN's Annual Report.

Note: In the context of the Diversity Questionnaire and throughout this report, the term SO/AC/Groups refers to:

⊙ SO – ccNSO, GNSO, ASO

⊙ AC – ALAC, GAC, RSSAC, SSAC

⊙ Groups – ICANN Board, ICANN staff, NomCom, Stakeholder Group, Constituency, RALO

When recommendations in this report refer to ICANN, it means all of those entities included in SO/AC/Groups.

2 Recommendations for Guidelines for Standards of Conduct Presumed to be in Good Faith Associated with Exercising Removal of Individual ICANN Board Directors

The proposed guidelines apply to all Board seats whether the Director is appointed by the SO/AC or the ICANN Nominating Committee (NomCom) and are as follows:

2.1 Recommendations for guidelines with respect to Petitions for removal:

2.1.1 May for any reason; and

2.1.2 Must:

2.1.2.1 Be believed by the Indemnified Party to be true.

2.1.2.2 Be in writing.

2.1.2.3 Contain sufficient detail to verify facts; if verifiable facts are asserted.

2.1.2.4 Supply supporting evidence if available/applicable.

2.1.2.5 Include references to applicable by-laws and/or procedures if the assertion is that a specific by-law or procedure has been breached.

2.1.2.6 Be respectful and professional in tone.

2.2 Recommendations for guidelines with respect to procedures for consideration of board removal notices by SO/ACs to include:

2.2.1 Reasonable time frames for investigation by SO/AC councils or the equivalent decision-making structures if the SO/AC deems that an investigation is required.

2.2.2 Period of review by the entire membership of the SO/AC provided the SO/AC organizational structure customarily provides review for individual members; otherwise, period of review by those empowered to represent the SO/AC in decisions of this nature.

2.2.3   Consistent and transparent 40 voting method for accepting or rejecting a petition; such voting maybe be by the entire membership or those empowered to represent the SO/AC in decisions of this nature.

2.2.4   Documentation of the community process and how decisions are reached.

2.3   Standalone Recommendations

In addition to the proposed guidelines which are intended to trigger the indemnity under ICANN Bylaws Article 20, Section 20.2, two other recommendations were developed that may be helpful to the community as standalone items

2.3.1   A standard framework be developed and used to raise the issue of Board removal to the respective body – either the specific SO/AC who appointed the member or the Decisional Participant in the case of a NomCom appointee. The framework would be in the context of developing a broader framework for implementing community powers and entering into the discussions contemplated by WS1. This framework could be developed by a new group specifically formed for that purpose.

2.3.2   Implement the guidelines as a community best practice to apply to all discussions even if not covered by the indemnities contemplated under Article 20. There may be discussions around rejecting a budget or rejecting a proposed standard Bylaw that would benefit from a good faith process. The guidelines for engaging discussions around Board removal could be adopted as a universal standard given that they are broad enough to encompass any discussion.

3   Recommendation for a Framework of Interpretation for Human Rights

The CCWG-Accountability WS2 recommends the adoption of the Framework of Interpretation it developed for the ICANN Bylaws dealing with Human Rights, which can be found in Annex 3.

4   Recommendations on Jurisdiction

4.1   Recommendations Relating to OFAC Sanctions and Related Sanctions Issues

The Subgroup considered issues relating to government sanctions, particularly[41] U.S. government sanctions administered by the Office of Foreign Asset Control (OFAC). OFAC is an office of the U.S. Treasury that administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals.

4.1.1   ICANN Terms and Conditions for Registrar Accreditation Application Relating to OFAC Licenses

For ICANN to enter into a Registration Accreditation Agreement (RAA) with an applicant from a sanctioned country, it will need an OFAC license. Currently, "ICANN is under no obligation to seek such licenses and, in any given case, OFAC could decide not to issue a requested license."[42] This uncertainty could discourage residents of sanctioned countries from applying for accreditation.

The sub-group recommends that the above sentence should be amended to require ICANN to apply for and use best efforts to secure an OFAC license if the other party is otherwise qualified to be a registrar (and is not individually subject to sanctions). During the licensing process, ICANN should be helpful and transparent with regard to the licensing process and ICANN's efforts, including ongoing communication with the potential registrar.

4.1.2   Approval of gTLD Registries

In the 2012 round of the New gTLD program, it was difficult for residents from sanctioned countries to file and make their way through the application process. The Applicant Guidebook (AGB) states: "In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs (specially designated nationals) but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license."

The sub-group recommends that ICANN should commit to applying for and using best efforts to secure an OFAC license for all such applicants if the applicant would otherwise be approved (and is not on the SDN list). ICANN should also be helpful and transparent with regard to the licensing process, including ongoing communication with the applicant.

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[41] In the future, if ICANN's activities are affected by other similar sanctions (e.g., similar in scope, type, and effect and with similar methods of relief for entities not specifically sanctioned), the spirit of these recommendations should guide ICANN's approach. Terms and Conditions for Registrar Accreditation Application, Section 4. https://www.icann.org/resources/pages/application-2012-02-25-en

[42] The term "best efforts," as used throughout this report, should be understood to be limited by "reasonableness," meaning that an entity (here, ICANN) must use its best efforts, except for any efforts that would be unreasonable. For example, the entity can take into account its fiscal health and its fiduciary duties, and any other relevant facts and circumstances. In some jurisdictions, this limitation is inherent in the use and meaning of the term. However, in other jurisdictions, this may not be the case, and thus it is necessary to explicitly state the limitation for the benefit of those in such jurisdictions.

4.1.3   Application of OFAC Limitations by Non-U.S. Registrars

It appears that some non-U.S.-based registrars might be applying OFAC sanctions with registrants and potential registrants, based on a mistaken assumption that they must do so simply because they have a contract with ICANN. Non-U.S. registrars may also appear to apply OFAC sanctions, if they "cut and paste" registrant agreements from U.S.-based registrars. While ICANN cannot provide legal advice to registrars, it can bring awareness of these issues to registrars.

The sub-group recommends that ICANN clarify to registrars that the mere existence of their RAA with ICANN does not cause them to be required to comply with OFAC sanctions. ICANN should also explore various tools to remind registrars to understand the applicable laws under which they operate and to accurately reflect those laws in their customer relationships.

4.1.4   General Licenses

OFAC "general licenses" cover particular classes of persons and types of transactions. ICANN could pursue general licenses to cover transactions integral to ICANN's role in managing the DNS and contracts for Internet resources, such as registries and registrars entering into Registry Agreements (RAs) and Registrar Accreditation Agreements (RAAs), Privacy/Proxy Accreditation, support for ICANN-funded travelers, etc. This would enable individual transactions to proceed without the need for specific licenses.

A general license would need to be developed in conjunction with the U.S. Department of the Treasury, which must amend OFAC regulations to include the new license. This regulatory process may be a significant undertaking.

The sub-group recommends that ICANN take steps to pursue one or more OFAC "general licenses." ICANN should first prioritize a study of the costs, benefits, timeline and details of the process. ICANN should then pursue general licenses as soon as possible, unless it discovers significant obstacles. If so, ICANN should report this to the community and seek its advice on how to proceed. If unsuccessful, ICANN needs to find other ways to remove "friction" from transactions between ICANN and residents of sanctioned countries. ICANN should communicate regularly about its progress, to raise awareness in the ICANN community and with affected parties.

4.2   Recommendations relating to Choice of Law and Choice of Venue Provisions in ICANN Agreements

This sub-group considered how the absence of a choice of law provision in the base RA, the absence of a choice of law provision in the standard RAA, and the contents of the choice of venue provision in RAs could impact ICANN's accountability. These are standard-form contracts that are not typically negotiated; changes are now determined through an amendment procedure (e.g. Art. 7.6 of the RA).

The sub-group understands that it cannot require ICANN to make amendments to the RA or the RAA. Rather, this recommendation suggests possible changes to the RA and

RAA for study and consideration by ICANN the organization, the GNSO, and the contracted parties.

The RA and RAA do not contain choice of law provisions. The governing law is thus undetermined, until determined by a judge or arbitrator or by agreement of the parties.

4.2.1   Choice of Law and Venue Provisions in the Registry Agreement

The sub-group identified several alternative approaches for the RA, which could also apply to the RAA. The body of the report discusses the advantages and disadvantages of each approach.

4.2.1.1   Menu Approach. The sub-group supports a "Menu" approach, where the governing law would be chosen before the contract is executed from a "menu" of possible governing laws. The menu needs to be defined; this could best left to ICANN and the registries. The sub-group discussed a number of possible menus, which could include one country, or a small number of countries, from each ICANN geographic region, plus the status quo (no choice of law) and/or the registry's jurisdiction of incorporation and/or the countries in which ICANN has physical locations.

The sub-group has not determined what the menu items should be, but believes there should be a balance between the advantages and disadvantages of having different governing laws apply to the same base RA, which likely suggests having a relatively limited number of choices on the menu. The sub-group recommends that the Registry choose from among the options on the menu (i.e., the choice would not be negotiated with ICANN).

4.2.1.2   "California" (or "fixed law") Approach. A second possible option is for all RAs to include a choice of law clause naming California and U.S. law as the governing law.

4.2.1.3   Carve-Out Approach. A third possible option would be a "Carve-Out" approach, whereby parts of the contract that would benefit from uniform treatment are governed by a uniform predetermined law (e.g., California) and other parts are governed either by the law of the registry's jurisdiction or by a jurisdiction chosen using the "Menu" approach.

4.2.1.4   Bespoke Approach. In the "Bespoke" approach, the governing law of the entire agreement is the governing law of the Registry Operator.

4.2.1.5   Status Quo Approach. A fifth possible approach is to retain the status quo, (i.e., have no "governing law" clause in the RAA).

4.2.2   Choice of Law Provisions in Registrar Accreditation Agreements

The options for the RAA are essentially the same as for the RA.

4.2.3 Choice of Venue Provisions in Registry Agreements

Under the RA, disputes are resolved by "binding arbitration," pursuant to ICC rules. The RA contains a choice of venue provision stating that the venue is Los Angeles, California as both the physical place and the seat of the arbitration.

When entering into contracts with registries, ICANN could offer a list of possible venues for arbitration rather than imposing Los Angeles, California. The registry that enters into a registry agreement with ICANN could then choose which venue it prefers at or before the execution of the contract.

4.3 Further Discussions of Jurisdiction-Related Concerns (Suggestion)

There were a number of concerns raised in the sub-group where the sub-group had substantive discussions but did not get to a point of conclusion. As an example, there were discussions of limited, partial, relative, or tailored immunity for ICANN that did not come to conclusion.

These concerns were put on the table by different stakeholders, and for these stakeholders, these are legitimate concerns. As these concerns were not discussed to the end, there should be a path forward for these concerns beyond the CCWG-Accountability, which was tasked to look into a limited number of issues within a limited period of time and with a limited budget.

Therefore, the sub-group suggests that another multistakeholder process of some kind should be considered to allow for further consideration, and potentially resolution, of these concerns. We believe that this report, with its annexes, can be a very useful tool for further debates which will surely take place – whether in another cross-constituency effort or in a future ATRT Review, or in some other ICANN context. The appropriate forum for such discussions is beyond the mandate of the CCWG-Accountability; however, we encourage the community to build on the work of the sub-group and prior work in this area.

5 Recommendations for Improving the ICANN Office of the Ombuds (IOO)

Note: All recommendations are closely based on the recommendations included in the external evaluation of the IOO, which was commissioned as part of WS2.

5.1 The Ombuds Office should have a more strategic focus.

5.2 The Ombuds office should include procedures that:

5.2.1 Distinguish between different categories of complaints and explains how each will be handled.

5.2.2 Set out the kinds of matters where the Ombuds will usually not intervene – and where these matters are likely to be referred to another channel (with the

complainant's permission)

5.2.3 Provides illustrative examples to deepen understanding of the Ombuds' approach.

5.3 Once ICANN has agreed to a revised configuration for the Office of the Ombuds, a plan should be developed for a soft relaunch of the function, which should incorporate action to emphasis the importance of the Ombuds function by all relevant parts of ICANN, including:

- ⊙ Board

- ⊙ CEO

- ⊙ Community Groups

- ⊙ Complaints Officer

5.4 All relevant parts of ICANN should be required (should include the corporation, the Board and committees, and anybody or group with democratic or delegated authority) to respond within 90 days (or 120 days with reason) to a formal request or report from the Office of the Ombudsman. The response should indicate the substantive response along with reasons. Should the responding party not be able to meet the 120-day limit due to exceptional circumstances, that party can apply to the IOO to seek an additional extension prior to the expiration of the original 90-day delay. The application should be in writing, stating the nature of the exception and the expected time required to respond. The IOO will respond to such requests within a week.

5.5 The ICANN Office of the Ombuds should establish timelines for its own handling of complaints and report against these on a quarterly and annual basis.

5.6 The Office of the Ombuds should be configured so that it has formal mediation training and experience within its capabilities.

5.7 Ideally, the Office of the Ombuds should be configured so that it has gender and, if possible, other forms of diversity within its staff resources. (The primary objective of this recommendation is to ensure that the Community has choices as to whom in the IOO they can bring their complaints to and feel more comfortable doing so.)

5.8 ICANN should establish an Ombuds Advisory Panel[43]:

5.8.1 Made up of five members to act as advisers, supporters, and wise counsel for the Ombuds and should be made up of a minimum of at least two members with Ombudsman experience and the remainder with extensive ICANN experience.

5.8.2 The Panel should be responsible for:

5.8.2.1 Contributing to the selection process for new Ombuds, which would meet the various requirements of the Board and Community, including diversity.

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[43] This recommendation is the subject of Implementation Guidance from Annex 9

5.8.2.2   Recommending candidates for the position of Ombuds to the Board.

5.8.2.3   Recommending terms of probation to the Board for new Ombuds.

5.8.2.4   Recommend to the Board firing an Ombuds for cause.

5.8.2.5   Contribute to an external evaluation of the IOO every five years.

5.8.2.6   Making recommendations regarding any potential involvement of the IOO in non-complaint work based on the criteria listed in Recommendation 11.

5.8.3   The Panel cannot be considered as being part of the Ombuds Office and cannot be considered additional Ombuds, but rather external advisors to the office.

5.8.4   Any such advisory panel would require the Ombuds to maintain its confidentiality engagements per the Bylaws.

5.9   The Ombuds employment contracts should be revised to strengthen independence by allowing for a:

5.9.1   Five-year fixed term (including a 12-month probationary period) and permitting only one extension of up to three years (the extension should be subject to a community-based feedback mechanism to the Advisory Panel covering Ombuds performance over the previous years).

5.9.2   The Ombuds should only be able to be terminated with cause.

5.10   The Ombuds should have as part of their annual business plan, a communications plan – including the formal annual report – publishing reports on activity, collecting and publishing statistics and complaint trend information, collecting user satisfaction information, and publicizing systemic improvements arising from the Ombuds' work.

5.11   The following points should be considered and clarified publicly when looking at the Ombuds' involvement in any non-complaints work:

⊙   Whether there is unique value that the Ombuds can add through the proposed role or function?

⊙   Whether the proposed reporting/accountability arrangements may compromise perceived independence?

⊙   Whether the workload of the proposed role/function would limit the Ombuds ability to prioritize their complaints-related work?

⊙   Whether any Ombuds' involvement with the design of new or revised policy or process, meets the requirement of not, in any way, creating a "stamp of approval"?

⊙   Whether the proposed Ombuds input may be seen as a "short-cut" or substituting for full stakeholder consultation?

The additional recommendations by the Transparency Sub-Group with respect to involving the Ombuds in the DIDP process should be considered using the criteria in Recommendation 11.

6 Recommendations to Increase SO/AC Accountability

Each SO/AC/Group should implement these Good Practices, to the extent these practices are applicable and an improvement over present practices. It is not recommended that implementation of these practices be required. Nor is it recommended that any changes be made to the ICANN Bylaws. It should be noted that the Operational Standards for periodic Organizational Reviews conducted by ICANN could include an assessment of Good Practices implementation in the AC/SO subject to the review.

6.1 Accountability

6.1.1 SO/AC/Groups should document their decision-making methods, indicating any presiding officers, decision-making bodies, and whether decisions are binding or nonbinding.

6.1.2 SO/AC/Groups should document their procedures for members to challenge the process used for an election or formal decision.

6.1.3 SO/AC/Groups should document their procedures for non-members to challenge decisions regarding their eligibility to become a member.

6.1.4 SO/AC/Groups should document unwritten procedures and customs that have been developed in the course of practice, and make them part of their procedural operation documents, charters, and/or bylaws.

6.1.5 Each year, SO/AC/Groups should publish a brief report on what they have done during the prior year to improve accountability, transparency, and participation, describe where they might have fallen short, and any plans for future improvements.

6.1.6 Each Empowered Community (EC) Decisional Participant should publicly disclose any decision it submits to the EC. Publication should include description of processes followed to reach the decision.

6.1.7 Links to SO/AC transparency and accountability (policies, procedures, and documented practices) should be available from ICANN's main website, under "accountability." ICANN staff would have the responsibility to maintain those links on the ICANN website.

6.2   Transparency

6.2.1   Charter and operating guidelines should be published on a public webpage and updated whenever changes are made.

6.2.2   Members of the SO/AC/Group should be listed on a public webpage.

6.2.3   Officers of the SO/AC/Group should be listed on a public webpage.

6.2.4   Meetings and calls of SO/AC/Groups should normally be open to public observation. When a meeting is determined to be members-only, that should be explained publicly, giving specific reasons for holding a closed meeting. Examples of appropriate reasons include discussion of confidential topics such as:

6.2.4.1   Trade secrets or sensitive commercial information whose disclosure would cause harm to a person or organization's legitimate commercial or financial interests or competitive position.

6.2.4.2   Internal strategic planning whose disclosure would likely compromise the efficacy of the chosen course.

6.2.4.3   Information whose disclosure would constitute an invasion of personal privacy, such as medical records.

6.2.4.4   Information whose disclosure has the potential to harm the security and stability of the Internet.

6.2.4.5   Information that, if disclosed, would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.

6.2.5   Records of open meetings should be made publicly available. Records include notes, minutes, recordings, transcripts, and chat, as applicable.

6.2.6   Records of closed meetings should be made available to members, and may be made publicly available at the discretion of the AC/SO/Group. Records include notes, minutes, recordings, transcripts, and chat, as applicable.

6.2.7   Filed comments and correspondence with ICANN should be published and publicly available.

6.3   Participation

6.3.1   Rules of eligibility and criteria for membership should be clearly outlined in the bylaws or in operational procedures.

6.3.2   Where membership must be applied for, the process of application and eligibility criteria should be publicly available.

6.3.3 Where membership must be applied for, there should be a process of appeal when application for membership is rejected.

6.3.4 An SO/AC/Group that elects its officers should consider term limits.

6.3.5 A publicly visible mailing list should be in place.

6.3.6 if ICANN were to expand the list of languages that it supports, this support should also be made available to SO/AC/Groups.

6.3.7 A glossary for explaining acronyms used by SO/AC/Groups is recommended.

6.4 Outreach

6.4.1 Each SO/AC/Group should publish newsletters or other communications that can help eligible non-members to understand the benefits and process of becoming a member.

6.4.2 Each SO/AC/Group should maintain a publicly accessible website/wiki page to advertise their outreach events and opportunities.

6.4.3 Each SO/AC/Group should create a committee (of appropriate size) to manage outreach programs to attract additional eligible members, particularly from parts of their targeted community that may not be adequately participating.

6.4.4 Outreach objectives and potential activities should be mentioned in SO/AC/Group bylaws, charter, or procedures.

6.4.5 Each SO/AC/Group should have a strategy for outreach to parts of their targeted community that may not be significantly participating at the time, while also seeking diversity within membership.

6.5 Updates to Policies and Procedures

6.5.1 Each SO/AC/Group should review its policies and procedures at regular intervals and make changes to operational procedures and charter as indicated by the review.

6.5.2 Members of SO/AC/Groups should be involved in reviews of policies and procedures, and should approve any revisions.

6.5.3 Internal reviews of SO/AC/Group policies and procedures should not be prolonged for more than one year, and temporary measures should be considered if the review extends longer.

6.6 Mutual Accountability Roundtable

6.6.1 It is recommended that the Mutual Accountability Roundtable not be implemented.

6.7 Should Independent Review Process (IRP) be applied to SO/AC activities?

 6.7.1 The IRP should not be made applicable to activities of SO/AC/Groups. The appropriate mechanism for individuals to challenge an SO/AC action or inaction is though ICANN's Ombuds Office, whose bylaws and charter are adequate to handle such complaints.

7   Recommendations to Improve Staff Accountability

7.1 To address the lack of understanding of the existence and/or nature of existing staff accountability mechanisms, the following actions should be taken:

 7.1.1 The ICANN organization should improve visibility and transparency of the organization's existing accountability mechanisms, by posting on icann.org in one dedicated area the following:

  7.1.1.1 Description of the organization's performance management system and process.

  7.1.1.2 Description of how departmental goals map to ICANN's strategic goals and objectives.

  7.1.1.3 Description of the Complaints Office and how it relates to the Ombuds Office.

  7.1.1.4 Organization policies shared with the CCWG-Accountability during the course of the WS2 work.

  7.1.1.5 ICANN Organization Delegations document.

  7.1.1.6 The roles descriptions included in this overall report.

  7.1.1.7 Expectations and guidelines regarding the development of staff reports for Public Comments, or staff response to Community correspondence.

 7.1.2 The ICANN organization should also evaluate what other communication mechanisms should be utilized to further increase awareness and understanding of these existing and new accountability mechanisms.

7.2 To address the lack of clearly defined, or broadly understood, mechanisms to address accountability concerns between community members and staff members regarding accountability or behavior:

 7.2.1 The ICANN organization should enhance existing accountability mechanisms to include:

7.2.1.1　A regular information acquisition mechanism (which might include surveys, focus groups, reports from the Complaints Office) to allow the ICANN organization to better ascertain its overall performance and accountability to relevant stakeholders.

7.2.1.1.1　The group notes that several new mechanisms are now established, but have not yet been exercised enough to determine effectiveness or potential adjustments. The evaluation mechanism proposed here would be helpful in determining effectiveness of these recent mechanisms before creating yet more mechanisms that may turn out to be duplicative or confusing for the organization and community.

7.2.1.2　Results of these evaluations should be made available to the Community.

7.2.2　Consistent with common best practices in services organizations, standardize and publish guidelines for appropriate timeframes for acknowledging requests made by the community, and for responding with a resolution or updated timeframe for when a full response can be delivered. The ICANN organization should include language in the performance management guidelines for managers that recommends people managers of community-facing staff seek input from the appropriate community members during the organization's performance reviews. Identification of appropriate community members, frequency of outreach to solicit input, and how to incorporate positive and constructive feedback into the overall performance review should be at the discretion and judgement of the personnel manager, with appropriate guidance from HR as necessary. Such a feedback mechanism should be supplemental to the existing mechanisms available to the community to provide input on ICANN staff performance, including direct communication to specific staff member, their personnel managers, senior executive staff, Board Directors, and the Complaints Officer.

7.3　The ICANN Organization should work with the community to develop and publish service level targets and guidelines (similar to the Service Level Agreement for the IANA Numbering Services) that clearly define the services provided by ICANN to the community as well as the service level target for each service. In this context:

7.3.1　ICANN should work with the community to identify and prioritize the classes of services for which service level targets and guidelines will be implemented, and to define how service level targets and guidelines will be defined.

7.3.2　Develop clear and reasonable guidelines for expected behavior between the ICANN organization and the community for those newly identified activities.

7.3.3　Develop and publish the resulting service levels, targets, and guidelines in a single area on icann.org. These targets and guidelines should also inform any regular information acquisition mechanism described in Recommendation 2 of this report.

The structure and specific timing of this effort should be determined by the ICANN organization (but be substantially under way before the end of 2018). We suggest that representatives of ICANN's executive team, the ICANN Board, and SO/AC Leadership participate in this effort to ensure a constructive dialogue across all parts of the ICANN community. This work should be, and be seen as, a genuine chance for collaboration and improved relationships between the Board, organization and community.

8 Recommendations to Improve ICANN Transparency

8.1   Improving ICANN's Documentary Information Disclosure Policy (DIDP)

8.1.1   The caveat that the DIDP applies only to "operational activities" should be deleted.

8.1.2   The DIDP should include a documentation rule whereby, if significant elements of a decision-making process take place orally, or otherwise without a lasting paper-trail, the participants in that decision-making process should be required to document the substance of the conversation, and include it alongside other documentation related to this decision-making process.

8.1.3   The DIDP should be expanded to include clearly defined procedures for lodging requests for information, including requirements that requesters should only have to provide the details necessary to identify and deliver the information.

8.1.4   The DIDP should impose clear guidelines on ICANN for how to process requests, including delegating a specific employee or employees with the responsibility of responding to DIDP requests, including a commitment to provide reasonable assistance to requesters who need it, particularly where they are disabled or unable to identify adequately the information they are seeking.

8.1.5   The DIDP should commit to complying with requesters' reasonable preferences regarding the form in which they wish to receive information under request (for example, if it is available as either a pdf or as a doc), if ICANN either already has that information available in the requested format, or can convert it to the requested format relatively easily.

8.1.6   The DIDP should specify that requests should receive a response "as soon as reasonably possible" and should cap timeline extensions to an additional 30 days.

8.1.7   The phrase "to the extent feasible, to reasonable requests" should be deleted from the provision on Responding to Information Requests.

8.1.8   In cases where information subject to request is already publicly available, ICANN staff should direct requesters, with as much specificity as possible, to where the information may be found. In other words, if the processing of a DIDP request reveals that the information has already been published, staff should

include information about where this information may be found in their response to the requester.

8.1.9 The exception for information "that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone" should be amended so that it only applies to information whose disclosure would be harmful to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.

8.1.10 The exception for "drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication" should be amended to clarify that this information should be disclosed unless it would be harmful to an ongoing deliberative or decision-making process.

8.1.11 The exceptions for "trade secrets and commercial and financial information not publicly disclosed by ICANN" and for "confidential business information and/or internal policies and procedures" should be replaced with an exception for "material whose disclosure would materially harm ICANN's financial or business interests or the commercial interests of its stake-holders who have those interests."

8.1.12 Where an exception is applied to protect a third party, the DIDP should include a mechanism for ICANN staff to contact this third party to assess whether they would consent to the disclosure.

8.1.13 The exception for information requests which are "not reasonable, excessive or overly burdensome, not feasible, abusive or vexatious or made by a vexatious or querulous individual" should be amended so that either the Ombudsman or the Complaints Officer automatically reviews any decision to use this exception.

8.1.14 The following sentence should be deleted: "Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the public interest in disclosing the information."

8.1.15 ICANN should consider future processes to expand transparency at ICANN Legal, including through clarification of how attorney-client privilege is invoked.

8.1.16 Wherever possible, ICANN's contracts should either be proactively disclosed or available for request under the DIDP. The DIDP should allow ICANN to withhold information subject to a non-disclosure agreement; however, such agreements should only be entered into where the contracting party satisfies ICANN that it has a legitimate commercial reason for requesting the NDA, or where information contained therein would be subject to other exceptions within the DIDP (such as, for example, where the contract contains information whose disclosure would be harmful to the security and stability of the Internet).[44]

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[44] This recommendation is the subject of Implementation Guidance from Annex 9

8.1.17 The DIDP should include a severability clause, whereby in cases where information under request includes material subject to an exception to disclosure, rather than refusing the request outright, the information should still be disclosed with the sensitive aspects severed, or redacted, if this is possible.

8.1.18 Where an information request is refused, or the information is provided in a redacted or severed form, the DIDP should require that ICANN's response include the rationale underlying the decision, by reference to the specific exception(s) invoked, as well as information about appeal processes that are available.

8.1.19 The Ombudsman's mandate regarding transparency should be boosted to grant the office a stronger promotional role, including by integrating understanding of transparency and the DIDP into ICANN's broader outreach efforts, by publishing a list of the categories of information ICANN holds.

8.1.20 Either the Ombudsman or the Complaints Officer should be tasked with carrying out reasonable monitoring and evaluation procedures, such as publishing the number of requests received, the proportion which were denied, in whole or in part, the average time taken to respond, and so on.

8.1.21 ICANN should commit to reviewing the DIDP every five years.

8.2 Documenting and Reporting on ICANN's Interactions with Governments[45]

8.2.1 In the interest of providing the community greater clarity with regard to how ICANN engages government stakeholders and to ensure that the ICANN Community and, if necessary, the Empowered Community is fully aware of ICANN's interactions with governments, the CCWG-Accountability recommends that ICANN begin disclosing publicly the following (notwithstanding any contractual confidentiality provisions) on at least a yearly (but no more than quarterly) basis with regard to expenditures over $20,000 per year devoted to "political activities," both in the U.S. and abroad:

8.2.1.1 All expenditures on an itemized basis by ICANN both for outside contractors and internal personnel.

8.2.1.2 All identities of those engaging in such activities, both internal and external, on behalf of ICANN.

8.2.1.3 The type(s) of engagement used for such activities.

8.2.1.4 To whom the engagement and supporting materials are targeted.

8.2.1.5 The topic(s) discussed (with relative specificity).

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[45] This recommendation is the subject of Implementation Guidance from Annex 9

8.3 Transparency of Board Deliberations[46]

8.3.1   The DIDP exception for deliberative processes should not apply to any factual information, technical reports, or reports on the performance or effectiveness of a particular body or strategy, as well as any guideline or reasons for a decision which has already been taken or where the material has already been disclosed to a third party.

8.3.2   The Bylaws should be revised so that material may only be removed from the minutes of Board meetings where it would be subject to a DIDP exception. Decisions to remove material from the minutes of Board meetings should be subject to IRP appeal.

8.3.3   Where material is removed from the minutes of Board meetings, the default should be to allow for its release after a particular period of time, once the potential for harm has dissipated.

8.4 Improving ICANN's Anonymous Hotline (Whistleblower Protection)

8.4.1   The policy should be clearly posted as "Employee Hotline Policy and Procedures" on the ICANN public website under the "Who we Are" or "Accountability and Transparency" portions as soon as possible.

8.4.2   Related to the above, the term "whistleblower" should be included in introductory text explaining the policy so that an ICANN community member – who may not know that the policy is called a "Hotline Policy" – may easily locate it using "whistleblower" as the search term. For example: "The following outlines elements of ICANN's Hotline Policy and Procedures. Some organizations refer to this as "whistleblower protections.""

8.4.3   The definition of incidents reported should be broadened from "serious issues" to encourage the report of all issues and concerns related to behavior that may violate local laws and conflict with organizational standards of behavior. Furthermore, the policy should provide specific examples of such violations to guide a potential reporter.

8.4.4   ICANN need to improve internal administration of the Hotline process by employing case management software to better enable tracking, documenting, reporting, and anticipating potential problem areas.

8.4.5   ICANN should regularly provide employees with data about use of the Hotline, that details not only the frequency of use but also the types of incidents reported.

8.4.6   ICANN should not prioritize receipt of reports as "urgent" and "non-urgent," but treat every report as a priority warranting formal acknowledgment of receipt of a report within 48 hours at the latest.

8.4.7   ICANN needs to more effectively address potential fear of retaliation against the reporter by stating unequivocally that alleged retaliation will be investigated with

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[46] This recommendation is the subject of Implementation Guidance from Annex 9

the same level of rigor as alleged wrongdoing. ICANN should also guarantee remedy for reporters who suffer from retaliation as well as clarify that good-faith reporting of suspected wrong-doing will be protected from liability.

8.4.8   ICANN's Hotline Policy and Procedures should undergo a third-party audit least every two years to help identify gaps and enable timely corrections. The audit, in turn, should be posted on the public website.

Annexes

Note: Due to size considerations, all annexes are presented as separate documents.

- ⊙ Annex 1 – Diversity – Final Report and Recommendations

- ⊙ Annex 2 – Guidelines for Standards of Conduct Presumed to be in Good Faith Associated with Exercising Removal of Individual ICANN Board Directors (Guidelines for Good Faith) – Final Report and Recommendations

- ⊙ Annex 3 - Human Rights Framework of Interpretation (HR-FOI) – Final Report and Recommendations

- ⊙ Annex 4.1 – Jurisdiction – Final Report and Recommendations

- ⊙ Annex 4.2 – Jurisdiction – Minority Statement

- ⊙ Annex 4.3 – Jurisdiction – ICANN 60 Transcript of Jurisdiction Discussion at WS2 Face-to-Face meeting

- ⊙ Annex 5.1 – Ombuds – Final Report and Recommendations

- ⊙ Annex 5.2 – Ombuds – Report by the external evaluator

- ⊙ Annex 6 – SO/AC Accountability – Final Report and Recommendations

- ⊙ Annex 7 – Staff Accountability – Final Report and Recommendations

- ⊙ Annex 8.1 – Transparency – Final Report and Recommendations

- ⊙ Annex 8 .2 – Transparency – Minority Statement

- ⊙ Annex 9 – Implementation Guidance

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Annex 1 – Diversity Sub-Group Final Report and Recommendations – CCWG-Accountability WS2 – March 2018

ICANN

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Executive Summary

ICANN has since its incorporation in 1998 made an effort to ensure global diversity at various levels in its staff, Community, and Board. Since its inception in 1998, ICANN Bylaws mandate diversity among ICANN Board of Directors and some of its constituent bodies to ensure inclusiveness and representation of the global Internet community.

The CCWG-Accountability WS2 Diversity project obtains its mandate and scope from the ICANN Bylaws and the CCWG-Accountability, WS1 Final Report, which included the following as part of Recommendation 12:

> *"As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms:*
>
> ⊙ *Considering improvements to ICANN's standards for diversity at all levels."*

Annex 12, which details Recommendation 12, also included the following recommendations with regard to diversity:

> *"Comments received on the Second Draft Proposal revealed that incorporating the diversity component into Accountability and Transparency reviews may overburden Review Teams. Therefore, the CCWG-Accountability recommends the following actions with the view to further enhancing ICANN's effectiveness in promoting diversity:*
>
> ⊙ *Including diversity as an important element for the creation of any new structure, such as the Independent Review Process (IRP) (for diversity requirements for the panel) and the ICANN Community Forum.*
>
> ⊙ *Adding Accountability, Transparency, and Diversity reviews of SOs and ACs to structural reviews as part of Work Stream 2.*
>
> ⊙ *Performing, as part of Work Stream 2, a more detailed review to establish a full inventory of the existing mechanisms related to diversity for each and every ICANN group (including Stakeholder Groups, Constituencies, Regional At-Large Organizations, the Fellowship program, and other ICANN outreach programs). After an initial review of the current documents, it became clear that they do not address the full concerns raised by the wider community on the issue of diversity.*
>
> ⊙ *Identifying the possible structures that could follow, promote, and support the strengthening of diversity within ICANN.*
>
> ⊙ *Carrying out a detailed working plan on enhancing ICANN diversity as part of Work Stream 2.*
>
> ⊙ *Strengthening commitments to outreach and engagement in order to create a more diverse pool of ICANN participants, so that diversity is better reflected in the overall community and thus more naturally reflected in ICANN structures and leadership positions."*

The Diversity Sub-Group focused on requirements 3, 4, and 5 for its work. This report presents a discussion of diversity at ICANN and identifies a number of diversity elements by which diversity may be characterized, measured, and reported. It provides a summary of diversity provisions in the new ICANN Bylaws, and is informed by feedback from ICANN SO/AC/Groups through a Diversity Questionnaire. Finally, it proposes a number of recommendations by which ICANN may define, measure, report, support, and promote diversity.

RECOMMENDATIONS

Defining Diversity

Recommendation 1: SO/AC/Groups should agree that the following seven key elements of diversity should be used as a common starting point for all diversity considerations within ICANN:

- ⊙ Geographic/Regional Representation

- ⊙ Language

- ⊙ Gender

- ⊙ Age

- ⊙ Physical Disability

- ⊙ Diverse Skills

- ⊙ Stakeholder Group or Constituency

Recommendation 2: Each SO/AC/Group should identify which elements of diversity are mandated in their charters or ICANN Bylaws and any other elements that are relevant and applicable to each of its levels, including leadership (Diversity Criteria), and publish the results of the exercise on their official websites.

Measuring and Promoting Diversity

Recommendation 3: Each SO/AC/Group, supported by ICANN staff, should undertake an initial assessment of their diversity for all of their structures, including leadership, based on their Diversity Criteria and publish the results on their official website.

Recommendation 4: Each SO/AC/Group should use the information from their initial assessment to define and publish on their official website their Diversity Criteria objectives and strategies for achieving these, as well as a timeline for doing so.

Recommendation 5: Each SO/AC/Group, supported by ICANN staff, should undertake a regular update of their diversity assessment against their Diversity Criteria and objectives at all levels, including leadership. Ideally, this update should be carried out annually, but not less than

every three years. They should publish the results on their official website and use this information to review and update their objectives, strategies, and timelines.

Supporting Diversity

Recommendation 6: ICANN staff should provide support and tools for the SO/AC/Groups to assist them in assessing their diversity in an appropriate manner. ICANN should also identify staff or community resources that can assist SO/ACs or other components of the community with diversity-related activities and strategies.

Recommendation 7: ICANN staff should support SO/AC/Groups in developing and publishing a process for dealing with diversity-related complaints and issues.

Recommendation 8: ICANN staff should support the capture, analysis, and communication of diversity information, seeking external expertise if needed, in the following ways:

⊙ Create a Diversity section on the ICANN website.

⊙ Gather and maintain all relevant diversity information in one place.

⊙ Produce an Annual Diversity Report for ICANN based on all the annual information, provide a global analysis of trends, and summarize SO/AC/Groups recommendations for improvement, where appropriate. This should also include some form of reporting on diversity complaints.

⊙ Include diversity information derived from the Annual Diversity Report in ICANN's Annual Report.

Note: In the context of the Diversity Questionnaire and throughout this report, the term SO/AC/Groups refers to:

⊙ SO – ccNSO, GNSO, ASO

⊙ AC – ALAC, GAC, RSSAC, SSAC

⊙ Groups – ICANN Board, ICANN staff, NomCom, Stakeholder Group or Constituency, RALO

When recommendations in this report refer to ICANN, it means all of those entities included in SO/AC/Groups.

Scope

Diversity within ICANN is important in ensuring a comprehensive representation of the global Internet community, stakeholders, interest groups, staff, and CEO, and for ensuring that ICANN has an extensive range of perspectives in skills and experience. In Recommendation 12 of the CCWG-Accountability Work Stream 1 report, the group assessed diversity requirements based on ICANN's governance documents (Bylaws, AOC, ATRT1, ATRT2, documents from each of ICANN's SOs and ACs).

The following is excerpted directly from the CCWG-Accountability Work Stream 1 report:

> *"Comments received on the Second Draft Proposal revealed that incorporating the diversity component into Accountability and Transparency Reviews may overburden Review Teams. Therefore, the CCWG-Accountability recommends the following actions with the view to further enhancing ICANN's effectiveness in promoting diversity:*

1. *Including diversity as an important element for the creation of any new structure, such as the IRP – for diversity requirements for the panel – and the ICANN Community Forum.*

2. *Adding Accountability, Transparency, and Diversity reviews of SOs and ACs to structural reviews as part of Work Stream 2.*

3. *Performing, as part of Work Stream 2, a more detailed review to establish a full inventory of the existing mechanisms related to diversity for each and every ICANN group (including Stakeholder Groups, Constituencies, Regional At-Large Organizations, the Fellowship program, and other ICANN outreach programs). After an initial review of the current documents, it became clear that they do not address the full concerns raised by the wider community on the issue of diversity.*

4. *Identifying the possible structures that could follow, promote, and support the strengthening of diversity within ICANN.*

5. *Carrying out a detailed working plan on enhancing ICANN diversity as part of Work Stream 2.*

6. *Strengthening commitments to outreach and engagement in order to create a more diverse pool of ICANN participants, so that diversity is better reflected in the overall community and thus more naturally reflected in ICANN structures and leadership positions."*

The scope of the Diversity Sub-Group Task has been to focus on actions 3 to 5 identified in the CCWG-Accountability Work Stream 1 report above.

Background and Supporting Information

Background and supporting information is contained in Annexes as follows:

- ⊙ Annex 1.1: Lightning Talks on Diversity

- ⊙ Annex 1.2: Information and Resources from ICANN Staff on Diversity

- ⊙ Annex 1.3: Extracts from ICANN Bylaws Related to Diversity

- ⊙ Annex 1.4: Diversity Questionnaire

Description of Issues

Definition of Diversity

The working group began by agreeing on the meaning of diversity and identifying elements of diversity they considered important across ICANN as a whole. It was agreed that diversity within ICANN refers to: "the creation/existence of an inclusive environment in various aspects of stakeholder representation and engagement throughout all levels of the staff, community, and Board."

The Elements of Diversity

During the discussion, the working group identified a number of elements of diversity, which are presented and discussed below in no particular order:

- Geographic/Regional Representation

- Language

- Gender

- Age

- Physical Disability

- Diverse Skills

- Stakeholder Group or Constituency

In considering the following discussion, the Sub-Group recognizes that this list may not be exhaustive. However, all identified elements of diversity are relevant and may have varying importance in different contexts, situations, or groups within ICANN. Furthermore, the discussion of diversity is appropriate to general participation in ICANN and not just to leadership positions.

Geographic/Regional Representation: Ensures that there is a balanced geographical representation throughout the organization. While already applied to the selection of ICANN Board Members, discussions have indicated that this criterion should be extended to all levels within ICANN.

Language: All languages should be possible to be represented in ICANN for the organization to position itself as a fully global, multi-stakeholder entity. There is a need to improve the balance between the six official languages at ICANN: Arabic, Chinese, English, French, Russian, and Spanish. However, ICANN manages the IANA functions that offers IDN services to some entities who do not use any of these six official languages, and it is very important that ICANN improve its ability to communicate with this group of stakeholders so that they can be better engaged.

Gender: Equitable gender representation should be sought at all levels of ICANN. Currently, ICANN's approach to gender is binary: male or female. The representation of women in all areas of ICANN remains a challenge. It is critical that in all official Community roles, equality between genders be achieved. It is no longer acceptable that there be a gender difference of more than 10 percent in the makeup of any leadership group with regard to the community from which it is drawn. It is also important for ICANN to note the evolving issue of equitable consideration of more complex gender identification.

Gender Expression: Given societal changes and the acceptance of variance in gender that goes beyond the binary classifications, the sub-group considers it important to create a welcoming environment for persons who don't conform to binary gender. There should also be further work done to ensure that there are no obstacles to inclusion or to the participation of those with gender variance in the various leadership roles. ICANN should accept the voluntary open identification of those who are gender variant while at the same time respect those for whom such identification is a private matter. Consideration should be given to adding "do not wish to disclose," "other," or something similar, in the gender identification portion of forms.

Age: This element refers to variations that facilitate inclusion of the range of age groups across ICANN, from older generations through to the next generations. Moreover, youth engagement should be taken into consideration whenever possible in the activities of the ICANN Community, fostering the exchange of experience between generations.

Physical Disability: This element refers to the consideration of individuals across a range of different physical disabilities to participate in ICANN activities at various levels.

Diverse Skills: Diversity in skills contributes to the quality of ICANN policy formulation, decision-making, and outreach. It is important to highlight and advocate the advantages of individuals bringing different and diverse skill sets into ICANN's many activities. All activities and groups within ICANN will benefit from having a diverse range of skills available. Outcomes formulated from diverse skills and knowledge will have a higher probability of being accepted by a diverse community. Increased diversity would help expand the diversity of skills within ICANN. Thus, achieving diversity in skills should not be seen as a choice between skills and diversity which excludes participation, but rather one which values many skills sets and facilitates inclusion and broad participation.

Stakeholder Group or Constituency: Diversity of stakeholder group or constituency participation in ICANN is important in meeting the multistakeholder goals of ICANN. This may or may not require a designated representative of a stakeholder group to participate in the various activities. However, attention needs to be paid to the selection process to ensure participation by both declared stakeholder groups with direct interests as well as minorities and underrepresented groups.

Related to, but broader than, stakeholder group diversity is the requirement that all relevant views, opinions, and perspectives are appropriately taken into account in decision-making. ICANN will not be a truly diverse organization if it merely conforms to diversity relating to the fixed characteristics of participants, while systematically marginalizing minority viewpoints or beliefs from consideration in decision-making.

Measuring Elements of Diversity

Of importance to the working group is which of and how the various elements of diversity can be successfully measured. When measuring diversity, it is not sufficient to use a static approach or "head count." Rather, ICANN should consider a more dynamic approach. There are elements of diversity that are important to observe, but difficult to measure by head count. For example, determining "active diverse participation" requires a combination of quantitative (statistics) and qualitative (the quality of engagement, that is, whether they take the floor, make contributions, or participate in email exchanges). From the discussions, the following indicators of diversity has been identified, which are based on the definitions provided above:

Geographic/Regional Representation: This is currently being applied to the selection of ICANN Board Members appointed through the NomCom. The data shared by AFNIC and Dalila Rahmouni indicated the need for the statistics to be based on both a regional analysis and country-by-country analysis. The geographic diversity being considered is in three forms:

1. The region in which one lives.

2. The region in which one was born.

3. The region with which one identifies culturally.

This data could be collected using the best practices identified by the NomCom process, adding the granular approach suggested by AFNIC and Dalila Rahmouni.

Language: The ability of ICANN stakeholders, staff, and Board to communicate in the six official languages should be measured and consideration should be given to assessing the ability to communicate in selected other languages. The extent to which translation and interpretation services for these and any other languages are requested by, available, and used by the various parts of ICANN should also be measured and documented.

Gender: Currently, gender equality at ICANN is limited. Within the community, women represent 26 percent of Community leaders, although the overall percentage of women within the Community is not accurately known. There are no statistics available on the overall gender diversity (beyond the female-male binary) in ICANN. There are studies that show that when gender equality is hard to achieve in representation or leadership, extra effort needs to be made, and positions often need to be left open until a proper balance can be achieved.

Age: Data on the age range of ICANN participants, staff, and community leaders is not currently held, but potentially can be collected and documented through a voluntary process.

Physical Disability: Some data on the number of requests to ICANN staff to respond to various disability challenges experienced by participants at various levels may be available for analysis, but this data can be gathered more systematically in the future.

Diverse Skills: Consideration of the various skills sets relevant to different groups within ICANN (eg Board, SO/ACs, NomCom, etc) and the current representation of those skills within those groups would be worthy of data collection and analysis.

Stakeholder Group: Within some groups (e.g., GNSO constituencies, ccNSO), it would be expected that individuals may well come from similar backgrounds and hold similar interests. However, within other groups (e.g., Board, NomCom), the presence of individuals with diverse stakeholder backgrounds and interests is a key contributor to the quality of policy or decision making. Data on the diversity of stakeholder participation in relevant groups can be collected, recorded, and analyzed to identify any gaps where specific stakeholders are not yet represented.

Data Collection: Data collection focused on the diversity elements identified in this paper should include the following:

⊙ Participation/representation in:

- ICANN Meetings

- ICANN SO/ACs and Stakeholder Constituencies

- ICANN Board

- ICANN Staff

- Cross-Community Fora (e.g., CCWGs, PDP WGs)
-
- Leadership Roles/Positions in:

- ICANN SO/ACs and Stakeholder Constituencies

- ICANN Board

- ICANN Staff

- Cross-Community Fora (e.g., CCWGs, PDP WGs)

⊙ A reliable and stable data-collection and storage framework should be determined, which notes the methodology by which data will be sourced and the frequency with which the data needs to be updated. The methodology may include:

- Self-declaration

- From ICANN SO/AC/Group

- From ICANN staff

- Research

- A combination of the above

⊙ Upon self-declaration in the data-collection process, a confirmation of groups or self-identified minorities, disadvantaged populations or stigmatized groups can be described and

pathways to foster inclusion can be drawn upon this identification for recommendations to act on a process to ensure diversity as a long-term process.

⊙ Implementation of diversity within ICANN. During discussions, it emerged that a majority of the members of the Diversity Sub-Group agreed that the implementation of the recommendations should be left to the ICANN organization to determine appropriate mechanisms and structures.[1]

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[1] A number of CCWG-Accountability WS2 Diversity Sub-Group members thought this insufficient and believed it was essential to establish an Office of Diversity. The role of this office would be to independently support, record, and keep track of issues including complaints from the community on diversity issues within the organization. The office was envisaged as being a very specific structural adjustment to the organization, but it did not receive consensus from either the Diversity Sub-Group or the CCWG-Accountability plenary. However, further input and comments on this matter were sought from the wider community, which did not yield sufficient support to include this as a recommendation.

Current State of Play

Diversity provisions in ICANN Bylaws: The following summary is informed by a previous working party on diversity in WS1, which reviewed the status of diversity within ICANN groups, and by examination of the new ICANN Bylaws dated 1 October 2016. The new Bylaws reflect ICANN's commitment to diversity as a Core Value in Section 1.2(b):

> *"(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent…"*

Additionally, there are specific provisions regarding regional diversity for some ICANN groups, but no references to other elements of diversity identified in this report. Relevant extracts from the ICANN Bylaws are provided in Annex 1.3.

Diversity Requirements from the ICANN Bylaws

- **ICANN Board:** Requirements for diversity in the ICANN Board are contained in Sections 7.2, 7.3, 7.5, and 8.5 of the ICANN Bylaws. Relevant extracts are provided in Annex 1.3. Essentially, Section 7.2(b) of the ICANN Bylaws requires that:

> *"the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth…"*

while Section 7.5 goes on to state:

> *"One intent of these diversity provisions is to ensure that at all times each Geographic Region shall have at least one Director, and at all times no region shall have more than five Directors on the Board (not including the President). As used in these Bylaws, each of the following is considered to be a "Geographic Region": Europe; Asia/Australia/Pacific; Latin America/Caribbean islands; Africa; and North America."*

- **NomCom:** There are no Bylaws provisions for the diversity of the Nominating Committee itself, other than that resulting from the fact that members are appointed from the diverse groups within ICANN. However, in relation to the selection of Board Members, Section 8.5 of ICANN Bylaws state:

> *"In carrying out its responsibilities to select members of the ICANN Board (and selections to any other ICANN bodies as the Nominating Committee is responsible for under these Bylaws), the Nominating Committee shall take into account the continuing membership of the ICANN Board (and such other bodies), and seek to ensure that the persons selected to fill vacancies on the ICANN Board (and each such other body) shall, to the extent feasible and consistent with the other criteria required to be applied by Section 4 of this Article, make*

selections guided by Core Value 4 in Article I, Section 2."

⊙ **ccNSO Council:** Section 10.3(a) of the ICANN Bylaws provide for some geographic considerations in the selection of ccNSO Council members:

> *"The ccNSO Council shall consist of three ccNSO Council members selected by the ccNSO members within each of ICANN's Geographic Regions in the manner described in Section 10.4(g) through Section 10.4(i); (ii) three ccNSO Council members selected by the ICANN Nominating Committee; (iii) liaisons as described in Section 10.3(b); and (iv) observers as described in Section 10.3(c)."*

⊙ **ASO:** Section 9.1(b) of the ICANN Bylaws recognizes that under the terms of the MoU signed between ICANN and the RIRs in October 2004, the NRO Number Council performs the role of the Address Council for the ASO. Geographic diversity on the Address Council is afforded by each RIR appointing its members.

⊙ **gNSO** Council: Section 11.3 of the ICANN Bylaws describes the selection of gNSO Council members. While there are no specific provisions for some aspects of diversity, stakeholder diversity is afforded by appointments from each stakeholder group.

⊙ **GAC:** No reference to diversity in ICANN Bylaws.

⊙ **SSAC:** No reference to diversity in ICANN Bylaws.

⊙ **RSSAC:** No reference to diversity in ICANN Bylaws.

⊙ **ALAC:** Section 12.2(d)(ii) of the ICANN Bylaws describes the selection of the 15 members of the At-Large Advisory Committee (ALAC). While there are no specific provisions for some aspects of diversity, geographic diversity is afforded by the requirement for three members to be appointed from each of the five geographic regions.

Diversity Provisions in Other ICANN Documents

⊙ **ATRT:** Section 4.6(b) of the ICANN Bylaws makes no explicit requirements for diversity to be addressed as an issue in Accountability and Transparency Reviews. There have been some references to diversity in past Reviews, but no specific recommendation with regard to Board/SO/AC diversity has been made by the ATRT.

⊙ **ICANN Staff:** No reference to diversity within ICANN documentation.

Response to the Diversity Questionnaire

The working group on diversity sent out a questionnaire, attached at Annex 1.4, to assess the state of diversity within different groups and received the following responses:

⊙ Diversity is an important issue to the ICANN Community and groups within ICANN. While many of the identified elements of diversity are relevant to various groups within ICANN, the levels of importance of these elements varies from one stakeholder group to another.

- Geographical/regional diversity is of importance to the following groups that responded to the questionnaire: GAC, NCSG, and BC. However, it remains a challenge for contracted parties such as RrSG, which has its participation governed by the relationship of the members with ICANN. SSAC considers geographic/regional diversity of secondary importance in as far as its role within ICANN is concerned.

- Language diversity is of importance to the following groups:

  - GAC, who have requested interpretation in the six UN languages and Portuguese.

  - Business constituency, which ensures interpretation of their newsletter into French, Spanish, and Portuguese.

  - NCUC, which has organized outreach events and webinars in multiple languages.

  - RrSG also pointed out a need to adapt to language diversity, having translated its charter into Chinese due to community demand.

- Gender diversity is essential and part of the criteria for positions in leadership at NCSG. It is also identified as important to BC, of secondary importance to SSAC, and a challenge to achieve in all groups.

- Age diversity is limited to the level of representation within various groups. Despite ICANN's recent regional programs, such as Nextgen, to encourage participants from 18-30 years old to volunteer at AC/SOs the responses received from the questionnaire indicate:

  - RrSG pointed out limitation of participation by age due to the nature in which they are constituted.

  - Both BC and NCUC have pointed out investing in training and mentorship programs.

  - Several groups signaled efforts towards capacity building to newcomers in the community.

However, for all the groups, there were no indications provided of their respective age representation range.

- Physical disability representation is limited to those able to participate within the various groups. Only RrSG mentioned considering physical disability in level of representation.

- Diverse skills are of primary importance to the role and function of SSAC and BC. GAC also noted taking skill set into account when considering the composition of members to their observers group. NCSG takes into account unique skills in their membership composition. RSSAC sees skills as a diversity element in which they are limited by the composition of its associate organizations. The Board, however, highlighted skills as the first priority in its consideration of elements of diversity.

- A diversity of stakeholder group/constituencies is of importance to the NCSG, but not a structure present in the other groups. The Board noted the importance of stakeholder group

diversity for the whole ICANN ecosystem and emphasized the importance to not discriminate any specific stakeholder group or any other element of diversity.

Additional Elements of Diversity

Each of the groups does have some elements of diversity that are important to them based on their role within ICANN, but not necessarily important to other groups across ICANN. Some of the additional elements of diversity received include:

- ⊙ **SSAC:** Of secondary relevance or lesser importance to skills, SSAC identified career background, time involved in ICANN, education, and sexual orientation.

- ⊙ **GAC:** Developed, developing, and underserved regions.

- ⊙ **RrSG:** Varying business models, varying resources.

- ⊙ **NCSG:** Sexual orientation, less-developed regions, and mixed backgrounds.

- ⊙ **BC:** Varying types of businesses, varying sizes of businesses, and varying viewpoints.

Current Measurement of Diversity

SSAC, NCSG, and BC have indicated in their responses that they undertake measurement for the diversity elements that are important to them. This is achieved through various mechanisms presented as follows: surveys; tracking of participation in activities, such as outreach programs, mentorship programs, and webinars. Measurement of diversity in ICANN is low since it has not received sufficient attention to by all the groups that have responded to the questionnaire. GAC requests that a matrix for measuring diversity be developed to guide how diversity can be measured to enable these groups to appropriately respond to the question. NCUC has a mentorship program designed to ascertain a quantity of members with structural barriers to participation and up-skill them, enabling more participation in its processes.

Educational and Informational Initiatives

The groups that responded have held outreach sessions, workshops, newcomer education, newsletters, and translation of various communication materials. BC and NCSG seem to pay more attention to diversity educational and informational concerns amongst the responses received. None of the SO/ACs' educational or informational initiatives pointed out having an evaluation process of such initiatives, or even discussions about how they can evolve.

Formal and Informal Practices and Policies

Based on the received responses, SSAC has an unwritten policy to promote diversity by taking into consideration diversity aspects of secondary importance in a situation where diversity aspects of primary importance are met. RrSG and BC have budget allocations to facilitate diversity participation in their activities. NCSG informally strives to facilitate diversity in its appointment to leadership roles and also invests in informal messaging channels initiated by their members to create speedier exchange of information to various regions.

In conclusion, while there are a number of existing mechanisms related to Board/NomCom or SO/AC diversity, these provisions are primarily related to geographic/regional or stakeholder elements of diversity. While some diversity arrangements exist within ICANN documents, diversity does not appear as one of the areas where ICANN continuously strives to improve.

Recommendations

This report offers a proposed common starting point for all diversity considerations within ICANN by identifying seven key elements of diversity. Each SO/AC/Group within ICANN should define what diversity means to them individually, initially in terms of these elements. This can be reviewed and augmented over time, but any revisions should always, as a minimum, include these elements.

Defining Diversity

Recommendation 1: SO/AC/Groups should agree that the following seven key elements of diversity should be used as a common starting point for all diversity considerations within ICANN:

- Geographic/Regional Representation

- Language

- Gender

- Age

- Physical Disability

- Skills

- Stakeholder Group or Constituency

Recommendation 2: Each SO/AC/Group should identify which elements of diversity are mandated in their charters or ICANN Bylaws and any other elements that are relevant and applicable to each of its levels, including leadership ("Diversity Criteria") and publish the results of the exercise on their official websites.

Measuring and Promoting Diversity

Once identification of the key elements of diversity is completed, each SO/AC/Group should perform an initial assessment of its diversity against their stated relevant elements for both participation and leadership. This information should then be used to formulate and publish on their official websites their diversity objectives and strategies for achieving these, as well as a timeline for doing so.

Having established a baseline, each SO/AC/Group should perform an annual update of their individual diversity assessment against their Diversity Criteria and objectives for both participation and leadership. They should use this information to review their objectives, strategies, and timelines, and publish this on their official website.

Recommendation 3: Each SO/AC/Group, supported by ICANN staff, should undertake an initial assessment of their diversity for all of their structures, including leadership, based on their defined Diversity Criteria and publish the results on their official website.

Recommendation 4: Each SO/AC/Group should use the information from their initial assessment to define and publish on their official website their Diversity Criteria, diversity objectives, and strategies for achieving these, as well as a timeline for doing so.

Recommendation 5: Each SO/AC/Group, supported by ICANN staff, should undertake a regular update of their diversity assessment against their Diversity Criteria and objectives at all levels, including leadership. Ideally this update should be carried out annually, but not less than every three years. They should publish the results on their official website and use this information to review and update their objectives, strategies, and timelines.

Supporting Diversity

ICANN staff should assist SO/AC/Groups by capturing, analyzing, and communicating diversity information. A Diversity section should be created on the ICANN website for the recording of all relevant diversity information in one place. This information should form the basis of an Annual Diversity Report that analyzes trends and complaints, and provides high-level information to be included in ICANN's Annual Report.

A process should be established for dealing with diversity-related issues and complaints by members of the ICANN Community.

Recommendation 6: ICANN staff should provide support and tools for the SO/AC/Groups to assist them in assessing their diversity in an appropriate manner. ICANN should also identify staff or community resources that can assist SO/ACs or other components of the community with diversity-related activities and strategies

Recommendation 7: ICANN staff should support SO/AC/Groups in developing and publishing a process for dealing with diversity-related complaints and issues.

Recommendation 8: ICANN staff should support the capture, analysis, and communication of diversity information, seeking external expertise if needed, in the following ways:

⊙ Create a Diversity section on the ICANN website.

⊙ Gather and maintain all relevant diversity information in one place.

⊙ Produce an Annual Diversity Report for ICANN based on all the annual information, provide a global analysis of trends, and summarize Community recommendations for improvement, where appropriate. This should also include some form of reporting on diversity complaints.

⊙ Include diversity information derived from the Annual Diversity Report in ICANN's Annual Report.

Note: In the context of the Diversity Questionnaire and throughout this report, the term SO/AC/Groups refers to:

- ⊙ SO – ccNSO, GNSO, ASO

- ⊙ AC – ALAC, GAC, RSSAC, SSAC

- ⊙ Groups – ICANN Board, ICANN staff, NomCom, Stakeholder Group or Constituency, RALO

When recommendations in this report refer to ICANN, it means all of those entities included in SO/AC/Groups.

Annex 1.1

LIGHTNING PAPERS ON DIVERSITY
(Presented at ICANN 56 in Helsinki)

At the onset of Work Stream 2 various lightning talks were presented to the CCWG-Accountability members highlighting the importance of diversity to ICANN. Of the lightning talks presented, two provided statistics from ICANN on diversity that have provided a starting point for discussions on diversity. The highlights of the reports are as follows:

AFNIC

Presented results of a pilot research on the extent of diversity within ICANN. Through the provision of a data-collection framework, and a snapshot of ICANN's current diversity metrics, the pursued goal of the publication was to enable:

⊙ In the short term, a quick and fact-based assessment of the current situation.

⊙ In the medium to long term, a clear baseline for tracking progress.

The initial effort focused on 190 ICANN Community leaders. These 190 individuals had at least one of the following roles within ICANN at the time of collection (April 2016):

⊙ Board Director

⊙ Supporting Organization or Advisory Committee member of the Council or equivalent

⊙ gNSO Constituency Executive Committee or Bureau member

⊙ Nominating Committee member

⊙ CCWG-Accountability members

This analysis had led to the following early findings:

⊙ ICANN community largely remains North American Region centric. Close to 40 percent of the 190 leaders considered in this study are from the North American Region. This is by far the largest delegation of the ICANN leaders population. On the other hand, Africa, Latin America, and Asia are underrepresented.

⊙ The dominance of native English speakers within ICANN is very strong. Close to two-thirds of the ICANN leaders speak English as their mother tongue. The repartition of languages within ICANN is in stark difference with the global population. It is unclear, of course, whether the fact that English is the working language is an outcome or a cause for this situation.

- Twenty-six percent of "ICANN leaders" are women. While this is obviously far from gender balance, it remains difficult to assess whether this ratio is representative of the population of ICANN participants in general. This ratio was not available at the time of writing. It is hard to find a reason for the very limited representation of women within the ICANN Board (4 out of 16) and Nomcom (2 out of 20). It would be useful to assess whether the gap in the Board is related to the gender imbalance in the Nominating Committee.

- Across the population of 190 ICANN leaders, the business sector and academic/technical community are most prominently represented. They represent about 80 percent of the individuals in the study. On the other hand, civil society and government represent only 10 percent each approximately.

DALILA RAHMOUNI

Dalila Rahmouni presented a paper stating the importance of diversity to ICANN and proceeded to define diversity based on various elements. She observed that ICANN is not as diverse as it should be based on the following statistics from her paper:

- Forty percent of ICANN community leaders come from North America and more than 63% are native English speakers.

- Women represent only 26 percent of ICANN community leaders.

- Eighty percent of ICANN Community leaders come from the technical community and the private sector, while civil society and government representatives each account for only 10 percent.

She provided various recommendations on how this diversity imbalance can be addressed, and her recommendations have been considered in this report.

Annex 1.2

INFORMATION AND RESOURCES FROM ICANN STAFF ON DIVERSITY

Information

The WS2 – Diversity Sub-Group also invited various ICANN staff to share their observations and experiences from the data they have collected over time on diversity. DRDP staff were able to provide details on the sources of gender and geographic data across ICANN that was provided as input into WS2 on Diversity. They also outlined some of the challenges and opportunities that could help inform the community's discussion on next steps. The challenges can be summarized as follows:

1. **Gender:**

⊙ Gender is not always self-selected. Best practice would be to have all individuals self-select their gender.

⊙ Gender selection is often presented as a binary. Best practice would be to include male/female/other fields.

⊙ Gender data compiled from salutations in meeting registration data is self-selected. However, titles, such as Dr. or Professor, are aggregated into the "other" category along with blank or non-selected entries. Best practice would be to offer a gender field in registration forms that provides male/female/do not wish to disclose/other options; this field could either be required or optional.

2. **Region:**

⊙ Human Resources uses three regional categories and Meetings uses eight regional categories. Best practice would be to identify a benchmark (i.e., ICANN regions), so that data collected is consistent across the ICANN Community.

⊙ Most ICANN groups collect regional information only; if the regions change, that data would become unhelpful. If raw data were collected instead – such as the country – then the data could be reprocessed as necessary to align with any potential changes in ICANN's regional categories.

Resources

⊙ GNSO Review: The second independent review of the GNSO, part of the organizational reviews mandated by the ICANN Bylaws, addressed diversity. Final Report issued by the Independent Examiner: https://www.icann.org/en/system/files/files/gnso-review-final-15sep15-en.pdf.

Section 9.4 of the Final Report deals with diversity. Recommendations 6, 7, and 32-36 relate to diversity. In July 2016, GNSO established a GNSO Review Working Group to develop an implementation plan for Board-approved GNSO Review recommendations. The work of this group can be seen at: https://community.icann.org/display/GRWG/GNSO+Review+Working+Group+Home.

⊙ For statistics on diversity of past AoC Review Teams, please see AoC and Organizational Review presentation in Dublin at ICANN54: https://meetings.icann.org/en/dublin54/schedule/wed-aoc-org-reviews/presentation-aoc-org-reviews-21oct15-en, slide 8.

⊙ ICANN 51 Los Angeles – "Showcasing Positive Trends and Business Diversity at ICANN Public Meetings": https://www.icann.org/news/blog/icann-51-los-angeles-showcasing-positive-trends-and-business-diversity-at-icann-public-meetings.

⊙ Afnic report on ICANN diversity

  ⦿ Article about the report: http://www.circleid.com/posts/20160620_diversity_is_neither_an_option_nor_secondary_requirement_for_icann/.

  ⦿ The report in English: https://www.afnic.fr/medias/documents/Dossiers_pour_actualites/2016_Icann_Diversity_Data.pdf.

  ⦿ The report in French: https://www.afnic.fr/medias/documents/Dossiers_pour_actualites/2016_Donnees_Diversite_ICANN.pdf.

⊙ On 26 June at ICANN56 in Helsinki, Dalila Rahmouni and Mathieu Weill presented lightning talks to the CCWG-Accountability on this topic. To view the presentations, please see: https://community.icann.org/x/rBWOAw.

⊙ Quarterly stakeholder call presentation includes data on Global Stakeholder Engagement by region: https://www.icann.org/en/system/files/files/quarterly-report-18aug16-en.pdf, slide 27.

WS1 WP3 Sub-Group Materials

⊙ https://community.icann.org/display/acctcrosscomm/Diversity

⊙ https://community.icann.org/download/attachments/56141553/Diversity_PC2.docx?version=1&modificationDate=1444735192000&api=v2

⊙ https://community.icann.org/download/attachments/56141553/WP3%20Diversity.docx?version=1&modificationDate=1444293034000&api=v2

Annex 1.3

EXTRACTS FROM ICANN BYLAWS RELATED TO DIVERSITY

Section 7.2 DIRECTORS AND THEIR SELECTION; ELECTION OF CHAIR AND VICE-CHAIR

(b) In carrying out its responsibilities to nominate the Directors for seats one through eight for designation by the EC, the Nominating Committee shall ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 7.3, Section 7.4, and Section 7.5. At no time when it makes its nomination shall the Nominating Committee nominate a Director to fill any vacancy or expired term whose designation would cause the total number of Directors (not including the President) from countries in any one Geographic Region to exceed five; and the Nominating Committee shall ensure when it makes its nominations that the Board includes at least one Director who is from a country in each ICANN Geographic Region ("Diversity Calculation").

(c) In carrying out their responsibilities to nominate Directors for Seats 9 through 15 for designation by the EC, the Supporting Organizations and the At-Large Community shall seek to ensure that the Board is composed of Directors who, in the aggregate, display diversity in geography, culture, skills, experience, and perspective, by applying the criteria set forth in Section 7.3, Section 7.4 and Section 7.5. The Supporting Organizations shall ensure that, at any given time, no two Directors nominated by a Supporting Organization are citizens from the same country or of countries located in the same Geographic Region.

Section 7.3 CRITERIA FOR NOMINATION OF DIRECTORS

(c) Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria set forth in Section 7.3.

Section 7.5. INTERNATIONAL REPRESENTATION

In order to ensure broad international representation on the Board, the nomination of Directors by the Nominating Committee, each Supporting Organization and the At-Large Community shall comply with all applicable diversity provisions of these Bylaws or of any memorandum of understanding referred to in these Bylaws concerning the Supporting Organization. One intent of these diversity provisions is to ensure that at all times each Geographic Region shall have at least one Director, and at all times no Geographic Region shall have more than five Directors on the Board (not including the President). As

used in these Bylaws, each of the following is considered to be a "Geographic Region": (a) Europe; (b) Asia/Australia/Pacific; (c) Latin America/Caribbean islands; (d) Africa; and (e) North America. The specific countries included in each Geographic Region shall be determined by the Board, and Section 7.5 shall be reviewed by the Board from time to time (and in any event at least once every three years) to determine whether any change is appropriate, taking account of the evolution of the Internet.

Section 8.5. DIVERSITY

In carrying out its responsibilities to nominate Directors to fill seats one through eight (and selections to any other ICANN bodies as the Nominating Committee is responsible for under these Bylaws), the Nominating Committee shall take into account the continuing membership of the Board (and such other bodies), and seek to ensure that the persons it nominates to serve as Director and selects shall, to the extent feasible and consistent with the other criteria required to be applied by Section 8.4, be guided by Section 1.2(b)(ii).

Section 10.3. ccNSO COUNCIL

(a) The ccNSO Council shall consist of three ccNSO Council members selected by the ccNSO members within each of ICANN's Geographic Regions in the manner described in Section 10.4(g) through Section 10.4(i); (ii) three ccNSO Council members selected by the ICANN Nominating Committee; (iii) liaisons as described in Section 10.3(b); and (iv) observers as described in Section 10.3(c).

Section 11.3. GNSO COUNCIL

(a) Subject to Section 11.5, the GNSO Council shall consist of:

I. *Three representatives selected from the Registries Stakeholder Group*
II. *Three representatives selected from the Registrars Stakeholder Group*
III. *Six representatives selected from the Commercial Stakeholder Group*
IV. *Six representatives selected from the Non-Commercial Stakeholder Group*
V. *Three representatives selected by the ICANN Nominating Committee, one of which shall be non-voting, but otherwise entitled to participate on equal footing with other members of the GNSO Council including (e.g., the making and seconding of motions and of serving as Chair if elected). One Nominating Committee appointee voting representative shall be assigned to each House (as described in Section 11.3(h)) by the Nominating Committee.*

Section 12.2(d) At-Large Advisory Committee

(ii) The ALAC shall consist of (A) two members selected by each of the Regional At-Large Organizations (RALOs) established according to Section 12.2(d)(vii), and (B) five members selected by the Nominating Committee. The five members selected by the Nominating Committee shall include one citizen of a country within each of the five Geographic Regions established according to Section 7.5.

Annex 1.4

DIVERSITY QUESTIONNAIRE

The CCWG-Accountability Work Stream 2 Diversity Sub-Group wishes to gather information from ICANN SO/AC/Groups on their current consideration of diversity and any actions they undertake to promote diversity. In this context, the term SO/AC/Groups refers to:

- ⊙ SO – ccNSO, GNSO, ASO

- ⊙ AC – ALAC, GAC, RSSAC, SSAC

- ⊙ Groups – ICANN Board, ICANN Staff, NomCom, Stakeholder Group or Constituency, RALO

Other groups and individuals are also welcome to complete this questionnaire and are requested to indicate their special interest and/or affiliation.

The Diversity Sub-Group has identified the following non-exhaustive list of elements of diversity as potentially relevant to ICANN SO/AC/Groups:

A. Geographic/Regional Representation

B. Language

C. Gender

D. Age

E. Physical Disability

F. Diverse Skills

G. Stakeholder Group or Constituency

Your cooperation is sought to answer the following questions:

1. What relative importance does your SO/AC/Group give to these seven dimensions of diversity?

2. What, if any, additional dimensions of diversity are important to your SO/AC/Group?

3. How, if at all, does your SO/AC/Group measure and track diversity issues related to its work?

4. How, if at all, does your SO/AC/Group seek to promote diversity in its membership, its active participation, and its leadership?

5. What, if any, educational and informational initiatives does your SO/AC/Group pursue to promote diversity awareness?

6. What, if any, formal or informal practices or written or unwritten policies are pursued in your SO/AC/Group to promote diversity?

You are also welcome to append any additional general comments on the topic of diversity.

One World, One Internet

Annex 2 – Guidelines for Good Faith Sub-Group Final Report and Recommendations – CCWG-Accountability WS2 – March 2018

ICANN

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Executive Summary

The CCWG-Accountability Work Stream 2 (WS2) was tasked with creating a framework for community members to propose removal of Directors in a manner that would allow individuals acting on behalf of their supporting organization or advisory committee to benefit from the indemnification clause enshrined in ICANN's Bylaws as amended on 1 October 2016. The goal was to find the right balance between encouraging good faith behavior from the community without discouraging exercise of the community power to remove Directors.

The CCWG-Accountability WS2 opted for a minimalist approach that leaves discretion to the SO/AC as to what process to follow, provided there is some process that can be documented and explained to other SO/ACs that are acting in the capacity of Decisional Participants within the Empowered Community (EC) as defined in ICANN's Bylaws.[1] Adherence to the guidelines should be sufficient to demonstrate the good faith required to trigger the indemnity. The result is that individuals who are representing their communities in a Director-removal process are shielded from the costs of responding to Director-initiated actions during or after the escalation and enforcement process for Director removal.

Description of Issue

Effective 1 October 2016, ICANN's Bylaws grants the multistakeholder community power through the EC mechanism to remove Board Members. Any Director designated by the EC may be removed without cause.[2] This new level of Director accountability and corresponding community responsibility are based on recommendations developed in the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 (WS1) Recommendations.[3]

Decisional Participants may be any SO/AC that is a member of the EC. In the event that a Decisional Participant endeavors to remove an individual Board Member, the actions of persons who are members of the leadership council (or equivalent body) of the Decisional Participant or a representative of a Decisional Participant in the EC Administration who is a party or threatened to be a party to any proceeding in connection with a Board Member's removal or recall pursuant to the Bylaws are indemnified against costs associated with the proceeding.[4] These persons are referred to as the "Indemnified Party" throughout the remainder of this report. The indemnification is conditioned on the fact that the Indemnified Party has acted in good faith.[5] The challenge was to create guidelines for conduct that would be considered good faith actions on the part of the Indemnified Party in order for the indemnification to apply while leaving the widest area of discretion for the SO/ACs. The absence of good faith leaves the Indemnified Party vulnerable to the costs of any proceeding that a Director may initiate in connection with removal or recall according to the Bylaws. The indemnification was crafted with the specific action of Director removal in mind. Indemnified Parties are protected from

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[1] ICANN Bylaws Article 6, Section 6.1 Composition and Organization of the Empowered Community
https://www.icann.org/resources/pages/governance/bylaws-en/#article6
[2] ICANN Bylaws Article 7, Section 7.11 Removal of a Director or Non-Voting Liaison
https://www.icann.org/resources/pages/governance/bylaws-en/#article7
[3] See https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf
[4, 5] ICANN Bylaws Article 20, Section 20.2 Indemnification with Respect to Director Removal
https://www.icann.org/resources/pages/governance/bylaws-en/#article20

expenses, judgements, fines, settlements, and other amounts that may be incurred in any such action.

As Directors may be removed for any reason, the guidelines were crafted in a way to avoid manufacturing cause through mandating specific conditions or circumstances that must be met in order for the process to commence. There is an inherent tension between creating a process that meets a legal threshold of good faith and avoiding the creation of a list of causes. For example, there were discussions as to whether SO/AC-appointed Directors should be notified of SO/AC expectations within a specified period of time upon taking a seat on the Board. It was concluded that any sort of requirement of that nature would, in fact, give rise to a list of causes and would run counter to the intentions of the WS1 recommendations. Good faith speaks to the intention of the Indemnified Party rather than the action of the Director. As long as the Indemnified Party participant is truthful, acting for the benefit of the community, and following established, transparent procedures, the good faith standard should be met.

Recommendations

Proposed Guidelines

The proposed guidelines apply to all Board seats, whether the Director is appointed by the SO/AC or the ICANN Nominating Committee (NomCom), and are as follows:

1. **Petitions for removal: may be for any reason, and must:**

    a. May for any reason; and

    b. Must:

        I. Be believed by the Indemnified Party to be true.

        II. Be in writing.

        III. Contain sufficient detail to verify facts, if verifiable facts are asserted.

        IV. Supply supporting evidence if available/applicable.

        V. Include references to applicable Bylaws and/or procedures if the assertion is that a specific Bylaw or procedure has been breached.

        VI. Be respectful and professional in tone.

2. **SO/AC's shall have procedures for consideration of board removal notices to include:**

    a. Reasonable time frames for investigation by SO/AC councils or the equivalent decision-making structures if the SO/AC deems that an investigation is required.

    b. Period of review by the entire membership of the SO/AC, provided the SO/AC organizational structure customarily provides review for individual members; otherwise,

period of review by those empowered to represent the SO/AC in decisions of this nature.

   c. Consistent and transparent[6] voting method for accepting or rejecting a petition; such voting maybe be by the entire membership or those empowered to represent the SO/AC in decisions of this nature.

   d. Documentation of the community process and how decisions are reached.

Standalone Recommendations

In addition to the proposed guidelines, which are intended to trigger the indemnity under ICANN Bylaws Article 20, Section 20.2, two other recommendations were developed that may be helpful to the community as standalone items:

1. A standard framework be developed and used to raise the issue of Board removal to the respective body – either the specific SO/AC who appointed the member or the Decisional Participant in the case of a Nom Com appointee. The framework would be in the context of developing a broader framework for implementing powers and entering into the discussions contemplated by WS1. This framework could be developed by a new group specifically formed for that purpose.

2. Implement the guidelines as a best practice to apply to all discussions even if not covered by the indemnities contemplated under Article 20. There may be discussions around rejecting a budget or rejecting a proposed standard that would benefit from a good faith process. The guidelines for engaging discussions around removal could be adopted as a universal standard given that they are broad enough to encompass any discussion.

Requirements for Recommendations

In terms of the proposed guidelines, there are no special requirements for the implementation of the recommendations. However, should the first standalone recommendation be accepted, then it would most likely require a new group to consider what a notification form may look like and, to the extent that a broader framework is developed, how it fits in.

Rationale for Recommendations

These recommendations represent a "minimalist" set of guidelines that will put the responsibility of putting specific processes in place by each SO/AC. This will avoid interference in the decision-making process of any particular SO/AC. The SO/ACs may have different expectations and standards for Directors who are chosen to represent them. The guidelines note that each SO/AC should have a decision-making process and the process must include a means to document the decision made, including verification and the steps taken to reach the decision. The objective is to not to be too prescriptive but establish principles for fair and reasonable conduct for the Community even if different internal standards apply for different interests. Per the guidance from the WS1 discussions, the CCWG-Accountability WS2 will not

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[6] For clarity, "transparency" does not exclude use of a secret ballot. Transparency as contemplated by this section means disclosure of the process. As long as the SO/AC discloses that voting method that is sufficient to meet the threshold of transparency.

be listing specific causes of action. Each SO/AC could have a different reason for Board removal, but all SO/ACs must follow the same guidelines in order to elevate their concerns to an action for removal in good faith. The proposed action may be subjective, but should be able to be explained and accepted by others.

Legal Review of Recommendations

The CCWG-Accountability WS2 submitted the recommendations to ICANN Legal for review with two questions:

1. Whether there is any conflict of interest were ICANN's internal legal team to review the recommendations rather than independent counsel

2. Whether the proposed recommendations would meet the threshold of "good faith" that may be required under California law?

Samantha Eisner, Deputy General Counsel for ICANN, responded to question 1 on 15 November 2016 as follows:

> *"There has not been any conflict assessment of this issue, and indeed no conflict arises.*
> *The ICANN legal team does not report to the Board. The ICANN legal team's obligation is to the organization and to uphold the Bylaws. The ICANN Bylaws now include a right of the community to directly remove Board members, and also allow for, at Section 20.2, the indemnification of community members who participate in good faith in those removal proceedings. It is ICANN's obligation to uphold that Bylaw.*
> *Providing guidelines to the community on what "good faith" could mean in these circumstances was recommended by ICANN. It is of benefit to all - the ICANN community, board and organization, to understand and agree upon what conduct is appropriate in these circumstances. This is a collective - and not an adverse - effort. The guidelines developed by the community are not expected to be overly burdensome or restrictive, but to provide some path of "if you do x while participating in the conversation, that tends to demonstrate good faith".*
>
> *There could be concerns, of course, depending on how the guidelines are drafted, as to whether they meet the requirements of law. For example, a guideline that suggests that "good faith" participation allows willful avoidance of facts (which, of course, is not part of the group's deliberations to date) should not be acceptable to any attorney reviewing the document, whether they are with ICANN's legal department or external. It will also be very important to understand if the ICANN legal department identifies any potential legal issues with the text as drafted, as that could impact whether the Board is in a position to accept the recommendation based on issues of legality.*
>
> *We recommend, as a starting point, that the guidelines be presented to the ICANN legal department for review. If it were to occur that the ICANN legal department raises a challenge to any of the guidelines, and it is believed by those participating in the discussion that there would be a benefit to obtain*

additional advice or a different viewpoint, that might be an appropriate point for reference to external counsel."[7]

With regard to question 2, ICANN Legal has advised that they *don't see any concerns or conflicts between the recommendations of the report and understand practices of "good faith" conduct.*[8]

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[7] Email response from ICANN Deputy Counsel, Samantha Eisner to Karen Mulberry and CCWG WS2 Legal Committee forwarded to Lori Schulman on November 15, 2016.
[8] Email response from ICANN Deputy Counsel, Samantha Eisner to Lori Schulman with a copy to CCWG WS2 Legal Committee, ACCT-Staff and Karen Mulberry on January 23, 2017.

Assessment of Recommendations

How do the Recommendations Meet the NTIA Criteria?

The guidelines assist the community with the implementation of Recommendation #2, they are consistent with rationale in support of NTIA requirements as more specifically described in Annex 02.[9] With regard to the fifth articulated criterion, the NTIA did not play a role in Director removal. There is no specific role to replace.

Are the Recommendations Compliant with WS1 Recommendations?

Annex 02 – Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement[10]

1. **Engagement:** The recommendations are focused on the escalation phase when engagement has failed to produce a desired outcome for the Community.

2. **Escalation:** The recommendations focus on the escalation portion of the report. They provide a framework for formulating a rational approach to raising the discussion of Board removal, while providing the SO/AC's latitude for their own internal decision-making. It will be up to each Decisional Participant (DP) to convince other DPs that escalation and, ultimately enforcement, are necessary. In the case of an individual SO/AC, the guidelines will assist the voting process that requires a majority in order for the escalation to move to the Community Forum phase.

3. **Enforcement:** As per the WS1 report, escalation is a prerequisite for enforcement. If the guidelines are followed, then the Decisional Participants will have the tools to enforce provided that the escalation has not resulted in a satisfactory resolution. In that case, the preparation will have been done in "good faith" and the indemnification will apply.

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[9] WS1 Annex 02 – Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement, page 24   https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf
[10] WS1 Annex 02 – Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement, page 11 https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf

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2. ICANN Bylaws as amended October 1, 2016
   https://www.icann.org/resources/pages/governance/bylaws-en

3. CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations
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Annex 3 – Human Rights Framework of Interpretation (HR-FOI) Final Report and Recommendations – CCWG-Accountability WS2 – March 2018

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Prelude

With ICANN's most recent Bylaw change, a Human Rights Core Value[1] was added to ICANN's Bylaws. In order for this Bylaw to come into effect, a Framework of Interpretation should be "approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2," as outlined in section 27.2 of ICANN's Bylaws.[2]

The first part of this document is the proposed Framework of Interpretation for the ICANN Bylaw on Human Rights. The second part of this document addresses the "considerations" listed in paragraph 24 of Annex 12 of the CCWG-Accountability Final Report.

This document was produced by the Cross Community Working Group on Enhancing ICANN's Accountability Sub-Group on Human Rights (CCWG SG HR) for discussion in the Cross Community Working Group on Enhancing ICANN's Accountability (CCWG-Accountability) plenary. This is a full consensus document produced by the CCWG-Accountability SG HR.

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[1] (viii) Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.

[2] "Section 27.2. HUMAN RIGHTS (a) The Core Value set forth in Section 1.2(b)(viii) shall have no force or effect unless and until a framework of interpretation for human rights ("FOI-HR") is (i) approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2, with the CCWG Chartering Organizations having the role described in the CCWG-Accountability Charter, and (ii) approved by the Board, in each case, using the same process and criteria as for Work Stream 1 Recommendations. (b) No person or entity shall be entitled to invoke the reconsideration process provided in Section 4.2, or the independent review process provided in Section 4.3, based solely on the inclusion of the Core Value set forth in Section 1.2(b)(viii) (i) until after the FOI-HR contemplated by Section 27.2(a) is in place or (ii) for actions of ICANN or the Board that occurred prior to the effectiveness of the FOI-HR.

ICANN BYLAW LANGUAGE	FRAMEWORK OF INTERPRETATION
"within the scope of its Mission"	ICANN's Mission is set forth in Section 1.1 of the ICANN Bylaws (see Annex A: The Mission establishes the boundaries of ICANN's Core Value to respect human rights. Due to the broad scope of human rights, attention to this limitation is necessary to ensure that ICANN will not step outside of its defined scope and mission. In this regard, any interpretation of the application of the Human Rights Core Value – provided in the Framework of Interpretation – must be checked against ICANN's Mission to ensure compliance with the general limitations provided in this part of the Bylaw.
"within the scope of other Core Values"	It is important to stress that the Human Rights Bylaw is a Core Value and not a Commitment. *"The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities."* (Bylaws, Section 1.2(c)) In contrast, Core Values are not necessarily intended to apply consistently and comprehensively to ICANN's activities. Rather, the Core Values are subject to the following interpretive rules in the Bylaws: "[…] *The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission."* (Bylaws, Section 1.2(c)) The Human Rights Bylaw needs to be balanced against other Core Values in the case where not all Core Values can be fully adhered to simultaneously. Furthermore, this interpretive rule recognizes that there must be flexibility in applying the Core Values, based on "many factors" that occur in "any given situation." This is also made clear in the Core Values section of the Bylaws, which states that the Core Values are intended to "guide" ICANN in its "decisions and actions." The Bylaws also prominently stress that the Core Values have to be "respected." *"ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values."* (Bylaws, Section 1.2.) Finally, there is no standing hierarchy in the treatment of the different Core Values; they are guiding elements that need, as appropriate, to be

	taken into account. The balance must be determined on a case-by-case basis, on the basis of proportionality, without automatically favoring any particular Core Value. The result of a balancing test must not cause ICANN to violate any Commitment, as Commitments are binding. The other Core Values are set forth in Annex B of this document.
"respecting"	ICANN will respect human rights, as required by applicable law (see below on applicable law). In order to do so, ICANN should avoid violating human rights, and take human rights into account in developing its policies as well as in its decision-making processes.

| "internationally recognized human rights" | There are a range of international human rights declarations and covenants that could be relevant to ICANN's Human Rights Core Value.[3] However, none of these instruments has a direct application to ICANN because they only create obligations for states. By committing to one or more of these international instruments, nation states are expected to embed human rights in their national legislation.

The reference to "internationally recognized human rights" in the Bylaw should not be read in isolation; rather, it must be considered together with, and limited by, the reference "as required by applicable law." As a consequence, under the Human Rights Core Value, international human rights instruments are not directly applicable to ICANN beyond what is provided for in applicable law. Rather, only those human rights that are "required by applicable law" will be relevant to ICANN.

Furthermore, depending on the jurisdiction in which ICANN operates, the law applicable to its operations may vary and thus the human rights applicable to ICANN's operations will vary as well.

Nevertheless, ICANN understands that internationally recognized human rights, including those expressed in the Universal Declaration of Human Rights, can guide its decisions and actions. |
|---|---|
| "as required by applicable law" | "Applicable law" refers to the body of law that binds ICANN at any given time, in any given circumstance and in any relevant jurisdiction. It consists of statutes, rules, regulations, etc., as well as judicial opinions, where appropriate. It is a dynamic concept inasmuch as laws, regulations, etc., change over time.

Applicable law can have disparate impacts on ICANN around the globe; for example, if ICANN employs personnel in different jurisdictions, then it must observe the appropriate labor laws in those various locales. Applicable law is thus a large body of law that eludes our ability to catalogue, but it is ascertainable in the context of a specific question or issue.

This limitation requires an analysis to determine whether any human right that is proposed as a guide or limitation to ICANN activities or policy is "required by applicable law." If it is, then abiding by the Core Value should include avoiding a violation of that human right. If the human right is not required by applicable law, then it does not raise issues under the Core Value. However, ICANN may still give this human right consideration, even though it is under no guidance to do so pursuant to the Core Values. |

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[3] Including, but not limited to:
  ● Universal Declaration of Human Rights
  ● International Covenant on Civil and Political Rights
  ● International Covenant on Economic, Social and Cultural Rights
  ● International Convention on Elimination of All Forms of Racial Discrimination
  ● Convention on the Elimination of all Forms of Discrimination Against Women
  ● Convention on the Rights of Persons with Disabilities
  ● UN Declaration on the Rights of Indigenous Peoples
  ● ILO's Declaration on Fundamental Principles and Rights at Work (applicable to ICANN's employees and workers)

"This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission or beyond obligations found in applicable law."	This sentence restates the basic concept that the Human Rights Core Value cannot create or be used to create any obligations that go beyond the limits of ICANN's Mission or applicable law.
"This Core Value does not obligate ICANN to enforce its human rights obligations or the human rights obligations of other parties, against other parties."	This part of the Bylaw draws the clear line between "respect" for human rights as a Core Value and any attempt to extend the Bylaw into requiring ICANN to enforce the human rights obligations of ICANN or any other party against other parties.

CONSIDERATIONS LANGUAGE (FROM ANNEX 12 CCWG REPORT, PARAGRAPH 24)	CONSIDERATIONS BY THE HUMAN RIGHTS SUB-GROUP
	The following part of the document addresses the "considerations" listed in paragraph 24 of Annex 12 of the CCWG-Accountability Final Report.
Consider which specific human rights conventions or other instruments, if any, should be used by ICANN in interpreting and implementing the Human Rights Bylaw.	ICANN, as a non-state private entity, is not a party to any human rights declaration, convention, or instrument. However, ICANN, the Community and the organization, could refer to any of the widely adopted human rights declarations, conventions, and other instruments[4] while taking human rights into account in its policies and operations. It should be noted that the Bylaw was not written with one specific human rights declaration, convention, or other instrument in mind.

With regard to the UN Guiding Principles for Business and Human Rights,[5] no consensus was reached as to their suitability for interpreting the Core Value. However, with regard to the implementation of the Core Value, certain aspects of the UN Guiding Principles for Business and Human Rights could be considered as a useful guide in the process of applying the Human Rights Core Value. There are certain Guiding Principles that may not be suitable for ICANN and others that might be applicable, depending on the circumstances. However, it is beyond the scope of this document to provide a detailed analysis of the Guiding Principles and their application, or not, in particular situations. To the extent that ICANN the organization is a business, it could consider certain aspects of the Guiding Principles as a useful guide when applying the Human Rights Core Value to its business activities.

In any case, a conflict between any Guiding Principle and an ICANN Bylaw provision or Article of Incorporation must be resolved in favor of the Bylaw or Article. The use of the Guiding Principles as potential guidance has to be carefully considered by each SO and AC as well as ICANN the organization. |

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[4] Including, but not limited to:
- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of all Forms of Discrimination Against Women
- Convention on the Rights of Persons with Disabilities
- UN Declaration on the Rights of Indigenous Peoples
- ILO's Declaration on Fundamental Principles and Rights at Work (applicable to ICANN's employees and workers)

[5] The "UN Guiding Principles for Business and Human Rights" is a non-binding document developed to provide guidance for business organizations.

The policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment [sic] to respect human rights.	In order to put the Human Rights Core Value into practice, ICANN, the community as well as the organization, will need to consider how to reflect this Core Value in their policy and operational processes. Each SO and AC should take the Core Value into consideration in its policy development or advisory role. It is up to each SO and AC, and ICANN the organization, to develop their own policies and frameworks to fulfill this Core Value. In doing so, the SOs and ACs, as well as ICANN the organization, should also take into account the requirement to balance the Core Values. The subgroup notes that the word "commitment" used in this sentence is not quite appropriate in the context of interpreting the Human Rights Core Value. There is a different section of the Bylaws that sets forth ICANN's "Commitments" (Section 1.2(a)). The Core Values (such as the Human Rights Core Value) are distinguished from the Commitments. The Bylaws state that "In performing its Mission, ICANN will act in a manner that … **respects** ICANN's Core Values" (Section 1.2; emphasis added) that "'Core Values' should also **guide** the decisions and actions of ICANN" (Section 1.2(b), emphasis added), and notes that "the specific way in which Core Values are **applied**, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated." (Section 1.2(c), emphasis added). Section 1.2(c) goes on to note: "perfect fidelity to all Core Values simultaneously" may not always be possible, and that "where one Core Value must be balanced with another ... the result ... must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission." As such, it would be more accurate to say that ICANN, the organization and the community, have an "obligation to respect and be guided by the Human Rights Core Value, as balanced with other Core Values where appropriate." A particular human right should not be considered in isolation since human rights are universal, indivisible, interdependent, and interrelated.
Consistent with ICANN's existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process.	The development of any new policies or frameworks that may be needed to apply the Human Rights Core Value will be dictated by the type of policy and how ICANN the organization and the community develop those policies. For example, "developing and recommending to the Board substantive policies relating to generic top-level domains" (Bylaws, 11.1) is the responsibility of the GNSO and any new or revised policies or frameworks, including any changes to the GNSO policy-development process, should be developed by the GNSO using that organization's policy and processes. The GNSO's policy-development processes provide for multistakeholder involvement in working groups developing these policies, and for public comment on any recommendations. Similarly, "developing and recommending to the Board global policies related to country code top-level domains" (Bylaws, Section 10.1(a)) is the responsibility of the country code Names Supporting Organization (ccNSO). Any new or revised policies or frameworks, including any changes to the ccNSO policy-development process, should be developed by the ccNSO using that organization's policy and processes.

	The review and development of recommendations on Internet Protocol (IP) address policy is the responsibility of the Address Supporting Organization (ASO). The ASO does not have a similar formal policy-development process to the ccNSO and the GNSO. Nonetheless, ASO should also consider how to apply the Human Rights Core Value.
	When developing corporate or operational policies, and executing its operations, ICANN the organization should take the Human Rights Core Value into account. In order to do so, ICANN the organization should propose a framework to the community, which should include multistakeholder involvement in its development, and regular review.
Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.	The interpretation of the Human Rights Core Value should be driven by the Framework of Interpretation. It is expected that the Core Value will be taken into account when future ICANN policies and procedures are developed and interpreted in accordance with the Framework of Interpretation.
	Supporting Organizations could consider defining and incorporating Human Rights Impact Assessments (HRIAs) in their respective policy-development processes. HRIAs should not consider particular human rights in isolation since they are universal, indivisible, interdependent, and interrelated. Given the interrelated nature of Core Values, the Supporting Organizations could also consider other Core Values, as part of the balancing required by the Bylaws.
	Advisory Committees could also consider similar measures defining and incorporating HRIAs in their respective processes. When examining its operations, ICANN the organization could consider instruments such as HRIAs to assess its impact on human rights. However, this is up to ICANN the organization to develop and implement. The results of such HRIAs should be reflected in ICANN's annual reporting.
Consider what effect, if any, this Bylaw will have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC)	ICANN's Mission, Commitments, and Core Values, including the Human Rights Core Value, should be taken into account by the SOs and ACs, and ICANN the organization when considering policy matters.
	The Board will need to take into account ICANN's Mission, Commitments, and Core Values, including the Human Rights Core Value, in considering all matters before the Board, which also includes advice given by the GAC.

ANNEX A

Section 1.1 of the ICANN Bylaws (ICANN Mission)

(a) *The mission of the Internet Corporation for Assigned Names and Numbers ("ICANN") is to ensure the stable and secure operation of the Internet's unique identifier systems as described in this Section 1.1(a) (the "Mission"). Specifically, ICANN:*

(i) *Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("DNS") and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ("gTLDs"). In this role, ICANN's scope is to coordinate the development and implementation of policies:*

- ⊙ *For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS including, with respect to gTLD registrars and registries, policies in the areas described in Annex G-1 and Annex G-2; and*

- ⊙ *That are developed through a bottom-up, consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.*

The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect to gTLD registrars and registries shall be deemed to be within ICANN's Mission.

(ii) *Facilitates the coordination of the operation and evolution of the DNS root name server system.*

(iii) *Coordinates the allocation and assignment at the top-most level of Internet Protocol numbers and Autonomous System numbers. In service of its Mission, ICANN (A) provides registration services and open access for global number registries as requested by the Internet Engineering Task Force ("IETF") and the Regional Internet Registries ("RIRs") and (B) facilitates the development of global number registry policies by the affected community and other related tasks as agreed with the RIRs.*

(iv) *Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, ICANN's scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.*

(b) *ICANN shall not act outside its Mission.*

(c) *ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.*

(d) *For the avoidance of doubt and notwithstanding the foregoing:*

(i) *the foregoing prohibitions are not intended to limit ICANN's authority or ability to adopt or implement policies or procedures that take into account the use of domain names as natural-language identifiers;*

(ii) *Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (C) below, and ICANN's performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers pursuant to these Bylaws ("Bylaws") or ICANN's Articles of Incorporation ("Articles of Incorporation"):*

(A)
(1) all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on 1 October 2016 [1], including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;

(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;

(B) any renewals of agreements described in subsection (A) pursuant to their terms and conditions for renewal; and

(C) ICANN's Five-Year Strategic Plan and Five-Year Operating Plan existing on 10 March 2016.

(iii)   *Section 1.1(d)(ii) does not limit the ability of a party to any agreement described therein to challenge any provision of such agreement on any other basis, including the other party's interpretation of the provision, in any proceeding or process involving ICANN.*

(iv)   *ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.*

ANNEX B

Other Core Values

(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;

(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market;

(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

(v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;

(vi) While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities;

(vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture;

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Annex 4.1 – Jurisdiction Sub-Group Final Report and Recommendations – CCWG-Accountability WS2 – March 2018

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Executive Summary

The CCWG-Accountability's Final Report for Work Stream 1 (WS1), Recommendation 12, proposed that a number of topics that were not essential for the transition and could not be completed in WS1 (due to time constraints of the transition) be undertaken in a Work Stream 2 (WS2) effort by the CCWG-Accountability. This recommendation was approved by the CCWG-Accountability's Chartering Organizations as well as the ICANN Board at its 10 March 2016 meeting. Annex 12 of the final report included the following requirement:

> *"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.*

> ⊙ *Consider potential Work Stream 2 recommendations based on the conclusions of this analysis.*

> *A specific Subgroup of the CCWG-Accountability will be formed to undertake this work."*

The Jurisdiction Sub-Group was created in June 2016 and held its first meeting on 25 August 2016. The Jurisdiction Sub-Group based its work on Annex 12 of the CCWG-Accountability Final Report. This proved somewhat challenging, as there are ambiguities in this text that led to some lack of clarity regarding both the scope and goals of the sub-group.

The sub-group proceeded to:

⊙ Discuss the topics of "confirming and assessing the gap analysis" and of changing ICANN's headquarters or jurisdiction of incorporation.

⊙ Work on refining the multiple layers of jurisdiction.

⊙ Prepare several working documents. These included one exploring the question: "What is the influence of ICANN's existing jurisdiction(s) relating to resolution of disputes (i.e., governing law and venue) on the actual operation of ICANN's policies and accountability mechanisms?"

⊙ Publish a questionnaire to allow the community to submit jurisdiction related issues for consideration by the sub-group.

⊙ Develop a series of jurisdiction-related questions for ICANN Legal, which were formally answered.

⊙ Undertake a comprehensive review of the litigations in which ICANN has been a party.

Based on this work, the sub-group developed a master list of "proposed issues" (Annex E). From this list, the sub-group prioritized, in the time remaining, the issues relating to OFAC sanctions and to the Choice of Governing Law and Venue Clauses in Certain ICANN Contract. After careful consideration of these issues, the sub-group reached consensus on recommendations for each of these.

In summary, the recommendations are:

Recommendations Relating to OFAC Sanctions and Related Sanctions Issues

The sub-group considered issues relating to government sanctions, particularly[1] U.S. government sanctions administered by the Office of Foreign Asset Control (OFAC). OFAC is an office of the U.S. Treasury that administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals.

⊙ **ICANN Terms and Conditions for Registrar Accreditation Application Relating to OFAC Licenses**

For ICANN to enter into a Registration Accreditation Agreement (RAA) with an applicant from a sanctioned country, it will need an OFAC license. Currently, "ICANN is under no obligation to seek such licenses and, in any given case, OFAC could decide not to issue a requested license."[2] This uncertainty could discourage residents of sanctioned countries from applying for accreditation.

The sub-group recommends that the above sentence should be amended to require ICANN to apply for and use best efforts[3] to secure an OFAC license if the other party is otherwise qualified to be a registrar (and is not individually subject to sanctions). During the licensing process, ICANN should be helpful and transparent with regard to the licensing process and ICANN's efforts, including ongoing communication with the potential registrar.

⊙ **Approval of gTLD Registries**

In the 2012 round of the New gTLD Program, it was difficult for residents from sanctioned countries to file and make their way through the application process. The Applicant Guidebook (AGB) states: "In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs (specially designated nationals) but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case,

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[1] In the future, if ICANN's activities are affected by other similar sanctions (e.g., similar in scope, type and effect and with similar methods of relief for entities not specifically sanctioned), the spirit of these recommendations should guide ICANN's approach.
[2] Terms and Conditions for Registrar Accreditation Application, Section 4. https://www.icann.org/resources/pages/application-2012-02-25-en
[3] The term "best efforts," as used throughout this Report, should be understood to be limited by "reasonableness," meaning that an entity (here, ICANN) must use its best efforts, except for any efforts that would be unreasonable. For example, the entity can take into account its fiscal health and its fiduciary duties, and any other relevant facts and circumstances. In some jurisdictions, this limitation is inherent in the use and meaning of the term. However, in other jurisdictions, this may not be the case, and thus it is necessary to explicitly state the limitation for the benefit of those in such jurisdictions.

however, OFAC could decide not to issue a requested license."

The sub-group recommends that ICANN should commit to applying for and using best efforts to secure an OFAC license for all such applicants if the applicant would otherwise be approved (and is not on the SDN list). ICANN should also be helpful and transparent with regard to the licensing process, including ongoing communication with the applicant.

- ⊙ **Application of OFAC Limitations by Non-US Registrars**

  It appears that some non-U.S.-based registrars might be applying OFAC sanctions with registrants and potential registrants, based on a mistaken assumption that they must do so simply because they have a contract with ICANN. Non-U.S. registrars may also appear to apply OFAC sanctions, if they "cut and paste" registrant agreements from U.S.-based registrars. While ICANN cannot provide legal advice to registrars, it can bring awareness of these issues to registrars.

  The sub-group recommends that ICANN clarify to registrars that the mere existence of their RAA with ICANN does not cause them to be required to comply with OFAC sanctions. ICANN should also explore various tools to remind registrars to understand the applicable laws under which they operate and to accurately reflect those laws in their customer relationships.

- ⊙ **General Licenses**

  OFAC "general licenses" cover particular classes of persons and types of transactions. ICANN could pursue general licenses to cover transactions integral to ICANN's role in managing the DNS and contracts for Internet resources, such as registries and registrars entering into Registry Agreements (RAs) and RAAs, Privacy/Proxy Accreditation, support for ICANN-funded travelers, etc. This would enable individual transactions to proceed without the need for specific licenses.

  A general license would need to be developed in conjunction with the U.S. Department of the Treasury, which must amend OFAC regulations to include the new license. This regulatory process may be a significant undertaking.

  The sub-group recommends that ICANN take steps to pursue one or more OFAC "general licenses." ICANN should first prioritize a study of the costs, benefits, timeline, and details of the process. ICANN should then pursue general licenses as soon as possible, unless it discovers significant obstacles. If so, ICANN should report this to the Community and seek its advice on how to proceed. If unsuccessful, ICANN needs to find other ways to remove "friction" from transactions between ICANN and residents of sanctioned countries. ICANN should communicate regularly about its progress, to raise awareness in the ICANN Community and with affected parties.

Recommendations relating to Choice of Law and Choice of Venue Provisions in ICANN Agreements

This sub-group considered how the absence of a choice of law provision in the base RA, the absence of a choice of law provision in the standard RAA, and the contents of the choice of venue provision in RA's could impact ICANN's accountability. These are standard-form contracts that are

not typically negotiated; changes are now determined through an amendment procedure (see, e.g., Art. 7.6 of the RA).

The sub-group understands that it cannot require ICANN to make amendments to the RA or the RAA. Rather, this recommendation suggests possible changes to the RA and RAA for study and consideration by ICANN the Organization, the GNSO and the contracted parties.

The RA and RAA do not contain choice of law provisions. The governing law is thus undetermined, until determined by a judge or arbitrator or by agreement of the parties.

⊙ **Choice of Law and Venue Provisions in the Registry Agreement**

The sub-group identified several alternative approaches for the RA, which could also apply to the RAA. The body of the report discusses the advantages and disadvantages of each approach.

1. **Menu Approach.** The sub-group supports a "Menu" approach, where the governing law would be chosen before the contract is executed from a "menu" of possible governing laws. The menu needs to be defined; this could best left to ICANN and the registries. The sub-group discussed a number of possible menus, which could include one country, or a small number of countries, from each ICANN Geographic Region, plus the status quo (no choice of law) and/or the registry's jurisdiction of incorporation and/or the countries in which ICANN has physical locations.

   The sub-group has not determined what the menu items should be, but believes there should be a balance between the advantages and disadvantages of having different governing laws apply to the same base RA, which likely suggests having a relatively limited number of choices on the menu. The sub-group recommends that the registry choose from among the options on the menu (i.e., the choice would not be negotiated with ICANN).

2. **"California" (or "Fixed Law") Approach.** A second possible option is for all RAs to include a choice of law clause naming California and U.S. law as the governing law.

3. **Carve-out Approach.** A third possible option would be a "Carve-Out" approach, whereby parts of the contract that would benefit from uniform treatment are governed by a uniform, predetermined law (e.g., California) and other parts are governed either by the law of the registry's jurisdiction or by a jurisdiction chosen using the "Menu" approach.

4. **Bespoke Approach.** In the "Bespoke" approach, the governing law of the entire agreement is the governing law of the Registry Operator.

5. **Status Quo Approach.** A fifth possible approach is to retain the status quo (i.e., have no "governing law" clause in the RAA).

⊙ **Choice of law provision in registrar accreditation agreements**

The options for the RAA are essentially the same as for the RA.

⊙ **Choice of venue provisions in registry agreements**

Under the RA, disputes are resolved by "binding arbitration," pursuant to ICC rules. The RA contains a choice of venue provision stating that the venue is Los Angeles, California as both the physical place and the seat[4] of the arbitration.

When entering into contracts with registries, ICANN could offer a list of possible venues for arbitration rather than imposing Los Angeles, California. The registry that enters into a registry agreement with ICANN could then choose which venue it prefers at or before the execution of the contract.

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[4] The "seat" of an arbitration is the legal jurisdiction to which the proceeding is tied.

Background

The CCWG-Accountability's Final Report for Work Stream 1 (WS1), Recommendation 12, proposed that a number of topics that were not essential for the transition and could not be completed in WS1 (due to time constraints of the transition) be undertaken in a Work Stream 2 (WS2) effort by the CCWG-Accountability. This recommendation was approved by the CCWG-Accountability's Chartering Organizations as well as the ICANN Board at its 10 March 2016 meeting. Annex 12 of the final report included the following requirement:

Jurisdiction

Jurisdiction directly influences the way ICANN's accountability processes are operationalized. The fact that ICANN is incorporated under the laws of the U.S. state of California 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. 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[5] of the Affirmation of Commitments, signed in 2009 between ICANN and the U.S. Government.

ICANN's Bylaws (Article XVIII) also state that its principal office is in California.

The CCWG-Accountability has acknowledged that jurisdiction is a multi-layered issue and has identified the following "layers":

- ⊙ *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*

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[5] *18. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (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; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.*

country and other geographic names, national security, etc.), privacy, freedom of expression.

☉ *Meeting NTIA requirements.*

At this point in the CCWG-Accountability's work, the main issues that need within Work Stream 2 relate to 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:

☉ *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.*

  ◘ *Consider potential Work Stream 2 recommendations based on the conclusions of this analysis.*

A specific Subgroup of the CCWG-Accountability will be formed to undertake this work.

Overview of the Work of the Sub-Group

The Jurisdiction Sub-Group based its work on Annex 12 of the CCWG-Accountability Final Report. This proved somewhat challenging, as there are ambiguities in this text that led to some lack of clarity regarding both the scope and goals of the sub-group.

The group initially discussed the topics of "confirming and assessing the gap analysis" and of changing ICANN's headquarters or jurisdiction of incorporation. The sub-group then worked to refine the multiple layers of jurisdiction, based on the discussion in Annex 12 of the WS1 Final Report. It was hoped that identifying specific layers (or types) of "jurisdiction" would help avoid the ambiguity of referring to each of these as "jurisdiction," as was often the case in informal discussions. The following were identified as "layers of jurisdiction":

1. Jurisdiction of incorporation.

2. Jurisdiction of headquarters location.

3. Jurisdiction of other places of physical presence.

4. Jurisdiction for the law used in the interpretation of contracts, etc. (choice of law), including contracts with contracted parties, contracts with other third parties, and actions of the Empowered Community.

5. Jurisdiction for the physical location of litigation of disputes (venue).

6. Relationships with national jurisdictions for particular domestic issues.

7. Meeting NTIA requirements.

While the sub-group did not come to agreement on whether each of these layers of ICANN's jurisdiction should be addressed by the sub-group, there was broad agreement that these were the categories or "layers" of jurisdiction.

The sub-group then prepared several working documents, including one exploring the following question: "What is the influence of ICANN's existing jurisdiction(s) relating to resolution of disputes (i.e., governing law and venue) on the actual operation of ICANN's policies and accountability mechanisms?"; and another discussing a hypothetical case involving litigation challenging ICANN's actions (or inactions) involving actual operation of its policies (e.g., delegation of a gTLD; acceptance of certain terms of registry operation) as violations of law.

The sub-group did not reach consensus on these documents, which may be found along with other working documents of the sub-group in the "Supplement of Working Documents."[6]

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[6] This will be a compendium of documents worked on by the group but not finished. It will be clearly noted that these documents are not consensus documents and do not represent findings by the sub-group.

The sub-group then agreed it would be worthwhile to develop and publish a questionnaire to give the broader Community an opportunity to provide factual information that could help inform the sub-group. The Questionnaire[7] is set forth below:

QUESTIONNAIRE

Responses must be transmitted via email to: ccwg-acctws2.jurisdiction.questionnaire@icann.org

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1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN's jurisdiction* in any way?

If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.

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2. Has ICANN's jurisdiction* affected any dispute resolution process or litigation related to domain names you have been involved in?

If the answer is Yes, please describe specific cases, situations or incidents, including the date, the parties involved, and links to any relevant documents. Please note that "affected" may refer to positive and/or negative effects.

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3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above?

If the answer is yes, please provide these copies and/or links.

4a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?* *If so, please provide documentation.*

4b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? *If so, please provide documentation.*

The questionnaire was published on 9 February 2017 and the response period closed on 17 April 2017. The sub-group received 21 responses to the questionnaire, which are in **Annex A** and also may also be found at https://community.icann.org/display/WEIA/Jurisdiction+Questionnaire. Members of the sub-group reviewed and evaluated questionnaire responses and presented them to the sub-group.

The sub-group also developed a series of Questions for ICANN Legal, which may be found at [https://community.icann.org/display/WEIA/Jurisdiction?preview=/59643282/84222028/Jurisdiction QuestiontoICANNLegalv2-0001](https://community.icann.org/display/WEIA/Jurisdiction?preview=/59643282/84222028/JurisdictionQuestiontoICANNLegalv2-0001). The Questions were sent to ICANN Legal on 2 March 2017 and

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[7] The questionnaire and links to responses may be found at https://community.icann.org/display/WEIA/Jurisdiction+Questionnaire.

responses were received on 10 April 2017. The questions and ICANN Legal's responses are attached as **Annex B**. These responses were discussed in the sub-group and with ICANN Legal.

The sub-group also undertook a comprehensive review of the litigations in which ICANN has been a party, a list of which may be found at https://www.icann.org/resources/pages/governance/litigation-en. Members of the sub-group reviewed many of these litigations, using a "summary sheet" completed by the reviewer of each case. The cases that were reviewed were presented to the sub-group by the reviewer and then discussed by the sub-group. The litigation summaries are collected in **Annex C**.

Based on this work, the sub-group developed a master list of "proposed issues" (**Annex D**). From this list, the sub-group prioritized, in the time remaining, the issues relating to OFAC sanctions and to the Choice of Governing Law and Venue Clauses in Certain ICANN Contracts. After careful consideration of these issues, the sub-group reached consensus on recommendations for each of these.

The sub-group proposed recommendations were submitted to the CCWG-Accountability Plenary. The CCWG-Accountability WS2 plenary meeting on 27 October 2017 included a discussion focused on jurisdiction issues.

The draft report was approved by consensus as defined in the CCWG-Accountability charter, and not by full consensus.[8] The government of Brazil, which did not support approving the report, prepared a dissenting opinion, which is supported by several other participants and can be found in **Annex E** of the report.

A transcript of the plenary discussions is included as **Annex F** to this report. As a result of these discussions, the section "Further Discussions of Jurisdiction-Related Concerns" was added to the draft report, suggesting a path forward for these concerns beyond the CCWG-Accountability through a further other multistakeholder process.

The draft report was published for Public Comment on 14 November 2017. The Public Comment period closed on 14 January 2018. Fifteen comments were received. These comments may be found at https://mm.icann.org/pipermail/comments-jurisdiction-recs-14nov17. These comments were summarized by ICANN staff in a "comment tool" spreadsheet, which may be found at https://community.icann.org/display/WEIA/Jurisdiction?preview=/59643282/79436152/Jurisdiction-PublicComments-jan2018-Summary-post.pdf. These comments were each duly considered and discussed by the sub-group. Where this led to a change to the sub-group consensus, the draft report was then changed to reflect the new consensus. The suggestion added to the report that "Further Discussions of Jurisdiction-Related Concerns" are needed was echoed in several comments subsequently received. These comments did not bring any changes to the report, recognizing that the need for "further discussions" to address unresolved concerns, including in other fora, had already been acknowledged.

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[8] CCWG-Accountability Charter, Section V:
    (a)   Full Consensus – A position where no minority disagrees; identified by an absence of objection.
    (b)   Consensus – A position where a small minority disagrees, but most agree
In the absence of Full Consensus, the Chair(s) should allow for the submission of minority viewpoint(s) and these, along with the consensus view, shall be included in the report.

RECOMMENDATIONS REGARDING OFAC AND RELATED SANCTIONS ISSUES

Background

The sub-group has considered several related issues under the common topic of the effect of government sanctions on ICANN's operations and accountability. In particular,[9] these issues have been raised in relation to U.S. government sanctions administered by the Office of Foreign Asset Control (OFAC).

OFAC is an office of the U.S. Treasury that administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted individuals and entities.[10] Where a nation is subject to sanctions, the sanctions may extend to its citizens, regardless of their personal character or activities. OFAC has been delegated responsibility by the Secretary of the Treasury for developing, promulgating, and administering U.S. sanctions programs. Many of these sanctions are based on United Nations and other international mandates; therefore, they are multilateral in scope, and involve close cooperation with allied governments. Other sanctions are specific to the national security interests of the United States.

OFAC acts under executive and legislative authority to impose controls on transactions and to freeze assets under U.S. jurisdiction.

OFAC also enforces apparent violations of its regulations, based on its Economic Sanctions Enforcement Guidelines.[11] Enforcement may result in civil penalties up to $250,000 per violation or twice the amount of a transaction, whichever is greater.

Persons Subject to Compliance Obligations

According to the OFAC website, "U.S. persons must comply with OFAC regulations, including all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, all U.S. incorporated entities and their foreign branches. In the cases of certain programs, foreign subsidiaries owned or controlled by U.S. companies also must comply. Certain programs also require foreign persons in possession of U.S.-origin goods to comply."[12]

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[9] In the future, if ICANN is subject to other similar sanctions (e.g., similar in scope, type, and effect, and with similar methods of relief for entities not specifically sanctioned), the spirit of these recommendations should guide ICANN's approach.

[10] Target individuals and entities may include foreign countries, regimes, terrorists, international narcotics traffickers and those engaged in certain activities, such as the proliferation of weapons of mass destruction or transnational organized crime.

[11] See OFAC Final Rule, "Economic Sanctions Enforcement Guidelines," 9 November 2009. The Guidelines outline various factors used by OFAC in taking enforcement decisions, which may include how compliance programs within an institution are working to comply with OFAC regulations. https://www.treasury.gov/resource-center/sanctions/Documents/fr74_57593.pdf.

[12] https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic.

Covered Persons

OFAC maintains a list of specially designated nationals (SDNs) that U.S. persons cannot transact with. These are individuals who are singled out for sanctions. However, where a sanction applies to a country, citizens of that country who are not SDNs often cannot freely transact with U.S. persons, without regard to their personal character or activities.

Prohibited Transactions

Under OFAC, certain transactions may be prohibited. Such transactions cannot be consummated unless there is either a specific license or a general license permitting the transaction.

OFAC Licenses

OFAC has the authority, through a licensing process, to permit certain transactions that would otherwise be prohibited under its regulations. OFAC can issue a license to engage in an otherwise prohibited transaction when it determines that the transaction does not undermine the U.S. policy objectives of the particular sanctions program, or is otherwise justified by U.S. national security or foreign policy objectives. OFAC can also promulgate general licenses, which authorize categories of transactions, without the need for case-by-case authorization from OFAC. General licenses are actually regulations, which must be adopted and then can be found in the regulations for each sanctions program[13] and may be accessed from OFAC's website.

The regulation covering a general license will set forth the relevant criteria of the general license, including the classes of person and category or categories of transactions covered by the general license.

Specific licenses are applied for by one of the parties to the transaction and issued on a case-by-case basis. A specific license is a written document issued by OFAC authorizing a particular transaction or set of transactions generally limited to a specified time period. To receive a specific license, the person or entity who would like to undertake the transaction must submit an application to OFAC. If the transaction conforms to OFAC's internal licensing policies and U.S. foreign policy objectives, the license generally is issued.

ISSUES AND RECOMMENDATIONS

⊙ ICANN and U.S. Sanctions

⊙ ICANN Terms and Conditions for Registrar Accreditation Application Relating to OFAC Licenses

⊙ Applicability of OFAC to Non-US Registrars

⊙ Approval of gTLD Registries

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[13] 31 CFR, Chapter V (Regulations). https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title31/31cfrv3_02.tpl

⊙ Application of OFAC Restrictions by Non-US Registrars

⊙ General Licenses

ICANN and U.S. Sanctions

There is a tension between ICANN'S goal of administering the Internet as a neutral global resource and the imposition of sanctions by the U.S. on other countries.[14] Sanctions, laws, and policies, when applied to domain name registrars and registries, can hamper access to the domain name system by innocent users and businesses, simply based on their nationality. For these persons to transact with ICANN, they or ICANN will need to apply for an OFAC license.

ICANN Terms and Conditions for Registrar Accreditation Application Relating to OFAC Licenses

Currently, the Terms and Conditions for the Registrar Accreditation Application state that "ICANN is under no obligation to seek [a license for a transaction with a non-SDN resident of a sanctioned country] and, in any given case, OFAC could decide not to issue a requested license."[15]

This is not an encouraging policy for potential registrars from sanctioned countries, even though ICANN has informed the sub-group that it has sought such licenses in the past and has been successful in doing so. If ICANN chose to exercise its discretion and not seek a license in any given case, this would have the effect of hampering ICANN's ability to provide services, inconsistent with the spirit if not the letter of ICANN's Mission. ICANN likely could not be held accountable for this decision under the current contract, because the contractual language gives ICANN unfettered discretion to decline to seek a license, without any indication of the criteria ICANN would use to make that determination.

This uncertainty and lack of transparency may deter potential registrars domiciled in sanctioned countries from pursuing registrar accreditation. This is not a good result. Instead, ICANN should seek to minimize the hurdles for residents of sanctioned countries seeking registrar accreditation. In turn, this should encourage the growth of the Internet in these countries.

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[14] The sub-group recognizes that many countries impose sanctions regimes and cooperate in the creation and enforcement of sanctions. As a practical matter, the effect of sanctions other than US sanctions has not been a concern for ICANN operations. In the future, if ICANN is subject to other similar sanctions (e.g., similar in scope, type and effect and with similar methods of relief for entities not specifically sanctioned), the spirit of these recommendations should guide ICANN's approach.
[15] https://www.icann.org/resources/pages/application-2012-02-25-en.

Recommendation

Currently, the ICANN Terms and Conditions for the Registrar Accreditation Application read as follows:

> **"4. Application Process.**
>
> Applicant acknowledges that ICANN must comply with all U.S. laws, rules, and regulations. One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury. These sanctions have been imposed on certain countries, as well as individuals and entities that appear on OFAC's List of Specially Designated Nationals and Blocked Persons (the "SDN List"). ICANN is prohibited from providing most goods or services to residents of sanctioned countries or their governmental entities or to SDNs without an applicable U.S. government authorization or exemption. ICANN generally will not seek a license to provide goods or services to an individual or entity on the SDN List. In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs, but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. **However, Applicant acknowledges that ICANN is under no obligations to seek such licenses and, in any given case, OFAC could decide not to issue a requested license.**" (emphasis added)

The last sentence should be amended to require ICANN to apply for and use best efforts to secure an OFAC license if the other party is otherwise qualified to be a registrar (and is not on the SDN List). During the licensing process, ICANN should be helpful and transparent with regard to the licensing process and ICANN's efforts, including ongoing communication with the potential registrar.

Approval of gTLD Registries

In the 2012 round of the New gTLD Program, it proved to be difficult for residents from countries subject to U.S. sanctions to file and make their way through the application process. The AGB (Applicant Guidebook) states, in language highly reminiscent of the RAA: "In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs (specially designated nationals) but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license."[16]

It is the sub-group's understanding that new gTLD applicants from sanctioned countries who are not on the SDN List found that the process for requesting that ICANN apply for an OFAC license is not transparent, and that response times for ICANN replies felt quite lengthy. In particular, ICANN apparently did not provide any indication that it had applied for an OFAC license.

Furthermore, the process is quite lengthy, even if ICANN is proceeding with speed. As a result, applicants may have felt they were in limbo.

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[16] New gTLD Applicant Guidebook, 1-25.

Recommendation

ICANN should commit to applying for and using best efforts to secure an OFAC license for all such applicants if the applicant would otherwise be approved (and is not on the SDN List). ICANN should also be helpful and transparent with regard to the licensing process, including ongoing communication with the applicant.

Application of OFAC Limitations by Non-US Registrars

It appears that some registrars might be following the rules of OFAC sanctions in their dealings with registrants and potential registrants, even when they are not based in the U.S. and it would appear they are not required to do so. In particular, it seems that some non-U.S. registrars may be applying OFAC restrictions even when they are not obliged to do so, merely based on an assumption that because they have a contract with ICANN, they have to apply OFAC sanctions. If registrars that are not based in the U.S. and do not have OFAC compliance obligations are nonetheless prohibiting registrants in sanctioned countries from using their services based on a mistaken belief that OFAC sanctions apply, that raises concerns with the availability of Internet resources on a global and neutral basis.

There may be other ways that non-U.S. registrars give the impression that these registrars are following OFAC sanctions. For example, the sub-group was provided examples of two non-U.S. registrars with registrant agreements that stated that persons located in sanctioned countries could not use their services due to OFAC sanctions.[17] Both registrars apparently used a registrant agreement "cut and pasted" from other sources.[18] One of the two registrars (Gesloten) has since revised its registrant agreement significantly, and removed any mention of OFAC restrictions. OFAC restrictions could have been included in these registrant agreements as a "cut and paste" error or because the registrar believed (rightly or wrongly) that OFAC sanctions applied to it. In either case, the conclusion is the same: registrars should understand which laws apply to their businesses, and they should make sure that their registrant agreements accurately reflect those laws.

ICANN cannot provide legal advice to registrars. Each registrar must make their own legal determination of how and whether OFAC restrictions apply. However, ICANN could provide a clarification to registrars that registrars do not have to follow OFAC sanctions solely based on the existence of their contract with ICANN.

ICANN is not a party to the registrant agreements, so there is nothing that ICANN can do directly. Nonetheless, non-U.S. registrars could also be encouraged to seek advice on applicable law and to accurately reflect the applicable law in their registrant agreements.

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[17] One was Gesloten.cw (http://domains.gesloten.cw/support/legal.php?requestfor=registraragreement&from=agree_page), a Curacao (Netherlands Antilles) registrar; the other was Olipso (https://www.olipso.com/en/domain-registration- agreement), a Turkish registrar (Atak Domain Hosting).

[18] For example, both agreements used "Mumbai time" as a standard even though neither is in India, located in that time zone, or has any particular contacts with India.

Recommendation

ICANN needs to bring awareness of these issues to registrars. ICANN should clarify to registrars that the mere existence of their RAA with ICANN does not cause them to be required to comply with OFAC sanctions. ICANN should also explore various tools to remind registrars to understand the applicable laws under which they operate and to accurately reflect those laws in their customer relationships.

General Licenses

In contrast to specific licenses, a general license covers classes of persons and types of transactions. ICANN could consider seeking one or more general licenses to cover particular classes of persons and types of transactions that are an integral part of ICANN's role in managing the DNS and in contracting with third parties to provide Internet resources. Broadly speaking, these licenses could apply to registries and registrars entering into RAs and RAAs, respectively, and to other transactions that may be core functions for ICANN (e.g., Privacy/Proxy Accreditation, support for ICANN-funded travelers, etc.).

An OFAC "general license" is actually a regulation. Creation of a general license involves a regulatory process, which is in the purview of the Executive Branch (more specifically, the U.S. Treasury, of which OFAC is a part). Indeed, 31 CFR § 595.305 defines a general license as "any license or authorization the terms of which are set forth in this part." In other words, the general license is a part of the OFAC regulations. As such, one does not merely "apply" for a general license. One must determine the desired parameters of the general license(s) and work with the U.S. Department of the Treasury and provide appropriate reasoning, support, etc. so that the Treasury undertakes the regulatory effort to bring the general license into being.

The sub-group believes that one or more general licenses could make future transactions with "covered persons" easier to consummate. Individual transactions would no longer require specific licenses, as long as the persons and transaction types were covered by the general license. Thus, the sub-group believes that one or more general licenses would be highly desirable. However, this may be a significant undertaking in terms of time and expense. As such, it would be prudent for ICANN to ascertain the costs, benefits, timeline, and specifics of seeking and securing one or more general licenses for DNS-related transactions. ICANN would also need to determine the specific classes of persons and types of transactions that would be covered by each license. ICANN would then begin the process of seeking these general licenses, unless significant obstacles were uncovered in the preparatory process. If obstacles are revealed, ICANN would need to find ways to overcome them. Failing that, ICANN would need to pursue alternate means to enable transactions involving residents of sanctioned countries to be consummated with a minimum of complication and uncertainty. If ICANN does secure general licenses covering DNS-related transactions, ICANN should make the Internet community aware of this.

Recommendation

ICANN should take steps to pursue one or more OFAC "general licenses" with the U.S. Department of Treasury in connection with DNS-related transactions. Initially, ICANN should make it a priority to study the costs, benefits, timeline, and details of seeking and securing one or more general licenses for DNS-related transactions. ICANN should then pursue one or more OFAC

general licenses, unless significant obstacles were discovered in the "study" process. If there are significant obstacles, ICANN should report them to the community and seek its advice on how to proceed. If unsuccessful, ICANN would need to find other ways to accomplish the ultimate goal – enabling transactions between ICANN and residents of sanctioned countries to be consummated with a minimum of "friction."

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When implementing each of the recommendations in this section, their utmost importance to ICANN in carrying out its mission and facilitating global access to DNS should be considered. Taking into account this importance, the implementation phase should start as soon as possible, but in no event later than six months after approval by the ICANN Board.

RECOMMENDATIONS REGARDING CHOICE OF LAW AND CHOICE OF VENUE PROVISIONS IN ICANN AGREEMENTS

Background

This sub-group has considered how ICANN's jurisdiction-related choices, in the gTLD base Registry Agreement (RA) as well as the Registrar Accreditation Agreement (RAA), may have an influence on accountability.

Three such jurisdiction-related choices have retained the attention of the members of this sub-group, namely the absence of a choice of law provision in registry agreements, the absence of a choice of law provision in registrar accreditation agreements, and the contents of the choice of venue provision in registry agreements.

Both the RA and the RAA are standard-form contracts that do not typically give rise to negotiation between ICANN and the potentially contracted party, with some minor exceptions when the contracted party is an intergovernmental organization or a governmental entity. Any changes to the base agreements are now determined through an amendment procedure, detailed in each agreement (see, e.g., Art. 7.6 of the RA).

It is the understanding of this sub-group that it cannot and would not require ICANN to make amendments to the RA or the RAA through this recommendation. Not only would that go beyond the stated mandate of the CCWG, but that would also constitute an infringement of the Bylaws (see, e.g., Sec. 1.1(d)(iv) of the Bylaws) and more specifically an infringement of the remit of the GNSO.

Rather, this recommendation should be understood as suggesting possible changes to the aforementioned contracts for study and consideration by ICANN the organization, by the GNSO, and by contracted parties. The sub-group believes that these changes would increase ICANN's accountability. It should be noted that, in formulating these recommendations, the sub-group did not consult with ICANN's contracted parties or seek outside legal advice.

Through its discussions, the sub-group has identified three separate issues that appeared to influence ICANN's accountability. These issues are listed below.

Issues

⊙ **Choice of law provision in registry agreements.**

ICANN's RA does not contain a choice of law provision. The governing law for the RA is thus undetermined, until a judge or arbitrator takes a decision on that matter in the context of a litigation or until the parties to any specific contract agree otherwise.

- ⊙ **Choice of law provision in registrar accreditation agreements.**

  ICANN's RAA does not contain a choice of law provision. As with the RA, the governing law for the RAA is undetermined until a judge or arbitrator takes a decision on that matter in the context of a litigation or until the parties to any specific contract agree otherwise.

- ⊙ **Choice of venue provision in registry agreements.**

  Disputes arising in the context of ICANN's RA are to be resolved under "binding arbitration" pursuant to ICC rules. Moreover, the RA contains a choice of venue provision. This provision states that the venue is Los Angeles, California as both the physical place and the seat[19] of the arbitration (to be held under ICC rules).

Possible Solutions

1. **Choice of law provision in registry agreements**

   A. **Menu Approach**

   It has emerged from the sub-group's discussions that there is a common ground whereby increased freedom of choice for the parties to the agreement could help registries in tailoring their agreements to their specific needs and obligations.

   Specifically, this would involve a "Menu" approach, whereby the law(s) governing the Registry Agreement is (are) chosen at or before the time when the contract is executed. Such choice would be made according to a "menu" of possible governing laws.

   This menu needs to be defined. It could be best to leave it to ICANN, working with the gTLD registries, to define the menu options. The sub-group discussed a number of possibilities for their consideration:

   - ⊙ The menu could be composed of one country from each ICANN Geographic Region.

   - ⊙ The menu could be composed of a small number of countries from each region.

   - ⊙ The menu could also include the status quo (i.e., no choice of law).

   - ⊙ The menu could also include the registry's jurisdiction of incorporation as a choice.

   - ⊙ The menu could also include the countries in which ICANN has physical locations.

   The sub-group has not determined what the menu items should be, as this is beyond the reach of the sub-group. However, the sub-group believes that a balance needs to be struck between the ability to choose (or at least to negotiate for) a particular choice of law, and issues arising from subjecting the standard base RA to a multiplicity of different laws. The proper balance is likely struck by having a relatively limited number of choices on the menu.

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[19] The "seat" of an arbitration is the legal jurisdiction to which the proceeding is tied.

The method of "choosing" from the menu also needs to be considered. The sub-group recommends that the registry choose from among the options on the menu (i.e., the choice would not be negotiated with ICANN).

The Menu approach has the following advantages:

1. It provides the parties, especially the registries, with effective freedom to define the law(s) governing their contracts. This may contribute to avoiding conflicts between provisions established in the contract and the provisions of national or supranational law, since the RA would be interpreted under the same national law that governs the registry (this assumes that the registry operator's national law is "on the menu").

2. It may also help registries that are more comfortable with subjecting their agreement in whole or in part to law(s) with which they are more familiar. This could lower the hurdles for those considering applying to operate a registry who are not familiar with U.S. law and thereby make ICANN's global outreach efforts more efficient.

3. Another possible advantage of the menu option is that parties may then choose a governing law which allows them to be compliant with mandatory extra-contractual legal obligations while not violating the provisions of the contract.

However, there are some disadvantages of the Menu approach.

A first disadvantage is the fact that the chosen law may not be entirely compatible with the contents of the RA. Indeed, the current RA has been drafted with U.S. law in mind and uses a style of drafting which corresponds with the American legal tradition. The result of this would be that some parts of the RA could be interpreted differently than they would under U.S. law, and differently than intended. In the context of litigation, some provisions could even be found invalid or unenforceable, which could result in the court deciding what an enforceable version would be or even deciding that the provision never applied between the parties.

A second disadvantage, which is related to the first, is that some registries could ultimately find themselves with a significantly different RA governing their relation with ICANN by virtue of mandatory modifications brought about by a different governing law.[20] These differences could turn out to be either an advantage or a disadvantage to these registries but could well be perceived as unfair. Over time, this could, and in all likelihood would, lead to some form of jurisdiction shopping by registries.

A third disadvantage is the fact that a choice must be made on the contents of the "Menu"

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[20] "Mandatory" provisions are understood here as elements of the governing law which may not be contractually set aside and necessarily govern the legal relations of the parties. This is different from *super-mandatory* provisions which apply according to objective criteria (such as the place of performance of the contract) and notwithstanding the choice of governing law made by the parties. This may be more prevalent in civil law countries than common law ones.

and that while there are some regions which are highly legally integrated (e.g., Europe) others are not at all, such as the Asia-Pacific region. Where exactly to draw the line and how to regionalize the world in terms both compatible with ICANN's operations and with the variety of legal systems and traditions may end up being a difficult and contentious task. And, of course, the menu option could present ICANN with the challenge of operating under contract clauses with significantly differing interpretations around the world.

B. "California" (or "fixed law") Approach

A second possible option is the "California" approach, whereby all RAs expressly state that the contract is governed by the law of the state of California and U.S. federal law.

This option has the advantage of certainty, since all RAs will be construed under the same governing law. It also has the advantage of being consistent with the drafting approach in the RA, which is drafted according to U.S. law principles. This is more likely to result in the agreements being interpreted as the drafters intended, while avoiding the unintended consequences discussed above under the Menu approach.

The main disadvantage of this option is that it forces all registries worldwide to look to California law when interpreting their contract with ICANN. While US-based registries might not see that as a problem, several members of the sub-group outlined the inconsistency between the global mandate of ICANN and the imposition of California law in its contracts with registries. Moreover, this might place some non-U.S. registries at a disadvantage in interpreting and potentially litigating the RA, since their knowledge of California and U.S. law might be limited.

Finally, California law might act as a chilling effect on potential litigation, discouraging litigants from litigating simply based on their lack of knowledge of California law.

C. Carve-out Approach

A third possible option would be a "Carve-Out" approach, whereby certain parts of the contract which may require or benefit from uniform treatment for all registry operators are governed by a predetermined law (e.g., California) and other parts (e.g., eligibility rules for second level domains, privacy, and data-protection rules) are governed by the either the same law which governs the registry as a legal person or by using the "Menu" approach for these other parts of the RA.

This approach has the advantage of certainty of interpretation for the uniform provisions of the Agreement, while allowing greater flexibility for other portions.

Moreover, generally speaking, this approach shares many advantages and disadvantages with the Menu approach.

Another disadvantage of this option is the fact that the applicable law within each RA is not uniform. This option assumes that all the obligations contained in the RA can be

neatly separated in categories, which are then "labeled" with a given applicable law. In practice, it may well turn out that many obligations are interdependent and as such, this choice may make the RA difficult for interpret for the parties and eventually for arbitrators, and as such make dispute outcomes more difficult to predict, which in turn could diminish accountability.

D. Bespoke Approach

Next, there is the "Bespoke" approach, where the governing law of the entire agreement is the governing law of the Registry Operator.

This approach has some of the advantages of the Menu approach, by allowing each Registry Operator to have their "home" choice of law.

As for disadvantages, they are also shared with the Menu approach and it could be added that these disadvantages find themselves compounded here by the fact that this approach consists, in practice, of a very large menu whose contents are determined by the place of incorporation/location of the registry (as a legal person.) In that sense, it can be very hard to predict the result of the application of a multitude of different bodies of laws to the RA. Some registries might find themselves at an advantage, others at a disadvantage, and some might find themselves with large parts of the RA reinterpreted or inapplicable due to mandatory provisions of the governing law, or simply with an RA which is very difficult to interpret.

E. Status Quo Approach

A fifth possible approach is to retain the status quo (i.e., have no "governing law" clause in the RA). The advantages of this approach have been explained by ICANN Legal in a document sent to the sub-group in response to questions asked by the sub-group [21]:

> "*Historically, the Registry and Registrar Accreditation Agreements are and have been silent on the choice of law to be applied in an arbitration or litigation. This allows the parties to an arbitration or litigation to argue (pursuant to the relevant arbitration rules, court procedures and rules, and laws) what law is appropriate to govern the specific conduct at issue. Arbitrators and courts are well-suited to make those types of determinations.*"

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[21] The questions may be found at https://community.icann.org/download/attachments/59643282/Jurisdiction%20Questions%20for%20ICANN%20L egal.pdf?version=1&modificationDate=1487972863000&api=v2. The response may be found at https://community.icann.org/display/WEIA/Jurisdiction?preview=/59643282/64081953/ICANN%20Responses%20 to%20JX%20Questions-SE.pdf

A disadvantage of the Status Quo approach is that potential contracted parties outside of the United States could be deterred by what they perceive as essentially a contract under U.S. law. In addition, currently, some contracted parties have to ask ICANN for permission to comply with the laws of their own jurisdiction, since they do not want compliance with these laws to constitute a breach of the RA. Another disadvantage was noted in the introduction to this section – that the governing law is undetermined, which creates ambiguity in interpreting the contract.

2. Choice of law provision in registrar accreditation agreements

The options for the RAA are essentially the same as for the RA.

3. Choice of venue provisions in registry agreements

When entering into contracts with registries, ICANN could offer a list of possible venues for the arbitration to take place rather than generally imposing Los Angeles, California as the place (and hence, both the "seat" and physical location) of the arbitration. The rest of the arbitration clause (namely, the rules of arbitration being ICC rules) would remain unchanged.

The registry which enters into a registry agreement with ICANN could then choose which venue it prefers at or before the execution of the contract.

Having this option open would diminish the cost of litigation for registries, potentially allowing registries to start arbitration procedures at a location that is more amenable to them than Los Angeles, California (although Los Angeles could remain an option.)

From the perspective of the contract issuer (which, in our case, would be ICANN), one risk associated with such a change is having to deal with a different *lex arbitri* than that of California. ICANN would also have to hire local counsel and travel to various arbitration proceedings. Furthermore, the *courts* of the seat of the arbitration may be competent to order interim relief and hear challenges to the award, among other things.[22]

Finally, the options given in the "venue menu" could correspond to ICANN's own regions as defined in ICANN's Bylaws; that is, ICANN could offer at least one venue per region.[23]

RECOMMENDATIONS

As stated in the Background section, the aim of the sub-group in formulating these recommendations is to frame them as a suggestion of possible paths towards increased accountability.

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[22] In addition to interim relief and award challenges, the *lex arbitri* is also relevant when witnesses are involved or when one of the parties would claim that the subject matter of the dispute is not arbitrable. The contents of the *lex arbitri* are to be found in the arbitration laws of a given country. Such laws are today rather standardized and in that sense, it is possible to further mitigate this risk by assessing the contents of the arbitration laws of each possible venue offered as an option in the "menu."

[23] "As used in these Bylaws, each of the following is considered to be a "Geographic Region": (a) Europe; (b) Asia/Australia/Pacific; (c) Latin America/Caribbean islands; (d) Africa; and (e) North America." ICANN Bylaws, Art. 7.5.

Choice of Law in Registry Agreements

The sub-group examined several options and suggests that ICANN, the contracted parties and the GNSO consider adopting a "Menu" approach to the choice of law provisions in gTLD Registry Agreements. The sub-group offers several suggestions for menu options, including:

- The menu could be composed of one country from each ICANN Geographic Region.

- The menu could be composed of a small number of countries from each region.

- The menu could also include the status quo (i.e., no choice of law).

- The menu could also include the registry's jurisdiction of incorporation as a choice.

- The menu could also include the countries in which ICANN has physical locations.

The sub-group recommends that the registry choose from among the options on the menu (i.e., the choice would not be negotiated with ICANN).

Choice of Law in Registrar Accreditation Agreements

The sub-group suggests that ICANN, the contracted parties, and the GNSO consider options for the RAA similar to those discussed for the RA above.

Choice of Venue in Registry Agreements

The sub-group suggests that a Menu approach also be considered for the venue provision of the RA.

Further Discussions of Jurisdiction-Related Concerns

There were a number of concerns raised in the sub-group where the sub-group had substantive discussions but did not get to a point of conclusion. As an example, there were discussions of limited, partial, relative, or tailored immunity for ICANN that did not come to conclusion.

These concerns were put on the table by different stakeholders and, for these stakeholders, these are legitimate concerns. As these concerns were not discussed to the end, there should be a path forward for these concerns beyond the CCWG-Accountability, which was tasked to look into a limited number of issues within a limited period of time and with a limited budget.

Therefore, the sub-group suggests that a further other multistakeholder process of some kind should be considered to allow for further consideration, and potentially resolution, of these concerns. We believe that this report, with its annexes, can be a very useful tool for further debates which will surely take place – whether in another cross-constituency effort or in a future ATRT Review, or in some other ICANN context. The appropriate forum for such discussions is beyond the mandate of the CCWG-Accountability; however, we encourage the Community to build on the work of the sub-group and prior work in this area.

STRESS TESTS

"Stress Testing" is a simulation exercise where plausible, but not necessarily probable, hypothetical scenarios are used to gauge how certain events will affect an entity or system. In the financial industry, for example, stress testing is routinely used to evaluate the strength of banks facing plausible scenarios of external crises.

Stress tests are used to assess how recommendations would improve ICANN's accountability when faced with plausible scenarios that impose stress on the ICANN organization and Community. An improvement in accountability can be seen when comparing the status quo with the structures and processes that would result from implementing the WS2 recommendations.

The following Stress Tests assess the recommendations to address government sanctions.

Stress Test #1: A registrar or registry declines to accept a domain registration because they believe they are subject to sanctions that apply to the ICANN corporation. (e.g., United States OFAC sanctions)	
Consequence(s): ICANN is failing to provide domain names to aspiring registrants from some countries.	
EXISTING ACCOUNTABILITY MEASURES	**PROPOSED ACCOUNTABILITY MEASURES**
ICANN management is able to explain the extent to which sanctions affecting ICANN would also affect contract parties. The community has the ability to challenge not ICANN inaction on this issue, via a Community IRP. If an Accountability & Transparency Review (ATRT) made relevant recommendations that were rejected by the board, a Community IRP could be brought to challenge that action.	One proposed measure is to have ICANN clarify to registrars that the mere existence of their Registration Accreditation Agreement (RAA) with ICANN does require the registrar to comply with sanctions that apply to the ICANN corporation. This clarification, if credible and legally substantiated, should allow registrars to accept domain registration requests from citizens of any country, subject to limitations and obligations due to applicable law.
CONCLUSIONS: Existing measures may not be adequate.	Proposed measures are an improvement in helping ICANN be accountable to global domain registrants

Stress Test #2: ICANN declines to enter into a Registration Accreditation Agreement (RAA) with an aspiring registrar from a country that is subject to sanctions that apply to the ICANN corporation. (e.g., United States OFAC sanctions)

Consequence(s): ICANN is failing on its Core Value "promoting competition in the registration of domain names," with respect to aspiring and qualified registrars from some countries.

EXISTING ACCOUNTABILITY MEASURES PROPOSED ACCOUNTABILITY MEASURES

For ICANN to enter an agreement with a party from a sanctioned country, it will an OFAC license. Currently, "ICANN under no obligation to seek such licenses…" The community has the ability to challenge ICANN inaction on this issue, via a Community IRP. If an Accountability & Transparency Review (ATRT) made relevant recommendations that were rejected by the board, a Community IRP could be brought to challenge that action.	One proposed measure is for ICANN to pursue one or more OFAC "general need licenses" to cover transactions such as is registry and registrar contracts, Privacy/ Proxy Accreditation, ICANN-funded travelers, etc. A general license would enable these transactions without the need for specific licenses. If a general license is not possible, another proposed measure is to amend ICANN stated policy to require ICANN to apply for and use best efforts to secure a specific OFAC license if the other party is otherwise qualified to be a registrar (and is not individually subject to sanctions). ICANN should be helpful and transparent about the licensing process, including ongoing communication with the potential registrar.

CONCLUSIONS:

Existing measures may not be adequate.	Proposed measures are an improvement in helping ICANN meet its Core Values and be accountable to global domain registrants.

Stress Test #3: ICANN fails to provide services to a new gTLD registry applicant from a country that is subject to sanctions that apply to the ICANN corporation. (e.g., United States OFAC sanctions)	
Consequence(s): ICANN is failing on its Core Value "promoting competition in the registration of domain names," with respect to aspiring and qualified registry operators from some countries.	
EXISTING ACCOUNTABILITY MEASURES	**PROPOSED ACCOUNTABILITY MEASURES**
For ICANN to enter an agreement with a to party from a sanctioned country, it will need an OFAC license. Currently, "ICANN is under no obligation to seek such licenses…" The community has the ability to challenge ICANN inaction on this issue, via a Community IRP. If an Accountability & Transparency Review (ATRT) made relevant recommendations that were rejected by the board, a Community IRP could be brought to challenge that action.	One proposed measure is for ICANN pursue OFAC licenses for all registry applicants otherwise qualified. ICANN should also be helpful and such transparent with regard to the licensing process, including ongoing communication with the applicant.
CONCLUSIONS: Existing measures may not be adequate.	Proposed measures are an improvement in helping ICANN meet its Core Values and be accountable to global domain registrants

One World, One Internet

ICANN

Annex 4.2 – Jurisdiction Sub-Group – Minority Statement – CCWG-Accountability WS2 – March 2018

DISSENTING STATEMENT OF BRAZIL

ON THE DRAFT REPORT ON JURISDICTION SUBMITTED TO THE CCWG PLENARY ON 11 OCTOBER 2017

Brasília, 24 October 2017

Brazil expresses its opposition to the draft report on jurisdiction submitted to the CCWG plenary on 11 October 2017.

The draft report falls short of the objectives envisaged for Work Stream 2 – in particular the need to ensure that ICANN is accountable towards all stakeholders –, by not tackling the issue of ICANN's subjection to US jurisdiction, as well as leaving untouched the unsatisfactory situation where US authorities (legislature, tribunals, enforcement agencies, regulatory bodies, etc.) can possibly interfere with the activities ICANN performs in the global public interest.

Brazil cannot accept this state of affairs – where Governments are not placed on an equal footing vis-à-vis the country of incorporation as regards their ability to participate in ICANN's management of Internet's global resources –, which is not in line with the rules and principles embodied in the Tunis Agenda for the Information Society nor with the fundamental tenets of the multi-stakeholder approach, which we uphold and support.

Brazil hereby submits the document annexed below, which forms an integral part of the present statement, and which indicates the points Brazil considers should have been reflected in the draft report.

ANNEX

1. **Introduction**

Brazil recalls the principle endorsed by the subgroup on jurisdiction on how it would proceed in discussing and proposing recommendations for ICANN, namely that "we [the

subgroup on jurisdiction and, by extension, the CCWG] should be looking at what are the outcomes we're looking for and less trying to be very specific about how to implement it."[1] As summarised by the rapporteur of the subgroup on jurisdiction, "we [the subgroup on jurisdiction and, by extension, the CCWG] are in the business of making policy recommendations and not implementation recommendations."[2]

At the CCWG plenary meeting at ICANN 59, the concept of immunity from US jurisdiction (partial immunity, restrictive immunity, immunity with exceptions) featured prominently as an indispensable condition for the CCWG as a whole to accept the proposal that it would not pursue recommendations to change ICANN's jurisdiction of incorporation or headquarters location. Subsequently, at the subgroup level, some convergence of views could be discerned to the effect that immunity from US jurisdiction would be needed to remedy "the concern that US organs can possibly interfere with ICANN's [core functions in the management of the DNS]".[3]

We understand that there was room for consensus around the need to recommend that ICANN seek to obtain immunity from US jurisdiction in ways that enhance ICANN's accountability towards all stakeholders. Thus the subgroup could have recommended that ICANN take steps to ensure that US organs cannot exercise jurisdiction over ICANN in ways that interfere with the policy development and policy implementation activities ICANN performs in the global public interest, while making sure that ICANN remains accountable for all its actions, including accountability under US laws and tribunals for such activities that do not directly interfere with the management of Internet's global resources.

We share the concerns expressed by some members of the subgroup on "how to design immunity [so that ICANN becomes free from the possibility that US organs may interfere with its core functions] in a way that does not immunise ICANN from liability for arbitrary and unlawful actions."[4] To address these concerns, we believe that the subgroup could have expressly called upon ICANN to maintain and further develop

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[1] The principle was spelled out by Mr. Bernard Turcotte at meeting #43 (23 August 2017) of the subgroup on jurisdiction and guided the subsequent work of the subgroup.

[2] Statement by Mr. Greg Shatan at meeting #43 (23 August 2017) of the subgroup on jurisdiction. See also statement by Mr. Bernard Turcotte at the same meeting: "Every time we get into detail of implementation, we are, A, causing more work for ourselves. B, sometimes doing that work without the full context. So … let's describe what we're looking for. What's our objective? And, you know, let's be clear. I mean, if this thing makes it through the entire process and is approved, ICANN is going to be bound to look into this and say what it can and can't do."

[3] See the statement by Mr. Nigel Robert on his email of 23 August 2017 (15:44:08 UTC), available at http://mm.icann.org/pipermail/ws2-jurisdiction/2017-August/001471.html: "The concern that US organs can possibly interfere with ICANN's ccTLD management is reasonable."

[4] Ibid.

independent accountability mechanisms to ensure that ICANN can be held liable, especially for its activities that would be covered by immunity from US jurisdiction.

Furthermore, we agree that ICANN's immunity from US jurisdiction should be partial, and therefore that there should be exceptions to it, which should enable, for example, that ICANN's internal governance functions which do not directly interfere with the management of Internet's global resources (such as employment disputes within ICANN, health and safety regulations, etc.) remain subject to the normal operation of the laws and tribunals of the country of incorporation.

2. Ensuring ICANN is accountable to *all* stakeholders

The NETMundial multistakeholder statement has urged that "… the process of globalization of ICANN speeds up leading to a truly international and global organization serving the public interest with clearly implementable and verifiable accountability and transparency mechanisms that satisfy requirements from both internal stakeholders and the global community."

In this connection, the Charter of Work Stream 2 expressly relies on the NETmundial multistakeholder statement in order to define ICANN's accountability goals.[5] Currently, ICANN's accountability mechanisms do not meet all stakeholders' expectations, for ICANN is more accountable to the country of incorporation and its citizens, namely the United States, than to others.

We would have hoped that the draft report on jurisdiction would have recommended measures aimed at increasing ICANN's accountability as defined in the NETmundial multistakeholder statement, i.e. accountability towards all stakeholders, by recommending that steps be taken to ensure that no single country, individually, can possibly interfere with the policy development and policy implementation activities ICANN performs in the global public interest, while making sure that ICANN remains accountable for all of its actions.

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[5] "During discussions around the transition process, 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." Work Stream 2 Charter, section II, problem statement.

3. ICANN currently is more accountable to US jurisdiction than it is to others

The authorities of a country where an entity is based have a superior (and in many respects exclusive) claim to jurisdiction over the activities of that entity. For example, the territorial State is the one with exclusive enforcement jurisdiction, so that only the local enforcement agencies have the necessary authority to compel people in the country to comply with national laws and court rulings.[6]

That the United States is in a unique position to impose or enforce its own laws and regulations and domestic policies over ICANN, in ways that affect the Internet worldwide, is borne out by the fact that, in the draft report on jurisdiction submitted to the CCWG plenary on 11 October 2017, the US OFAC sanctions regime has been singled out as a major problem for ensuring ICANN's impartial operations towards all stakeholders. The sanctions regime of no other country has been so singled out, nor could they be so, as sensibly interfering with the activities ICANN performs in the global public interest. Notice that ICANN is subject to the OFAC sanctions regime because (i) OFAC applies to US nationals (individuals or entities) and (ii) ICANN is incorporated under US laws, i.e. a legal entity possessing US nationality.

OFAC is just one example of a regime under US laws that applies to ICANN in a manner that can interfere with the functions and activities ICANN performs in the global public interest. As these functions and activities acquire greater importance in practically every sector of a country's life, it is not unreasonable to assume that other US organs or regulatory bodies in each and every sector may exercise their powers of jurisdiction over ICANN in ways that influence ICANN's policy actions with consequences for the Internet in other countries.

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[6] In the case of ICANN, if the argument is made that any country in the world could pass legislation or judgments to interfere with ICANN's core functions which are performed in US territory, the enforcement of any such legislation or judgment would still need go through action of US enforcement agencies. In other words, US organs would have to consent to them, and US organs themselves would have to carry out or enforce the required action at the request of other countries' organs. For example, in the absence of treaties agreed on by the United States, US courts would have first to recognise foreign judgments against ICANN, in *exequatur* proceedings, for them to be enforceable within the US, and their execution would have to be carried out through US organs.

4. The insufficiency of remedies that do not shield ICANN from US jurisdiction

For as long as ICANN remains a private law entity incorporated under US laws with no jurisdictional immunity for its core global governance functions, it will be subject to US jurisdiction in the ways described above, notably to US exclusive enforcement jurisdiction over activities and people within US territory in ways that can adversely affect the Internet worldwide. Hence, for ICANN to obtain "insulation from the vagaries of U.S. foreign policy or other laws and policies that would circumvent ICANN's accountability to its global MS community",[7] it is necessary that it be granted immunity from US jurisdiction. This insulation, in turn, cannot be achieved through just the commitment of US enforcement agencies to exempt ICANN from *specific* and *currently known* regimes or measures that interfere with ICANN's activities, as will be the case, for example, if ICANN obtains a general license from OFAC. Apart from many other (non OFAC) existing US laws and regulatory regimes that can potentially impact on ICANN's global governance functions, new and unforeseen laws and policies that interfere with ICANN's activities can at any time be enacted and enforced by the country of incorporation.[8]

5. The need for ICANN's immunity from US jurisdiction

To remedy the state of affairs described above, where the United States is in a unique position to impose or enforce its own laws and regulations and policies over ICANN in ways that affect the Internet in other countries, it is necessary that ICANN obtain immunity from US jurisdiction. There is no obstacle preventing private organisations formed under the laws of one country, as ICANN currently is, to enjoy (be granted) jurisdictional immunities. If immunity is so granted, ICANN would still be an organisation incorporated under the laws of California, subject to California laws and to their corresponding accountability mechanisms with respect to such activities that may be expressly exempted from the immunity regime.

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[7] According to Professor Milton Mueller, who is a participant in the subgroup on Jurisdiction, "[w]hat we need is … insulation from the vagaries of U.S. foreign policy or other laws and policies that would circumvent ICANN's accountability to its global MS community." (http://mm.icann.org/pipermail/ws2-jurisdiction/2017-August/001391.html)

[8] One historical example of such new legislations enacted by the US which affected the dealings of US nationals (citizens and entities) with foreign countries is the Cuban Liberty and Democratic Solidarity [Libertad] Act of 1996, also known as Helms–Burton Act.

Further, in addition to the necessary exceptions to ICANN's immunity from US jurisdiction, which would thereby remain subject to the existing accountability mechanisms under US laws, all of ICANN's public global activities that will cease to be subject to the unilateral accountability mechanisms of the United States will, instead, be subject to the accountability mechanisms devised by the global multi-stakeholder community.

There are precedents of modern regimes of partial immunity, with a detailed set of exceptions as well as internal accountability mechanisms, applicable to private law entities, although strictly speaking no such precedent would be necessary for a suitable regime of immunity to be crafted.

For example, the ICRC (International Committee of the Red Cross) is a private association formed under the Swiss Civil Code, it draws its legal existence from the Swiss domestic legal order, it is subject to the laws of Switzerland, it is not an intergovernmental organisation. Yet it enjoys immunity from the local laws, subject to few exceptions (the basis for the ICRC's immunity is an agreement with Switzerland as well as Swiss laws). Further, where the ICRC enjoys jurisdictional immunity, it is immunity from adjudication and enforcement, and it can be waived at any time. Accordingly, it is not immunity from liability.

In the US, there would be at least one similar example, namely the International Fertilizer and Development Center (IFDC), whose immunity from US jurisdiction seems to have been obtained through a Presidential decree in 1977 under the US International Organizations Immunities Act. The IFDC would remain a US incorporated non-profit corporation employing relevant US laws for its internal governance functions that do not impinge on its global mandate.

6. **Conclusion**

Brazil considers that the draft report on jurisdiction submitted to the CCWG plenary on 11 October 2017 should have reflected the points identified above, as well as included recommendations to the effect that

(i) ICANN shall obtain jurisdictional immunities from the United States, for example under the US International Organizations Immunities Act, except for such

ICANN activities that do not directly interfere with the management of Internet's global resources, which exceptions will inter alia enable US adjudication of claims related to ICANN's internal governance functions;

(ii) ICANN shall maintain and further develop accountability mechanisms not subject to the jurisdiction of any single government, through appropriate bottom-up multi-stakeholder policy development processes, to ensure that ICANN can be held liable especially for its activities that are immune from US jurisdiction.

Due to the draft report's failure to address such concerns which, in our view, occupied centre stage in the process that led to the launching of Work Stream 2, Brazil cannot support the draft report.

Annex 4.3 – Jurisdiction Sub-Group – Transcript of Jurisdiction Discussion at WS2 Face-to-Face Meeting at ICANN 60 – CCWG-Accountability WS2 – March 2018

ABU DHABI - CCWG Accountability WS2 Face to Face Plenary Session @ ICANN60

Friday, October 27, 2017 – 08:30 to 17:30 GST

ICANN60 | Abu Dhabi, United Arab Emirates

This is an excerpt from the official transcript which only captures the discussion on the Jurisdiction report. The text dealing with elements before and after this discussion of the Jurisdiction report have been removed for convenience and no other editing has been performed. As agreed by the WS2 plenary this will be included as an official annex to the jurisdiction report.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

THOMAS RICKERT:	Thanks very much. Let's just check that we have Greg on the phone line.
GREG SHATAN:	This is Greg, I'm here.
THOMAS RICKERT:	Greg, great to have you. So I think that we can start this session with the Rapporteur being on Board in the first item and this is sort of following up to what I said at the beginning of this meeting is the presentation, discussion of minority opinions. And for that, I would like to invite the colleagues from Brazil to make the first intervention. Again, the report, as was discussed and presented to the Plenary does not go far enough for some in the sub team. We do want to make sure that these views are not being ignored, but just the opposite, that these views are properly recorded and archived because jurisdiction related debates will surely continue beyond the life of this Work Stream 2 or even the CCWG as such, and, therefore, we want to make sure there is a repository of the various views that have been held so that future debates can be informed by those views.
	And I would like to acknowledge and thank Brazil for refining their minority position. As you will have noted, the process related points have been removed, which I think is great because even though not everyone might agree with the substance of the work products of the CCWG, what we should all take care of and be responsible for is the process. Because following the process for coming up with our recommendations is actually giving legitimacy to the recommendations and the multi-stakeholder model as such. And, therefore, thanks again for refining your minority opinion. And as promised, we want to give you ample opportunity to make your views heard. And this does not only go for Brazil, but also for Parminder who has asked for a dial out and I would like to remind the operator that Parminder wanted a dial out ready for the

jurisdiction session, so we will be sure to make sure to put Parminder's views on the record as well.

But before we do that, let me hand over to Benedicto, is it going to be you to make that intervention? If so, the floor is yours. Please.

BENEDICTO FONSECA: Thank you, this is Benedicto Fonseca from Brazil. Thank you, Thomas, for this. I would like to take this opportunity to thank you and the Co Chairs for offering us the opportunity to speak to our minority opinion. We have since you guys have indicated revised version focusing on the substance of our concerns, I'd like to also take this opportunity to thank all those who have been participates in these jurisdiction subgroups. We understand there have been very complex and sometimes difficult discussions. We understand we have been working under severe pressure of time, dealing with issues that are in itself complex, that relate to different areas of work within ICANN. So I'd like to take this opportunity to thank all those and to acknowledge the good work that has been done. Although not exactly addressing some of the issues I would like to have addressed, but I would like to acknowledge the impressive amount of work of time, of manpower, that has been invested in this process.

With this, I'd like to state that the I would not like to try to reformulate what we have stated in our document. We think we have been, as I have said, the process of further refining the idea to make sure we have a very clear message in regard to what are the important points for us and why we cannot accept the document, although we viewed the document and the process that lead to it, we cannot accept it because we do not consider it to address adequately the some of the main areas of concern to us and others, I assume. So I would like, with your indulgence to talk to my colleague, Thiago to make a very short presentation of the document. As I have said, I think the documents speaks for itself. We would not like to reformulate, but just highlight those areas the document would like to take advantage of this opportunity to have it on record. And maybe on that basis, to elicit some discussion and have some feedback from other colleagues that might also illustrate us and further provide some input in our thinking. Thank you. So with this I turn to Thiago.

THOMAS RICKERT: Thanks very much, Benedicto. We do not have a two minute timer running, so Thiago, please take the time that you need in order to convey the message and bring the points across.

THIAGO JARDIM: Thank you, Thomas. This is Thiago Jardim speaking for the record. I was about to say just that I would perhaps probably go over the two to three minute time limit to present the position on this issue. I think it's perhaps appropriate for us to go through the document that we submitted as a dissenting statement for those

who have not had an opportunity to have a look at it, to be familiar with it. And as Ambassador said, perhaps this will instill some discussions.

In the [indiscernible] statement, the revised version that we submitted, we maintained the substantive points and we started the document I'm not sure whether there's a PDF version that could be displayed on the screen for the remote participants to follow it as well. In any case, I'll start by mentioning the introductory points of the dissenting statement. In the introduction, we recall what we understood was a principle endorsed by the Subgroup on how we would proceed when drafting recommendations and that principle was brought to our attention by Bernie. And I thank him for that. And the principle is that the Subgroup would be drafting policy recommendations, which is to be distinguished from important because it sends a clear message that the Subgroup doesn't have to get into too much detail when providing for guidance for ICANN to proceed when perhaps implementing measures and when considering the measures that were recommended by the Subgroup.

Let me then quote what was said at that point in time, referring to that principle. The Subgroup should be looking at the outcomes they are looking for and less trying to be specific about what is implemented. Having that in mind, we would like to recall what was discussed and eventually decided at ICANN 59. The concept of immunity during that meeting featured prominently as an indispensable condition as we understood it at that time for the CCWG to, as a whole, to accept the proposal that you would not pursue recommendations to change ICANN's jurisdiction of incorporation or Headquarters location. This was fine. This was fine for the CCWG as a whole on the condition that immunities would be discussed and eventually feature in the recommendations.

Subsequently at the Subgroup level, those who follow the work of the Subgroup will recall that there was in our view some room for agreement to discuss immunities and there was a legitimate concern expressed by many Subgroup members that U.S. [indiscernible] could possibly interfere with ICANN's core function in the management of DTMS. So we thought the immunity aspect shouldn't have been discussed and we regret that in the final recommendation it was not discussed and it did not appear as one of the issues that should be should have a recommendation about.

We'll also share the concerns expressed by some members of the Subgroup on the need to design immunity in a way that did not or does not immunize ICANN from arbitrary lawful actions. And to address these concerns, we believe ICANN could have

[indiscernible] alongside a recommendation on immunities, a detailed set of exceptions to make sure ICANN is not immunized from lawfully actions. So there can be a set of ICANN activities that would still be subject to laws of tribunals and laws of configuration. And we continue to believe even for those activities that would be immunized from U.S. jurisdiction, those immunities would be subject to accountability mechanisms devised by the ICANN community itself. This is particularly the case, for example, if you think of the IRP tool that currently exists. And there could be other mechanisms to make sure that ICANN remains accountable, even for those activities that are immune.

In point two then of dissenting statement, we expressed the fundamental aspect that we think should have guided the work of the Subgroup and that is that the Subgroup should be trying to recommend measures that will make ICANN accountable towards all stakeholders. And we recalled into that effect the net [indiscernible] stakeholder statement which [indiscernible] that the process of globalization of ICANN speeds up, leading to a truly International and global organization, serving the public interest with clearly implement and verifiable accountability and transparency mechanisms to satisfy requirements from both internal and emphasize the global community.

So in this connection, let me recall you that the charge of Work Stream 2 expressly relied on the [indiscernible] statement in order to define ICANN as accountability course, to our understanding, ICANN's accountability mechanisms currently do not meet all stakeholder expectations because ICANN, again, is more accountable to the country of incorporation and its citizens because it is subject to the country of incorporations jurisdiction more than it is to the jurisdiction of other countries.

Again, we would have hoped the draft report would have recommendations aiming to increase ICANN's accountability as defined in the multi-stakeholder statement, accountability towards all stakeholder, by recommending that steps be taken to recommend that no single country individually can possibly interfere with the policy development and policy implementation activities ICANN performs in the global public interest.

Moving on to point three, and then there's a brief explanation of why, we consider ICANN is more accountable towards the country of incorporation than it is to other countries. We explain very briefly that the country of incorporation has a superior, and in many respects, exclusive claim to jurisdiction over the activities of ICANN. One example of is that it is the territory state with the necessary authority to enforce legislation, court rulings against the entity that is based in that territory. So ICANN, in that sense, is subject to more jurisdictional authority of the United States than it is subject to the jurisdictional authority of other countries.

I think this is borne out by the fact that the draft recommendation, and I think this is a plus aspect that should be praised, recommends measures in relation to OFAC sanctions. The fact that the Subgroup on jurisdiction singled out OFAC sanctions is an indication that the measures adopted by the United States are a reason of concern other man the measures adopted by other countries. So we would have liked that the Subgroup on jurisdiction recommended wider measures, not just OFAC measures, are taken care of, but the U.S. regulatory bodies and that they continue to have the possible to continue to interfere with ICANN's function.

Moving to point four. The measures recommended by Subgroup and jurisdiction, which to give this one example, targeted OFAC sanctions, are insufficient in our understanding because again it leaves uncovered the other measures. The current legislation that exists in the United States that can be applied and enforced against ICANN in ways that will effect ICANN's development and core functions. So there are other legislations and measures that can still be adopted and will possibly be adopted in the future is a matter of concern.

I think it's important in this respect to highlight that our understanding is that the Subgroup should have recommended not just specifically that measures start against specifically and currently known regimes that exist and that currently effect ICANN. It would have been an incremental gain, if you will, if the Subgroup had recommended measures that could be used in general and would make sure that ICANN is aware that it needs to take steps to obtain exemptions from unknown interference on the part of the country of incorporation.

This would explain, therefore, the need for ICANN to have immunity from the United States jurisdiction, which is point five.

And just one brief word in relation to immunities before I move to the conclusion. We have, from the beginning, reiterated the concern that ICANN must remain accountable for its actions. And immunity doesn't equal impunity because, one, for the actions that are covered by an immunity regime, it's possible and there will be an internal accountability mechanisms devised by the community, but also there could be exceptions to immunity regime. And it's important to understand that exceptions to organizations immunity, something that is not necessarily the rule and International practice, if you look at the U.N. for example, it's the understanding that organizations have absolute immunity and here we were willing to accept that exceptions be crafted, that there is a regime carved out making sure that some of those ICANN activities that do not interfere with ICANN's global management of the [indiscernible], those activities would still be

subject to the normal laws and tribunals of the incorporation, which is the United States. I think that shows the willingness on our part to listen to concerns of the community and make sure that those concerns are taken care of, taken on board.

Having said that, we would have hoped that the draft report would have had recommendations and I'll ask perhaps to the last page of our document to be shown on screen, we would have hoped that the recommendations would have included at least two recommendations that we included in our dissenting statement. They are, again, reflecting the spirit that the Subgroup providing for policy recommendations, not too much concern with the details, which would be left and could be left if the Subgroup so wishes to the implementation stage. We also could have recommended the setting up of a team to discuss how to implement those recommendations. But here they are, those two first recommendations. First, that ICANN should retain jurisdiction in the United States under the [indiscernible] immunity act except for such ICANN activities that do not directly interfere with the management of the Internet's global resources, which exceptions would, for example, enable U.S. adjudication of claims related to ICANN's Governmental functions, for example, employment disputes, contracts that ICANN concludes with local service providers.

And the second recommendation typed into the first would be that ICANN shall maintain and further develop accountability mechanisms not subject to the jurisdiction of any single country for appropriate bottom up multi-stakeholder processes to ensure that ICANN can be held liability especially for [indiscernible] immune from jurisdiction.

Because these two recommendations did not appear in the draft report, not just as recommendations, but it did not appear not even in the text, so we believe that particular failure leaves out many concerns related to jurisdiction that lead to the establishment of that workforce 2 and because of that, unfortunately Brazil cannot support the draft report. Thank you.

THOMAS RICKERT: Thank you very much, Thiago. Are there any questions for Thiago? Or Benedicto? That does not seem to be the case. I would like to Kavouss, I apologize. I'm sorry, I oversaw overlooked your raised hand. The floor is yours.

KAVOUSS ARASTEH: Thank you. Thank you, Thiago, for the very comprehensive understanding of the situation. It's not a question to you, but just a clarification. Do you mean by perusal of the matter of the recommendations of this implementation to have something similar to the implementation oversight group or team to review the matter after Work Stream 2 to understand how it should be

implemented and if there is any shortcoming, this shortcoming could be inserted? Is that the case you are referring to? Thank you.

THOMAS RICKERT: Please.

BENEDICTO FONSECA: Thank you. I'll take that. I think the main point we have raised is that we think the Subgroup should not be concerned too much with the implementation phase, but the Subgroup should have looked into the issues and to the [indiscernible] importance of the issue to try to come up with the appropriate recommendations without at this point in time being concerned too much about implementation. So we thought it was not requested from the group to engage into that. We tried more to advise and to on the basis of the issues, what should be done in that regard. So we think that maybe one thing that constrained too much the group was the concern to make sure or even to have some kind of political assessment of what was viable or not and that I think the group itself, imposed itself too many constraints and that impeded the issues. I think this is basically what we are saying when we talk about implementation, that should not have been the focus of the work of the group. It was more trying to come up with kind of policy recommendations and the whether those and what would be required and if any, the timing or the political timing was right or not, I think this was not something that should have been addressed. It has consumed and constrained and guided the work of the Subgroup so much. I don't know if I have an answer to Kavouss's question.

THOMAS RICKERT: Thanks very much, Benedicto. Are there any more questions for Benedicto or Thiago?

THOMAS RICKERT: Steve had a question in the chat which I'm going to read out for you. Is it realistic to say ICANN shall obtain jurisdictional immunities with sanction relief our report recommendations that ICANN use best efforts to obtain, but we are not able to guarantee the result?

Thiago, would you care to respond to that?

THIAGO JARDIM: Yes, thank you. Thank you, Thomas. Thank you, Steve, for the question. This is Thiago for the record. I think the Subgroup is in the business of making recommendations toward ICANN. And I understand that there might be problems for ICANN to implement those recommendations. But then it could come down to how we craft those recommendations. Recommendations could be worded, for example, recommended that ICANN take steps to obtain. It is in itself a recommendation that would impose a soft obligation, an obligation of conduct rather than an obligation of result. And then we could also ask for ICANN to come back to the

	community to seek more guidance on the issue. But at the end of the day, I think the problem with the draft report as it is currently drafted, it doesn't even take into account the need to discuss those issues the way we are discussing it now and I thank you for that.
THOMAS RICKERT:	Thanks very much. So can I ask those who want to make statements, I know that Parminder wanted to speak, so can you please put yourself in the cue so that we can see how many interventions we can hear before we break for lunch? But in conclusion with respect to the statement from Brazil, you might remember that when we issued the Co Chair statement on the way forward for the jurisdiction recommendations, we reserved the right to publish a statement responding to the minority statement. And given the version that we discussed a minute ago, the Co Chairs do not see the need for any clarifying response to your minority statement. So unless the Plenary suggests otherwise, there will be no reaction to the minority statement, but we will just attach it to the report on a [indiscernible] basis.
THOMAS RICKERT:	So there are two hands raised, or three hands raised, so it's good there's a cue forming. And just as a heads up, this is not to limit your ability to speak. What we should be doing is get a quick reaction from the group where there are whether any of those hands raised are related to my statement i.e. there will be no Co Chair response to the minority statement. If there were the case, then I'd like you to just make yourself heard. So that does not seem to be the case. So we can now move to the other interventions, so Parminder is first. Then Kavouss. Then Sebastien. Then Greg. Parminder, let's do a little audio test whether you can be heard. Welcome to the meeting.
PARMINDER SINGH:	Thank you, Chair. I'm Parminder. Am I audible?
THOMAS RICKERT:	You are audible and the floor is yours. Please go ahead.
PARMINDER SINGH:	Thank you so much, Chair. And thank you for giving me this opportunity to [indiscernible] our views speaking on behalf on a lot of organizations and groups we work with. So thank you for that.

First of all, I would start by completely agreeing about [indiscernible] statement and would not repeat its point that were already said in the statement that we start with [indiscernible] points and the fact that we would like the recommendations which have been suggested to be the ones which should have been part of the report and [indiscernible]. And also, other statements or clarifications which [indiscernible] statement carries.

After that, I would come to the additional point that we would like to make. And the reason that we do not agree or reject the |

statement, the report as it stands, is both because of the content and the process. And I would speak about the two sequentially.

About the content, we do agree that [indiscernible] among the few who first read this demand, but you think it addresses a part of the problem and the problem is conjoined. It is one problem [indiscernible] very well that one country is able to exercise jurisdiction over a very important global Government function, which leads people from other countries in an unequal position. And it is not just a political statement, but these developments are real and factual. And the kind of sanctions which effect [indiscernible] are not very different from the kind of things that many of the [indiscernible] Government [indiscernible] and so on can put on the main policies of ICANN which is something that is not acceptable. And, again, even some kind of political statement that all countries should have an equal rule and no country should be able to exercise no jurisdiction and extract more accountable from ICANN than others should have been part of this report because are the kinds of things which have been said earlier in many global texts. And we are also the mandated of this group to do, which somehow it was not considered the mandate. So at least make some operational, some political statement about equality between countries and people of the world is important within this jurisdiction. And none of that was done, which is a problem.

And also the third problem which is going to come from the process, in the discussions, they were not even acknowledged. Not acknowledged officially when the process was on and I will give instances of that, and not acknowledged in the final report even as something important, which was discussed, which was the position of many participants and very passionate and the [indiscernible] position of many participants.

Now do please note that the immunity under the [indiscernible] act was a compromised position because after all, this immunity, which is customized immunity under U.S. law is subject to U.S. legislative and residential executive accountability and it can be [indiscernible]. And, therefore, it is not the perfect solution we would we agree to because we do not want to be subject to [indiscernible]. But this wasn't a compromise, it was a climb down [indiscernible] we are ready to do it, we are ready to take immunity as many NPOs or NGOs in the U.S. already have and we were ready to give examples of that, we were ready to consider that. And we were ready to carve out any areas other people may not want to get immunized, get ICANN immunized against. But none of this was even a consideration. And that is a major problem with this report.

And to say why these issues are important because going into the future and [indiscernible] is utilized and this dominates all factors, [indiscernible] and factors GTID and business are going to be important and this puts [indiscernible] from other countries at great disadvantage [indiscernible] subject to U.S. rules. And [indiscernible] is dealing with the [indiscernible] is one of the most hotly contested political areas. And this conversation, the fact that there's the only [indiscernible] list, the fact of the U.S. jurisdiction is going to be a continuing problem. And we don't see the problem solved at all and these are actually practical reasons and not just political ones that we oppose the report about.

Now having said it, our main position on the action content, we would briefly speak about the process. The problem has been noted and can be noted from two day proceedings that this is the statement, this is the position which is very passionate and practical measures, too, we very strongly associate with. [Indiscernible] being the case from the [indiscernible], if you look at the kind of public comments, I mean, we have participated in many meetings among stakeholders and all of them said jurisdiction was the most important. [Indiscernible] of the world's population. And I know in developing countries every year this was a very important issue.

But the problem was that even when we came up with a compromise which was under the U.S. law and we were ready to carve out exceptions to immunity, this was not given an official space in the year and a half to be discussed at all. And that really [indiscernible] the process and because of that the legitimacy of this report.

Now many processes were kind of proposed by the groups, too. The initiative said you cannot talk about solutions, you can only talk about issues, and at that time we kept on coming out with the customized immunity discussions, but whenever we give that particular proposal, people said, no, no, jurisdiction issue is something that we know is a problem, but whatever you do with it, the problem will remain. And then we say, no, we have a solution because that's how we can show that what you are arguing is wrong and we would give the solution of customized immunities and they would say, no, you can't discuss solutions. It was a very difficult situation. Really nothing was being done over month base things were stalled, people wanted to discuss the political thing and we were not allowed to discuss.

I will fast forward and come to Johannesburg meeting where suddenly it was decided by [indiscernible] and the CCWG chair that certain solutions are out of mandate. Now this is very strange that while we are not allowed to discuss solutions and we are at the issue stage how solutions disappeared from our table or our mandate. Anyway, there were again talks around it and people

said at least customized immunity should be stripped from that particular [indiscernible] and people agreed it could be in this draft and it looked like it implied [indiscernible] that this would be discussed.

Now we went along with this promise and the process again meandered in many different directions and for them there was another process position, which was the [indiscernible] which said that everyone can suggest clear issues with clear solutions in an e mail with a clear header and we can combine them. And we, of course, did give this as one of the issues and the solution being customized immunity. And excuse me to go into details because I think these details need to be recorded and [indiscernible] available here.

At that point when people gave these specific issues and specific solutions and [indiscernible] was done to [indiscernible] into a few set of issues, which we found was fine because we don't repetitions or overlaps and we came up with six other [indiscernible] that would then be discussed. And for some reason, number 1 and 2 were [indiscernible] and Choice of Law issues and the discussion started. And while the discussion was going on on [indiscernible] and Choice of Law, we were not bringing up immunity discussions because we thought that was not proper because there were two types of recommendations being drafted right now. And it is the chair's job to see that the deadline is coming and we have this problem, so what to do about it? It seems that was taken [indiscernible] and people were not the process minder have a different responsibility than the workers as minders. And once the working group's job is done, these are the recommendations. Now this is complicated and appropriate and obviously as we have been saying and [indiscernible] has said, the most important issues were not even in a year half discussed.

We are happy to have that discussion done, for other people to come and see that these are the reasons we don't agree with customized immunities, for us to say we probably can meet the concerns in this manner, and then people say, [indiscernible] and honestly say, well, this was done and this was discussed and this was the status of consensus of of our lack of consensus of this issue. This did not take place. And this is a fact and I would like that fact to be contributed by the people that are chairing this meeting. And if this is accepted, then it should be explained why, when the most important issues are brought up by an important part of the group was not recognized and taken up.

Really, unfortunately, not only was it not recognized, it was said that the talk which some people are doing is about change of place of incorporation of ICANN or change of location of ICANN. This was done in an official document including a final report

which said we suggested change of [indiscernible] and then was never discussed. One thing is to show the discussion that some people are trying to do and which is being refused and the discussion on change of location and incorporation, which was not. And this includes, it has nothing to do with the proposal which was one of the most important proposals for part of the group. This does not happen. I would like a statement and explanation of that.

Now we do [indiscernible] as we said and try to meet the concerns of other people and we had not met consensus. It is possible then through the report, in this final report, that this happened and we did not get the consensus, but advantaged and disadvantages were discussed. But this was not done. In fact, the report did not say we discussed immunity. It says we discussed change of incorporation. It does not say we discussed advantages and disadvantages.

Now let me briefly say the Board does say about some issues where they [indiscernible] as part of the report like the four or five choices of option issues which are not recommendations, but they were just a reflection of discussions.

Now if you ask me, I was there most of the time in the group, I do not recommend discussions on fixed law approach, which I'm sure it would have been discussed in some of those calls which I was not there, but these were major discussions about the possibility that fixed law should replace the Choice of Law solution, which is fine. But this talks about the advantages and disadvantages in one part of the report, the same report which refuses to acknowledge, much less talk, about the issue about customized immunity which [indiscernible] is not putting an objection against, which I'm objecting against and many people here wanted to be brought up. We would like to know where the report can talk about certain discussions even if they are not recommendations, but not other issues.

So that finishes my intervention on the customized immunity. Very briefly, if you would allow me to talk for about four minutes? Okay, by silence, I take it that I can. These are the two particular determinations I had asked for before the first reading which the chair and the Subgroup Rapporteur were kind enough to explain in the first reading which I could not attend because it was very late hour in India. But I have a brief comment on those clarifications.

I would first go to the one on Choice of Law. The issue here, I was told that it is clear that the group is recommending a [indiscernible] based approach. That recommendation and the rest of the discussions of other options do not constitute recommendations,

but are merely [indiscernible] discussions or the kinds of things the group considered.

Now if this is so, my first question is to let the report make it clear as it is present that the recommendation is only that we would like to see a [indiscernible] based approach. And the rest of it, in the report, if at all, needs to be in a manner which does not imply that it's probably also the options being offered to ICANN. I agree that there is some [indiscernible] which says this is the recommendation, but there is also not enough clarity. So please be clear with me about the recommendation being clear that we would like a [indiscernible] based approach. And the others are not our recommendations because of discussion. And I'm sorry, but I refer back to the call of the discussion which area which was very briefly discussed by the group, why can't the discussion of immunity, which were tried to be brought in by many people, many times, and there's a lot of text there, could not also be regarded as part of the report. And this is a question I would like to be clarified about.

And even now, coming back to the new [indiscernible] based approach, I think it is not enough to recommend to ICANN that the [indiscernible] approach where one of the options could be a fixed law [indiscernible] which is not actually many options because fix law [indiscernible]. One of the options could be, of course, use of [indiscernible], which I agree would be part of a menu. And others could be probably the country of history and other could be [indiscernible] where it is not mentioned at all. I agree with that menu.

But I think unless we also make further recommendations because recommendations between ICANN and [indiscernible] is a very unequal relationship. ICANN is the principle party which holds all the cards in its hands. Now if we just tell them that you can choose one of them and that's all, there's nothing stopping ICANN from consistently choosing [indiscernible] formula, for example, almost automatically every time. And I think we need to clearly see, if we don't want to make it compulsory that we don't use California law, we can just say, okay, use any of them, there's nothing from stopping them from using California law every time. So let's make some recommendation which is to give consideration to the fact that these are the problems that other countries may face and they may be better off if they have some Choice of Law which is closer to their country not affect their own country. And we would like to see at least a certain proportion of the contracts having a [indiscernible] region which is not California law or [indiscernible] and of other countries.

Unless you kind of nudge ICANN with some recommendation towards not automatically going for California law option, the

recommendation model doesn't say anything because we can't be in compliance with this recommendation and consistently go for either California law or no Choice of Law.

So this is a change which I would request.

THOMAS RICKERT: Parminder, this is Thomas speaking. You asked for another four minutes and we are now past 4:30 local time, so the lunch break is waiting. And maybe you can speak for another one or two minutes and then you can resume after the lunch break. So it's perfectly possible for you to get back after the lunch break, okay?

PARAMINDER SINGH: Okay. I [indiscernible] more than two minutes. So I will briefly talk about the clarification which, Thomas, you gave about for the history changes to be changed or not. I will say that what I was talking about is there is not a change of contract and I understand the legal issues contract and we are to change from draft templates. And when I say [indiscernible], they mean template contract and we can always recommend template contracts so we change all [indiscernible] future contract and that's about the contract [indiscernible] can dually change. And I think we should not have language that we cannot [indiscernible] ICANN to be –

THOMAS RICKERT: We would like to see the center of the portion of the contract.

PARAMINDER SINGH: You have asked for another 4 minutes. Maybe you can speak for another one or two minutes. Then you can resume after the lunch break. So change contract and place. When I say out of here I think they know the contract and they can always recommend the template contract and change future contracts or that's about the contract and about the change in the manner in which that I can bow. I was disclosing and while I come back after lunch. So happy lunch. Thank you so much.

THOMAS RICKERT: Thank you very much Parminder. And thank for doing this mostly. It's certainly a challenge to follow these long meetings through the phone line and the remote participation room. It's 3 minutes over time. But I would really like to ask your patients. Because I think with a couple of process related points that Parminde made, we should give Greg as the remembertory of the team a opportunity to respond before we break for lunch. Then after lunch we will go back to Parminde then proceed with can calf. So Greg if you would like to make remarks in response to Parminde. This is the opportunity for you to do so?

GREG SHATAN: Thank you Thomas, Greg for the record. I want to reflect on the long and hard work on the subgroup and of course while we have a number of subgroup participants in the audience, there are also members of the plenary who did not participate or did not follow the work of the subgroup. So, it's important to note that your hearing one side of the story. So, I would just like to point out that

we discussed various points around immunity repeatedly and at great lengths. Often without regard to what was actually to agenda or the menu of the subgroup at the time. And I would say that there were a number of robust opinions expressed that were very different from those that you've heard today.

So, one shouldn't get the idea that these were unanswered points or unanswered opinions. It's not my place nor is it my place when lunch is awaiting to go over those other positions. But we have at least orally a minority position that has no majority opinion or other divergent opinions expressing other views. But though other views were amply expressed during the life of the subgroup. And I think that we just need to be cautious about identifying opinions as facts when they are opinions. As a wise man once said you are entitled to your own opinions but not your own facts. So I think that's what went on and I would have liked to have had more time. I would of also like to have had more are participation in the final weeks of the group. If you go back and look, some people were absent. I do not speak of Brazil in this case. They were fully engaged throughout. But sometimes things could of been brought up that weren't in the course of our time. Finally, I would just like the under score what Thomas said at the very beginning that this is not the last time. That issues that do fall under the heading of jurisdictions will be discussed. In the ICANN space or around ICANN. And I do note that the report indicates that there will be a number of annexes to it, which will include and supplements. And so a good number of the working documents and documents reflecting the discussions that took place, even if they did not come to a conclusion will be reflected in the full report as it's packaged up with its annexes. So there will be ample opportunity for others to see the course of our discussion. What was summarized were the discussions that led to the recommendations that were in the report primarily. That's why they are there.

So I won't keep you from lunch any further. I may come back after lunch if there's anything further for me to respond to. But I do want to thank everyone, even though I was holding the minority opinions for all their work in the subgroup and of course this will be this is an inflexion point and not the end of these discussions. And we will see where they are taken next.

Thank you.

THOMAS RICKERT: Thanks very much Greg. Thanks everyone for this good discussion which will continue after this lunch break. We will have a full hour for lunch. We will reconvene at 1314 local time which translates to 940 UTC. We will have a full hour then continue with the discussion. I will ask the staff not the clear the list of hands in the Adobe room so we can start with the same order of speakers

that you see in the Adobe room now. Thanks very much and recording can be stopped.

THOMAS RICKERT: Thanks very much. This is Thomas Rickert speaking for the record and we would now like the resume our discussion on minority views or other expressions of thoughts on the jurisdiction topic. And we will now continue with the queue. So Sebastien will go first. Then Greg then Kavouss then we go back to Parminder. Those that want to be added to the list, and speakers please raise your hand or should you be on the phone line only give a signal so we can add you to the queue.

SEBASTIEN BACHOLLET: Thank you very much. I'm very honored to be the first speaker in this session.

I wanted to make three remarks or comments. So first one, it's regarding the discussion we have to see where we come from. And of course where we are going and what is the step we are doing here and what could be the next step.

I don't think it's the end of the journey and I don't think, if ICANN is still alive, we will have a long journey. And that's to be taken into account in our thinking.

Concerning the subgroup report, I would like very much to support it like it is today for to go for public comments. And I would like to add what else from my point of view, the next step possible. I suggest that during the discussion about the document gathering the work of all subgroups, we study how and where the next step regarding up the lives is very important. One about community. Beyond there is and push a step forward after the completion of the work of our Work Stream 2. Thank you.

THOMAS RICKERT: Thank you very much Sebastien, Kavouss is next

KAVOUSS ARASTEH: Thank you Thomas. I have one comment and I have two short questions. I hope I don't go beyond two minutes.

THOMAS RICKERT: We don't have the clock running.

KAVOUSS ARASTEH: This time you are very generous and I thank you very much. Danke schon [speaking in Japanese]

Chairman or co chair or Thomas, distinguished colleagues. I'm not comfortable and even surprised to refer to the minority view and majority view. On this particular issue. Jurisdiction is in the governments is not within some private people or individual on one hand and government other hand.

So let us not refer to minority view and majority views. Let's say statement by colleagues that may not be comfortable with the results, but not minority.

An individual or someone representing 250 million people cannot be seen as minority, it's two or three individuals may represent themselves or represent some other people. So we cannot say that. The issue is between the governments.

I think I support the statement made by ambassador [indiscernible] indicating after all of this issues, discuss the union lateral governance of the jurisdiction remain within the hand of one single government.

During the final stage of the Work Stream 1 when the people wanted to justify that single government agree with the process of the transition, in particular during the testimony before the subcommittee of senate, it was several to mention that don't worry, we maintain the jurisdiction to remain within hand of us. That means the government. So the issue was designed and [indiscernible] orchestrated as such. So we did not expect that this group doing more than they have done.

Because that was the situations.

And I think that what was said is exactly correct. That the jurisdiction remains within the governance and hand of that single country. So it is not majority, just minority. It's something that the beginning part of transition was more or less technical part, apart from some accountability which is very good now community has some actions to take. So our support to this statement made by ambassador and other colleagues may make it ever. My question, this is the comment, my question chair to you, question 1, how the course of action mentioned in the two recommendations will be carried out and is there any guarantee it will be carried out successfully. Saying irk can will do that and ICANN will take that. Apart from some words and wishful thinking whether in fact would have some reality. It may be some visions and whether in term of reactions, I don't know.

And the second question is that the statement made by ambassador and maybe by some other colleagues that joined him, what is the next step? To consider thousand follow up this course of action. I am not thinking of ART, ATRT procedure. I want a practical. How do we do that? We should not take it on statement to be noted. Is cause actions it cause attentions. The issue stays there and must be continued to be resolved in one way or other. Thank you very much.

THOMAS RICKERT: Thank you very much Kavouss. Let me try to respond to the points you made. Firstly, the term minority report is used quite commonly in the ICANN processes. And as you well know everyone in this room as well as joining remotely is participating in this effort in the personal capacity. So as much as David is not here, Asvarson is here as David McAuley we are not here representing the people of our nations if we are government he representatives of our companies or of our associations. Nonetheless, I think it's an important point that you make that certainly governance if they speak in their capacities as governance have huge populations they represent and the term minority statement might suggest to somebody who is not familiar with the model that we are using to create policy, that populations or governance might be marginalized. So I don't have any issues whatsoever with calling this statement for dissenting opinion or some other term that Thiago or Bendict might find the nature of this paper.

You mentioned that things might be said during hearing in Washington and that the process was designed to make it stay within Washington. I have followed those hearings and to my recollection, there has been no statement made by a CCWG representative. I do remember that Farzi testified on the hill so has Steve bee angle owe and others. But nobody has made any information on behalf of the CCWG precluding the outcome of the CCWG deliberations. And I think that our process was very open and I'm sure Greg will be in a position to speak to that as well. So the topic of changing jurisdiction or even changing place of incorporation was not out of scope. But it was just that during the course of the discussions in the sub team such ideas didn't get sufficient traction to be legible for consensus.

With respect to the question about the cause of action, as you know, our recommendations, once adopted by the plenary need to be approved by the courting organizations and by the board. And there will be enacted. To the extent that your question relates to the OFAC licenses that should be sought we certainly have no authority to OFAC to grant those licenses but what ICANN can do if our recommendations are adopted and if we get them through the second reading first which is an important prerequisite for that, then ICANN needs to use best efforts to get these licenses. But what is done by OFAC is not within our control.

With respect to the second question, and I hope I got the question right, I think it relates to the concrete actions that will be taken based on the Brazilian statement. And I think what we should be doing is discuss this once we have the second reading. Now that the plenary has the opportunity to listen to all the arguments, there may be a change of positions in the plenary. So the plenary might raise substantial objections against the report. Right? So I think it's premature to assume that the second reading will be successful.

But if it were, then our suggestion is to do two things. The first of which is to make more explicit reference to the points that have been raised in the documentation that has been developed in the course of the work of the sub team. And as Greg mentioned before we broke for lunch, he said that a lot of those points that have been mentioned by Bendict or Thiago and, also, Parminder have been subject of debate in the sub team. So we will highlight the reference to the appendices where these, can be found so it doesn't get sort of buried in the appendixes.

Second we suggest doing is actually creating a second document with the transcript of this very session and, also, make that part of our report. So that for everyone to see during further debates on jurisdiction, what points have been raised and how this interaction went on in the CCWG. So that we have a tangible take away for future jurisdiction related to debates to build on.
So I think that covers the four points in total that I have noted from your intervention. And now I think we can move to Parminder again. Parminder the floor is yours please.

PARMINDER: This point was about when the report is that we cannot recommend changes to registry and [indiscernible] I will arguing that this agreement for me is the template contract and not the specific contract and therefore I do not want [indiscernible] statements to go in the name of CCWG in the final report this is up to you now to look at it whether this is a correct or not. I will close it at that.

Just add that [indiscernible] so much time to make these comments but I would regret that the questions and the proposals in these comments in which they respondents too. For example, I mentioned that the menu approach should be operated by saying we match ICANN to consider not automatically choose in California law or some such thing. And that part of the report. So please I would like you to consider those things. And I have to now the mic, respond to the statement which I will Greg made who said that indeed discussions took place between these points and then the quotations without regards to what was on agenda.

And that is true. That's what I have mainframe yes. We kept on trying to push these discussions the question however is what was it never on agenda? Never during the year and a quarter was this issue on agenda. And that is the question, you're right Greg, they will discuss in on agenda. The question is why didn't it ever get to the agenda which is the problem. Even when there was six discussed it was not discussed.

One of the issues is we don't talk about it but to look forward in the positive manner. I feel a lot of mentioned including by Thomas and Greg that this is not the end of the road. There will be other

forums. And an observation by George in the chat window if there's a way to reflect in the report whether we can make it clear that yes, again I go back to the report where Greg says that we could not discuss other issues because we were short of time. That's why we took two and not the other four. But these are important issues. Now I don't agree that this is okay to be done, but even if it was done it needs to be put on record that these were the issues, we could not include them, due to the range of loose and kind of combination that the value puts it was proposed. But there are advantages and disadvantages. And I again, I refer to the fact that advantages and disadvantages of options like 6 option in the choice of law section and other possible options have been put there which were actually only discussed but never recommended.

So records of important discussions and possible recommendations do exist in the report in the same way. Why can't we put [indiscernible] discussions and one possible recommendation which is the current record recommendation by Brazil in the report saying we were rushed for time we could not either take it up fully or during taking it up we did not see there would be a consensus and it's a work in progress and fighter for them to look at it.

If this kind of thing can be considered as missing scope to agree to a few things though I keep saying the process has been initiated by the fact that this issue was never formally on the agenda for a very, very long time that the group met on the jurisdiction issue. Thank you very much Thomas.

THOMAS RICKERT: Thanks very much Parminder. I would like to briefly respond to a few points that you made. One is related to the change of contracts. Were you said you were asks for response, why those can't be changed. ICANN has contracts with hundreds, if not thousands of contracted are parties. And our group does not have any authority whatsoever to change those contracts or to force ICANN to change unilaterally it's contracts. The contracts with registries and registrars is through changing one is which through consensus policies, EDPDPs that go through GNSO. And the other root is contract negotiations and the process for contract changes is specified in the registrar accreditation and registry agreement. And therefore our forces, our powers are limited to recommending to look to those issues and those contracts and change processes to come up with some amendments or changes to those contracts.

The second point is, the discussion of immunityies. I'm sure that Greg will be able to point to specific meetings where that has been discussed. So I think that can be clarified. And with respect to your point that the recommendations or the points that were discussed that didn't make it to recommendations should be referenced to

better I think I said earlier in response to Kavouss intervention that we will make sure there's stronger links from the report to the the appendixes including the transcript from this very meeting so these few points and substantive discussions are visible.

Let's now move to farce they.

FARZANEH BADII: Jorge was before me actually.

THOMAS RICKERT: I don't mind. Jorge go ahead.

JORGE CANCIO: For the record. Thank you Farzi. That was actually expecting your intervention to response to it afterwards. But now that we can be the other way around.

Now seriously, I think that there have been many interventions in the direction of saying, okay we had substantive discussions on some issues. However those discussions for instance on the issue of limited tailor made be spoke immunities didn't really get to the final point be it for scheduling reasons for timing issues, for whatever reasons. But I think it would be kind of unfair to leave it by that. And I understand or I think I understand that you want to make some clearer linkages to the where we discussed that. But I think that it would probably make sense to describe this explicitly in the report. And, also, kind of agreeing because in the end it's not an agreement of on a specific recommendation but an agreement on a fact that we have these substantive discussions that we didn't get to a point of conclusion on them. And that probably it would make sense to have some sort of follow up, I don't know, in a Work Stream 3 or in a different kind of process on these issues. Because they are issues that are put on the table by different stakeholders. They are of course legitimate. We haven't discussed them to the end. And so I think it would make sense to include something in the report. Recommending or suggesting that there should be a way forward on them. Thank you.

THOMAS RICKERT: Thanks very much Jorge. Now Farzi.

FARZANEH BADII: Thank you very much. I'm astonished because it says a statement comes from a ghost it should be given more weight. We should know that the issues that were reported, the jurisdictional issues were reported by mostly non governmental people. People that faced jurisdictional problems. But when using the DNS. And I also liked to point out that I want the hear more about support for the process of this subgroup. And it's recommendations because until because it has been very criticized by some. I would frame as unfairly criticized and I don't think delegitimizing the process of the subgroup will benefit the DNS users that are facing sanctions.

And the recommendations of the subgroup will be fast if implemented will facilitate their access to the end and it's something that we have forgotten them for the past 19 years. So it is time now to set aside the political battle of jurisdiction and think about pragmatic solutions that can help DMNS access if DNS access.

So I do want to know that even without minority statement there is support for the recommendation. Especially for OFAC recommendations. And I think that is very important thing for the for us for later to advocate for its implementation of the recommendation.

The other and another small point that I wanted to make, I do I have supported the discussion about partial immunity of ICANN. I think it's something that we should definitely discuss. We have been having problems with CCTLD delegation and I dot IR was as we know there was a case already about dot IR in the U.S. court about its attachment. I think for that reason we need to definitely look into partial immunity for ICANN. But I don't think this subgroup has demanded or can do it.

THOMAS RICKERT: Thank you very much Farzi since you also mentioned further debate and Jorge made the suggestion I think we at CCWG are not in the position to kick off a new process. We have been tasked to look into a limited number of issues for a limited period of time with a limited budget given. And with us coming up with proposals to come into existence with various reincarnations over and over again, I think can't be done procedurally. I think what we are doing is make the report very useful tool for further debates which will surely takes place but I'm not sure that we can really trigger this. Because we don't have the mandate to do so.

I think that if there shall be another course constituency effort or there should be that within ADRTs that something else would be decided but not by CCWG. I'm cautious about not creating expectations but what the group can and cannot do without over stepping over reaching or actually powers.
But more than happy to reassume the discussion on that for now with the minority statements once we get to the recommendations and the second reading.

I now have Greg then Olga they David. Greg.

GREG SHATAN: Thank you Greg Shatan for the record.

A couple of quick points, first I would like to let the members of the plenary not in the subgroup not what our working method was and what we attempted to do over the longer period of our work. Was

to identify issues before remedies. And immunity was identified as a remedy.

But throughout the conversation about immunity when it was brought up in the A group seemed to start with remedies without identifying the issue that it was intended to resolve until really kind of the very end of the process. So that's one reason why immunity didn't come up as often as it might in our formal agenda. The discussion seemed to start with the idea that there was a remedy that was needed rather than with an issue that needed to be remedied.

Second, I would say that it was not only the lack of time that you would in some issues making it to consensus and some not, but there was also a lack of a clear path forward based on the views that were being expressed in the subgroup. And in the we didn't come to the end of the road on those, where that road led was at best unclear and I think for that reason rather than dwelling on what might have happened, because that's difficult to predict, the point that we need to look at is where these conversations might takes place next.

And the last thing is, the issue of immunity actually is extremely complex and multilayered. Indeed I was thinking about the very case involving dot IR that Farzi mentioned and ICANN was not a party to that case. So immunity as to suit, which is the type of immunity that is contemplated in the IOI, would not have shielded the dot IR consideration that took place in that particular case. Would it be needed to be some other sort of immunity to have there. And of course in the end the decision of the Court was that it was beyond the reach of the Court to attach the dot IR CLD. So in that instance I think many of us would agree justice was served.

But, I think that only goes to point out how that subject is really a subject in and of itself and may not even fit quite so neatly into an accountability group, given that our predicate document for this entire CCWG accountability, when it lists existing forms of accountability, and I think its annex E or appendix E to the Work Stream 1 report, cite litigation and recourse to the courts as an existing form of accountability for ICANN. And I would note that we spent a considerable amount of time in the group, and I would not call it stalled. We spent a considerable amount of time in this growl examining each litigation that ICANN was a party to. And what it's ramifications were for the work of the group. It's interesting to reflect if immunity existed even the so called partial or tailored amind that was referred to I don't believe any of those cases could on have been brought because they did in factory late to the core functions of ICANN and not things like employee disputes or whether the garbage was being put out improperly. So those cases which sought the hold I would of been barred at least

from the courts. That's something to contemplate I know second recommendation in the dissenting opinion of Brazil is that there be a further multi stakeholder forum for those sorts of things to be adjudicated. But that is another thing that is way down the line, certainly beyond the line of Work Stream 2.
Thank you very much.

THOMAS RICKERT: Thanks very much Greg. Now we move to Olga please.

OLGA CAALLI: We like to support and concern the concerns about colleagues from Brazil in their minority statement. Perhaps we agree with our distinguished colleague from [indiscernible] that it may not be named minority statement perhaps dissenting opinion or what they think is best for this important opinion.

We would like to also support the idea from gore jay in Switzerland for the convenience of a follow up process on this important issue. We understand your concern Thomas we are not creating a new process that is not a mandate and I agree with you in that. And we would not be triggering a new process or creating a new one. We would like to have the concept in the report of having a follow up on this important issue. Thank you.

THOMAS RICKERT: Thanks very much Olga. David.

DAVID McAULEY: I Thomas. I wanted to make a brief statement. We talk about substance and I make my views clear that before and I'm not a supporter on a immunity idea but I appreciate the government of Brazil putting it on paper.

On process I've been involved in substance I don't think I missed a meeting and my assessment of the process has been that it's been extremely fair. It was a lot of work for one basically one repertoire to handle. A lot coming at the repertoire. The process was fair. It formed our direction, our direction coming out of Work Stream one 1 is this subgroup would consider you jurisdiction by focusing on the settlement of dispute jurisdiction that makes the litigation study that Greg mentioned critical. That was our remit and that was the primary focus and immunity wasn't. So I think I want to say I think the process has been extremely fair. Thank you.

THOMAS RICKERT: Thank you very much David. Andreea.

ANDREEA BRAMBILLA: For the record it was me speaking earlier in morning when person ear introduced me as Canada. I want to note that we support the multi stakeholder process where the multi jurisdictions were developed considering the divergence that the subgroup started with a lot of to come up with concrete and practical solutions is that warrant solutions by the broader ICANN community. We

certainly recognize that jurisdiction is a complex multidimensional issue and we are not opposed to continuing the discussion. In doing so we should not lose sight of our collective goal which is really to reinforce the accountability framework that was part of the stewardship transition and we believe the additional have been proposed in that respect. Thank you.

THOMAS RICKERT: Thank you very much Andreea. Parminder.

PARMINDER: Thank you chair. I would first point I wish to make is about your observations that which follows from my and some other people's requests that can be effort to some follow up versus to which you said that it's not in our mandate to talk about these kind of follow up processes. I really do not agree with this conception of our mandate. Our mandate is to advise ICANN the do whatever is in the power of ICANN to do. Including to abolish itself. That's the what is authority. If I'm recommending authority to India I can recommend anything which is in the power of person who recommended too. It's not about my policy I have zero authority. Recommending bodies don't have authorities. But when they recommend it to and they are supposed to recommending authorities I'm repeating the point this is becoming earlier [indiscernible] conversation so I agree to catch his attention. Yet Thomas initially said we started very open mindedly to Kavouss point that whether U.S. jurisdiction is required or whether we have to act within it. It's show that our mandate is whatever our mandate is within the jurisdiction question. So I don't accept that we cannot tell ICANN recommend to ICANN that we think that we need a singular process like ours to keep discussing the situation.

So the problem here is we may not agree the make that recommendation but I would request here to reclarify rather this is the situation. Because if we can ask ICANN to make PPIE as reorganization and do all those things we can ask it to do anything because after all it's up to it whether it wants to do it or not. That's the frustration that I want, again to get few the chair on that.

Second point when chair is pointed to one of my points, what I was asking for was to mention [indiscernible] recommendation inside the report and not as index. In the same manner as some choice of law options exist inside the report right now even though they are not agreed by consensus. Many of them actually were not properly discussed here. For example, 6th California law option.

They are there just as things which could be possible with their advantages and disadvantages.

So please clarify my pure specific point which I'm now saying for the timer you I'm not talking about indexes being referenced

there's a record choice of law in the part of the report already. Non recommendations why can't we have immunity in the same manner inside the report assured of immediate was discussed and recommendation that was provided focused by many but not reach consensus as we all said but review the fact that we did not have time. This is my proposal and not put it in annex.

Let me quickly also respond to what Greg said. He said immunity was shown as in remedy without showing the issues that it addressed. This is absolutely not a factual statement. And I would go on the A list to provide all of the evidence to prove that one of the first documents which was made regarding the influence of jurisdiction of ICANN, there was about 5 or 6 points put about whatever issues which create the problem to which the immunity discussion would try to solve. This happened from the start. It's public inputs also carry many examples and during my organization of all those issues and immunity was never shown as a remedy without with the issues. Absolutely I would say absolutely a false statement on record. And I'm sure there's proof are false.

And the second thing I said was there was not a clarity on the part of [indiscernible] I have no idea what that means. Because I would think what needs to be done and how another proposal has been very clear. So I would like to get clarification of what was the non clarity in part forward. And here I would also mention that repeatedly I asked chair to speak ICANN legal's opinion and whether a carve out can be made from a possible immunity to enable ICANN to function under the nonprofit law of California. And this reference was never made. So we were ready for being very clear on all kinds of parts forwards and there was not a fact that there was lack of clarity on the part forward. Thank you very much.

THOMAS RICKERT: Thanks Parminder after Parminder we have Delila.

DALILA RAHMOUNI: Can you hear me?

THOMAS RICKERT: Yes, we can hear you. Go ahead. Welcome.

DALILA RAHMOUNI: Thank you so much. This is the French government. We would like to report the question raised by [indiscernible] it's minority statement. We need to support for your proposal to its abilities for the ICANN we think this is not a policy question but a legal question. And concerning the mandate of this specific jurisdiction. We think if it is not a mandate of the subgroup we think that in the Work Stream 2, the subgroup can work on the guidelines of the option of partial immunity. And we think this is really the are start of this option to explore within this group.

THOMAS RICKERT:	Thank you very much let's move to Greg then Kavouss. Those that want to be added to the list please do so now. Other you wise I'll now close the queue and take stock so we can move to the next part of the agenda.
	Greg?
GREG SHATAN:	Thanks Greg Shatan for the record. First, just to be clear I stand by my statements and I believe they are factually correct.
	With regard to the process and the past that took place. Second, in terms of process, would like to point out that the second recommendation because one of our members took it on themselves to take the various pieces and put them together into a first a draft of that recommendation that was Raphael Boguardlaw. So I think we need to look to members of the subgroup in part when we think about why certain recommendations were more fully delated than others.
	And not merely think about time and just to kind of refine the point about there not being a clear path forward, what I'm really referring to is the fact that there were significant and I think over all more objections to the concept of immunity even tailor immunity than there were those in support. I would not have used the word many to describe those in support. Which is not in any way to invalidate the opinions of those that did support that position. But it is being put forward as a descent or minority opinion in part because that support was not readily ascertainable. Nor did it become clear in any way there was any type of support for beyond the support that you have seen and heard today.
	So I think that is what I'm saying when I refer to no clear path forward. It was clear there was strong support for the two recommendations that did ultimately gain the approval of the subgroup. And I'll leave it at that. Thank you.
THOMAS RICKERT:	Thanks very much.
GREG SHATAN:	One more sorry, one more point quickly.
	The mandate of the subgroup [indiscernible] certainly not as broad as ICANN. And indeed there was quite disagreement about [indiscernible] our but tinge mandate as a whole I think really had a fair, very specific mandate. Thank you.
THOMAS RICKERT:	Thank very much Greg. Last in the queue is Kavouss. And after that I'd like to close the queue and take stock. Kavouss, please.

KAVOUSS ARASTEH: Thank you Thomas. I think what was mentioned by Greg I have tracked. Perhaps he didn't mean that when he said there was no any support. I perhaps put it in a way that you always mention there was no sufficient traction but not any. When you say any that means no support at all. That was not the case. Just make it clear.

But I agree with some term you use no sufficient traction or no sufficient support. That is one thing.

Second point I want to make it clear that reference was made on to distinguished colleagues to political statement and to fairness. No one in this conversation, this morning and this afternoon referred by any means to any political motivation nor fairness on the activities of the group.

When you say equal footing, it's not in government it's not political. You are talking equal footing you are talking gender equality. There's legal issue but not political. So I don't think people can tailor them and put them in the framework of political. And fairness I don't think anybody at this meeting talk about all fairness of the activities of the group. There auto for we should not refer to that. Thank you.

THOMAS RICKERT: Thank you very much Kavouss.

I think we should probably do two things. One is to again confirm that we were get the transcript which is currently in captioning format cleaned up. And tidied up so it can be made an appendix to our report the. And several of you have asked we establish stronger links between the report and the issues that did not make it to recommendation status. Including Parminder that said he wants the immunity topic to be explicitly mentioned in the report. And what I think that quite some sympathy and support was the proposal made by gore jay a little bit early your on which I'm going the paste into the Adobe room chat again for everyone's review. I'm going the read it out for you.

Discussions in the jurisdiction subgroup were inconclusion on some issues. Again was the partial immunity for ICANN. It may be that ICANN community wishes to full out discussions on these issues many which are recorded in the annexes to this report. So we suggest that we use this language add that into the report and then as suggested a add the transcript of this meeting to the report. But now, before we can actually move to making something in the appendix to report, we need to get the report adopted.
And that leads us to the next agenda item and that is the second reading of the jurisdiction subgroup report. And at the end of or after Greg has shown us through the recommendations, you need

to make a decision whether you want to raise an option to the report or not. In the absence of substantive objection we can call this a successful reading. Now you have heard all of the by those that were proposing to some or all recommendations in the report so all of the facts are at your fingertips. And I think we have done a much more thorough job on the second reading than we have done on any of the second reading. Because you got all the first handed information from those that don't like the recommendations.

Right? And I think we have never done such an can exercise before. So if you think that we can't proceed with a successful second reading, then you should object. If you think we should keep the report and that it should make its way into the final report then you should not object.

All the facts are on the table. We know the timing issues we cannot make substantive changes or any changes to the report. Otherwise we run the risk of not having anything on jurisdiction on our final packet. So with that I'd like to hand it over to Greg to show us through the latest findings of the jurisdiction sub team. Over to you Greg please.

GREG SHATAN: Thank you Thomas, Greg Shatan for the record.

So, we will go back again through the report for the second reading. Once again, at the request of member of the subgroup we have this comment here. It's not part of the report. But just notes that we looked at various issues regarding a registrar that had was not doing business with people with Iranian passports and we included in if that was related to OFAC there was no clear showing that it was. That the recommendations that we have deal with it in deal with it in an adequate fashion. And noting again that subgroup will consider creating stress tests based on these scenarios. And as Kavouss and Steve DelBianco both noted earlier Steve has created a three stress tests related to the group.

So if we go on to the next slide.

The this is the first of our set of recommendations regarding sanctions and specifically on OFAC sanctions.
We noted that before ICANN to enter into an RAA with a applicant from a sanction country it means to get an OFAC license. The terms of the application to become a registrar state that ICANN is under no obligation to seek such licenses and in any given case OFAC could decide not to issue a requested license.

The subgroup recommended that this sentence be amended to require ICANN to apply for and to use best efforts to secure an

OFAC license rather than merely saying they are under no obligation the seek such a license.

This of course would only apply if the parties otherwise qualified to be a registrar.

And is not individually subject to sanctions.

We also recommend that during this licensing process ICANN should be helpful and transparent with regard to the licensing process and ICANN's efforts, including ongoing communication with the potential registrar. That is the first of the OFAC recommendations. Next slide please.

Second, recommendation relates to the approval of GTLD registries to subgroup noted it was difficult for residents of sanctioned countries to file new are gTLD applications and make their way through the process.

The applicant guide book noted that ICANN sought and granted licenses as required in the past but OFAC could decide not to issue a requested license. The subgroup recommended that ICANN should commit to applying for any and best efforts to secure an OFAC license for all new gTLD registrants that fell into this category as long as they are otherwise qualified is can not individually subject to sanctions.
Again, we recommend that ICANN should be helpful and transparent with regard to the licensing process including ongoing communication with the applicant.

That's the second OFAC recommendation.

Next slide please.

Third OFAC recommendation, subgroup noted that some non U.S. based registrars might be applying OFAC sanctions with registrants and potential registrants based on a mistaken assumption that they must do so simply because they have the RAA contract with ICANN. Non U.S. registrars may also appear to apply OFAC sanctions if they cut and paste registrants agreements from U.S. based registrars that contain OFAC prositions. We saw a couple of examples in the subgroup one of which was recommend identified by that registrar during the course of the group. May have been coincidental but in any case it was recommend identified.

We note that ICANN cannot provide legal advice to registrars but it can bring awareness of these issues to the registrars the.

So the sub group recommended that ICANN clarify to the registrars that the mere existence of RAA with ICANN does not require them to be required to comply with OFAC sanction we also recommend that ICANN should explore various tools to understand registrars the applicant laws by which they operate and accurately reflect those because e laws in the customer relationships including the customer contract.

I'll pause here and see if there are any remarks other questions? We have one more OFAC recommendation.

Let's move on to the next I see a hand from Kavouss I don't know if that's a new hand?

THOMAS RICKERT: Kavouss if you have a question go ahead.

KAVOUSS ARASTEH: Yeah just a small question. In the two recommendations refer that ICANN use best effort wishful thinking to secure OFAC license. I'm not asking him, I'm asking ourselves, what is the degree of assurance that this sort of license be secured?

Thank you.

THOMAS RICKERT: Greg floor is yours.

GREG SHATAN: Thank you. First I would not describe best efforts as wishful thinking or any of this as wishful thinking. Indeed we have seen that in Work Stream 1 our recommendations, once approved by the board, after of course being approved by the charting organization were put into effect.
So I would expect that if these recommendations are approved all the way down the line, that they will be put into effect. And of course there's no assurance because we are talking about party under over which we have no control as to whether the licenses would be granted. I will note that with regard to the individual licenses, that ICANN seems to have a perfect track record in secure these licenses when they have been applied for.

So, I think while past performance is no guarantee of future performance, one would generally expect the same degree of success in the future especially since we are asking ICANN to increase its commitment to getting these licenses. And even with their somewhaty equivocal commitment they have in fact gotten the licenses that were sought.

That's I think as much as anyone can say about that. Or at least certainly as much as I can say.

Why don't we move on to the next slide he please.

The last of the OFAC recommendations relates to a general licenses. Not the specific licenses that we have been discussing so far.

OFAC general licenses cover particular classes of person and types of transaction.

ICANN could pursue general licenses to cover transactions integral to ICANN's role and managing DNS and contracts for Internet resources. This would enable individual transactions to proceed without needing specific license as long as they fell into the type of transactions and class of person that the general license covered.

A general license would need to be developed with the U.S. department of treasury, which is where OFAC sits within the structure. Which would then need to amend the OFAC regulations to add the new license or licenses. This regulatory process maybe a significant undertaking. With that in mind, the subgroup recommended that ICANN takes steps to pursue one or more general licenses. And that ICANN should first as a priority study the costs, benefits, timelines and details of the process. ICANN should then pursue the general licenses as soon as possible, unless it discovers significant obstacles are through the study. If they do discover significant obstacles ICANN should report this fact to the ICANN community. That's us.

All of us, even though it's not in the CCWG accountability. And seek the advice of the community on how to proceed.

If ICANN is unsuccessful in getting a general license then ICANN needs to find other ways to remove friction from transactions between ICANN and residents of sanctioned country.

Lastly, ICANN should communicate regularly about its progress, to raise awareness in the ICANN community and with effected parties.

That is the last of the OFAC recommendations. Next slide please. We move on to the set of recommendations regarding choice of law and choice of venue provisions in ICANN contracts.
The first of which relate to choice of law and venue provisions in the registry agreement.

We identified in the subgroups several alternative approaches for the registry agreement. And we also note these could also apply to the registrar accreditation agreement.

The menu approach, the fixed law or California approach. The carve out approach. The bestowing approach and the status quo

approach. These are explained and discussed in the following slides. Next slide please.

First the menu approach. As it says here, the subgroup supports a menu approach. Where the governing law would be chosen before the contract is executed from a menu of possible governing laws. The menu needs to be defined, this could besting left to ICANN and the registries to define the menu.

The subgroup discussed the number of possible menus, which could include either one country or a small number of countries from each ICANN geographic region. In addition the menu could include the status quo which is no choice of law. And or the registries jurisdiction of incorporation and or each of the countries in which ICANN has physical location and which thus have jurisdiction over ICANN.

Subgroup has not determined what the menu items should be. But believes there should be a balance between the advantages and disadvantages of having different governing laws apply to the same base RA. This likely suggests having a relatively limited number of choices on to the menu.

The subgroup has not determined how options will be chosen from the menu e.g., the registry could simply choose from the menu or it could be negotiated with ICANN. In spite of what Parminder said in his remarks we do not identify, nor do we contemplate that it would simply be chosen by ICANN. If it's either a negotiation point or something that should be chosen by a the registry. But we did not make a determination.

So that in essence would need to be agreed on as part of the agreement as any agreement would be. But the question of how, if the registry gets to impose it on ICANN or whether it's a negotiated point is an implementation point that's beyond our subgroup's recommendations. Next slide please.
These are the remaining options. The California or fixed law approach which would make all contracts subject to California law.

And U.S. law as the governing law of the contract.
To be clear that's not the governing law of the parties to the contract. It's the law under which the contract is interpreted.
Next is the carve out approach. Where parts of the contract that would benefit from uniform treatment would be covered by uniform predetermined law. For instance California. And other parts perhaps those that relate more to the actions of the registrar within their own country would be governed by the law of the registries jurisdiction or by a law chosen using the menu approach.

Next is the Bespoke approach or the custom approach that would fit each contract to the country of the registry operator. That would be the governing law essentially home law for the registry operator. Last of course is the status quo approach which is to retain the status quo of having no governing law clause in the RAA.

I see question from Steve in the chat.

Negotiate implies that ICANN would need to agree with whatever menu item selected by the contracting party right?

That is correct although we also contemplate the possibility that it would be selected by the registry operator without ICANN having the opportunity to object as long as it was on the menu that had already been agreed toacy an overall concept.

Next slide please.

Next recommendation has to do with choice of law provisions and in are regular start accreditation agreements.

Here we simply note that the same approach should be taken for the RAA as for the RA.

The last choice of law approach this up with relates only to choice of venue and not to choice of law. So this is in registry agreements. Under the registry agreement disputes are resolved by binding arbitration pursuant on ICC rules. The RA base agreement contains a choice of venue choice provision stating the venue is Las Angeles California as both the physical place and the seat of the arbitration.

When entering into contracts with registries, we recommend that ICANN could offer a list of possible venues for arbitration rather than imposing Las Angeles California venue.

So there could be a venue menu. The registry that enters into the registry agreement could choose what venue it prefers at or before the time of execution of the contract.

If we take this menu approach. I see series of questions from Parminder in the chat. Little hard to wind back and see them all.

These options are listed as I said before because they were part of the discussion that led up to the recommendation that ultimately went there. So they are kind of fold in the recommendation itself as it goes. Immunity is not in the path of any of the recreations that were chosen. That's why it's not mentioned here. And is not

does not fall within the discussion of any recommendations that were adopted that's why it doesn't appear in the main report.

So that concludes the second reading. Of the jurisdiction subgroups report. And I'd like to see if there's any questions?

THOMAS RICKERT: Thanks very much Greg. Now let me ask the floor whether there are any questions?
I
see Parminder's hand is up. And since this is not the part where we all express our views to the extent required to make our views heard, we should go back to the two minute rule. So please make sure your intervention is not exceeding two minutes. Parminder the floor is yours please.

PARMINDER: Yes thanks I will not take that long at all. My question remains why the report carries a record of options which were actually not discussed at length they were never discussed on the maybe discussing some of the things that are missed. They are there in the report but why can't we do the same with immunity in the discussions which were put up in public inputs by many members repeatedly and asked for great thing that they do not connect to any particular recommendation that is not a very valid point but could effective also of a kind of immunity from one part of the whole machinery and here does connected to that part.

In any case it connects to the whole mandate. Why can't we have immunity options as part of the which we have other options which actually were discussed many times lesser than immunity issue. Thank you very much.

THOMAS RICKERT: Thanks very much Parminder in accordance with the usually work practices this report has reached consensus in the sub team. And therefore we are considering it as a plenary and for those who are think that their disliking of the recommendations go as far as objecting to the report as you such they should use that opportunity.

Anymore questions for Greg?

The line is now or the queue is now clear.

Now, we as a group now have the opportunity to get the report ready for public consultation to get some input from the community, whether they think we have done a good job with the recommendation and they support us in putting this into our final package or not. So I see that two hands are raised again. Can we keep this very brief since Parminder just spoke let's move to Kavouss or was that unrelated Kavouss? Kavouss go ahead.

KAVOUSS ARASTEH: Just a question when and how you treat [indiscernible] as related to the approval the recommendations and green light for the approval. Don't want we approve then the source remain and over. Please define a relation in them and take this reaction as we would not be for complete thank you.

THOMAS RICKERT: That's a good point Kavouss we can certainly go through the stress test now although they are not part of the recommendations I would suggest that we in pause this for a moment. Steve can I ask you to join us over here. Steve has not only volunteered to draft the test that has been communicated on the list but he's also volunteered to show us through the stress test what they mean and whether they were successful.

So I he will review the results of your work in a moment right? Thanks so much Steve and for the others that will get back in the queue once we have gone over the stress test.

STEVE DELBIANCO: Thank you, Thomas. I assume you can take the PDF that was circulated this morning and just load pages 1, 2 and 3 and we can scroll through those. As you know you can click on the Adobe right hand corner and it will expand to the full screen if you want the read it in detail. Or you can refer to an email that Thomas sent 3 or 4 hours ago.

The stress test prepared at the request of Kavouss and I pulley supported the idea of doing a stress test instead of coming up with specific media reports and can examples. The facts of which are always open the dispute. When they are presented.

The elegance, the attractiveness of a stress test is to propose a plausible scenario that is not necessarily a probable scenario. But it's plausible and it's degree of abstraction the scenario where there doesn't need to be a debate about whether it did happen or whether it will happen. And there's to debate over the particles. It's stated in general terms which are sufficiently general that enable us to focus not on which registrar did it, when did they do it and what was the reason, but instead focus on whether the accountability recommendations we come up with would actually improve the accident ability of ICANN and it's bylaws over what the status quo would be. There's three of them for the sanctions related recommendations and when I go through them I think you will quickly see we don't need to spend very much time on them in this group since they are very close what was used by the subgroup as they developed these three sanctions recommendations. In other words, the sanction recommendations include the stresses they sought to alleviate. If you recall the Greg led us through each of the sanctions anticipated the problem that occurred in the previous round or occurring today or could occur in the future.

First stress test number 1 is where registry or registrar would decline to the don't main registrations because they believe they are subject to sanctions that apply to the ICANN.

For example the U.S. has OFAC thanks this stress test should apply to any sanctions of any nation that could impair the ability of ICANN registrars to serve the community now the consequence of stress test is always listed as second. And it ICANN fail to provide the domain name in the bylaws. Left the existing and right hand corner is how the proposed measures change that.

Under existing we noted the fact that ICANN management can at any point the legal or GTLD team could tell contract parties they are under no obligation to worry about sanctions the sanctions relate to their entity nobody is subject to a sanction just because it applies to ICANN and they are a contract party.

If ICANN failed to do this diligently, the community has the ability to challenge ICANN's inaction via a community IRP thanks to the work we did in Work Stream 1. Every five years a accountability and transparency team can make secondations and if they are rejected IRP can be brought to board to challenge that action by board.

Flipping to proposed measures we discussed what the proposed measures were in respect to clarifications and the clarifications conduct can which if it were credible and substantiated it should allow registrars to have the you insurance they need to go ahead and except registrations from the registrars that that country. So we prove that it's an a profit and ICANN is for the registrants. I can proceed I didn't care quickly to the other two Thomas.

THOMAS RICKERT: Let's check whether there are questions related to the stress test?

                         Okay.
                         Good to go Steve.

STEVE DELBIANCO: Thank you. The second one relates to a stress test of ICANN declining to enter into a registration agreement. Registration accreditation agreement or IRAA with an aspiring registrar a country that is subject to sanctions in a corporation. For example the United States applies sanctions through the on OFAC many European nations have sanction regimes of their own. I didn't think it was appropriate to focus only on OFAC by the stress tests are an example. The consequence of doing so ICANN failed on one of the core values that is "promoting con with the domain names with the respected qualified in the countries.
                         Today ICANN is under no obligation the seem a license to get around that sanction however one if the proposed measures in the right hand column is for ICANN to pursue general licenses to

cover transactions and the general license would work but if a general license is not achievable another proposed measure is ICANN stated policy so ICANN is apply for and use best efforts to obtain a specific OFAC license for that party. General OFAC license for all parties and specific license in respect to a single party. I note that the recommendations includes requests that ICANN can be transparent and interactive in had discussing with the community and the potentially registrar the progress of its infliction pore the license. The conclusion for this stress test is the proposed measures are an improvement helping ICANN meet I core value and be accountable to the domain registrants.

The third and final stress test is similar to that that we have a gTLD.

THOMAS RICKERT: Sorry Steve let's pause for a second to see if there's any questions relating to the second stress test?

Doesn't seem to be the case. Let's proceed.

STEVE DELBIANCO: Thank you. So a applicant in the next round or subsequent rounds of gTLD application, the applicant in entering into an agreement with ICANN, ICANN in a stress test number 3 would suggest that it might fail to provide sevens. Services lying excepting a application, processing the application doing the evaluate that if it failed to provide services to a new gTLD applicant for a country that is subject to sanctions that apply to the corporation. ICANN would again fail at the core values same as the previous. And one is for ICANN to pursue, to be committed to pursue specific OFAC license for all specific applicants that are qualified to be a registry applicant. Under the previous stress test the recommendation for a general license for ICANN to obtain one eliminates the need for specific ICANN it's repeated here. The conclusion is that proposed measure would be an improvement with respect to accountability and serving the core values.

So Thomas those are the three stress tests. I think it's obvious that they don't add substantial incremental value to the work of the subgroup at this point because the subgroup considered these kinds of scenarios when they put together the recommendation. Nonetheless we recycled some methodology we achieved in Work Stream one where we came up with with plausible scenarios and ran them by existing and proposed measures to see if we achieving ability.

THOMAS RICKERT: Thank you very much Steve. Any questions on the third stress test?

There doesn't seem to be the case. So thank you again Kavouss for recommending that we do these three stress tests and Steve

for drafting and explaining them. And since you know that the stress test which have been requirement for Work Stream 1 are not a requirement for Work Stream 2, you know nonetheless we did them which I think was very helpful. So we again exceeded the expectations of the plenary didn't we?

He's smiling.

Okay, so we had a queue that was and those in the queue were patiently waiting to be heard. Thanks again Steve. Parminder the floor Parminder is now lowered his hand. Parminder did you still want the speak?

Okay that seemed to be an old hand to Tijani, please.

TIJANI BEN JEMAA: Well on behalf of the government of Brazil liked to formerly object to both recommendations as read out by Greg stat an. As we consider they do not address adequately areas of key concern to us. As clearly indicated in our minority opinion or dissenting opinion. That we have filed. So in the light of the CCWG charter, we request that our document, minority opinion or dissenting statement to be attached to the report and be when it is submitted to for public consultation. And in that regard Mr. Chair I understand you are also proposing that a transcription of this session also included, attached we do not have any objection to that of course. We would like to just make sure that it will be identified in a distinct way from what is requested per the charter which is the report itself in the minority opinions. And I'd like also to take the opportunity to invite subworking group participants the wider CCWG participants in the wider community to consider the all the elements that would be before them. Thank you.

THOMAS RICKERT: Thanks very much Tijani. Parminder your hand is raised again would you like to make a recommendation?

PARMINDER: Yes thank you. I would like it in the [indiscernible] but let me also speak that I do also object to the board as it stands and they associate for it to the reason it's very adequately addresses the mandated given to it and does not even fully explore the issues that were to its mandate. And because of that, because it was initiated by the small concentration of important issues considered by many but they would not put one of them in there and given adequate time.

And I also would like to at that if during the reading, and the recommend will not need to the obtain those would like to make a point in making this part efficient and time has really been the problem as it was said also in the last stages of subgroup then it should of been managed better because people wanted certain all times to discuss those issues. And thank you so much. It was

really to be [indiscernible] a lot of planning. Thank you for everything [indiscernible]

THOMAS RICKERT: Thanks for your kind words Parminder and thanks for all your contributions.

Let's now proceed to the second reading. So get ready for marking objections with a red flag in the Adobe room. We are using the Adobe room for this exercise. It makes it easier to capture what the plenary wishes including the remote participants. And Olga is asking how we include the stress test in the report? We make them an appendix to the jurisdiction sub team's report as well as the paper from Brazil, I intentionally did not call it minority statement now as you may have noticed and we will include the additional language as you have suggested by Jorge. With these qualifications, those that object to submitting the report for public consultation and deeming it a successful second reading please use the red flag in the Adobe room.

If you are support the recommendations there's nothing you need to do. Because we do the consensus test by just checking the level of objection.

So I sigh Parminder's objection and Brazil's objection is also noted.
We have Deliala and KavoussKavouss objecting.

Okay.

Thanks for this. And I guess with this level of disagreement the over all support level or objection level hadn't really changed from the second from the first reading, I apologize, so therefore let me congratulated Greg and his team for a successful second reading. Let's give him a round of applause.

[applause]

Great, so we can conclude that agenda item. Which now allows us to go to AOB. So can I ask when there's any AOB from the floor?

[END OF TRANSCRIPT]

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Annex 5.1 –Ombuds (IOO) Sub-Group Final Report and Recommendations – CCWG-Accountability WS2 – March 2018

ICANN

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Executive Summary

The CCWG-Accountability's final report for Work Stream 1 (WS1), Recommendation 12 proposed that a number of topics that were not essential for the transition and could not be completed in WS1 (due to time constraints of the transition) be undertaken in a Work Stream 2 (WS2) effort by the CCWG-Accountability. This recommendation was approved by the CCWG-Accountability's Chartering Organizations as well as the ICANN Board at its 10 March 2016 meeting.

In addition to this, the ATRT2 recommendation for the evaluation of the ICANN Office of the Ombuds (IOO) was transferred to the CCWG-Accountability WS2 to avoid overlap or duplication of work.

To undertake this work, the CCWG-Accountability WS2 created an IOO Sub-Group, which was charged with presenting a report to the CCWG-Accountability WS2 Plenary for consideration.

After some initial discussions, the IOO Sub-Group decided to focus its work on the external review of the IOO.

The Request for Proposal for Assessment of the ICANN Office of Ombudsman is quite detailed and lays out the requirements, which align with those of Recommendation 12 of the WS1 Final Report as well as the request from ATRT2, quite clearly and can be found in Annex 5.1.1 of this document.

The final report of the external evaluator can be found in Annex 5.1.2 of this document, which concluded that:

- *the Ombuds function is valued and provides an essential 'safety valve' for fairness*

- *it does not however meet all expectations, with a number feeling that it does not have enough power or independence*

- *there is no single 'model' that can be readily applied to the ICANN Ombuds function and that to deliver confidence in fairness and to meet the range of expectations, it will need to adopt a multi-faceted approach*

- *the current Ombuds function is close to what is needed, but could use some re-configuring and strengthening*

The final report also identified five areas for improvement:

1. Clarify role and processes – manage expectations

2. Standing and authority

3. Strengthen independence

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4. Strengthen transparency

5. Policy for non-dispute roles

To address the need for improvement, the report made 11 recommendations, which are listed in the body of this report and in Annex B.

It is also important to note that the CCWG-Accountability WS2 created eight sub-groups to work on the various aspects of WS1 Recommendation 12, and that it was understood that there could be overlaps between these sub-groups in their recommendations and the IOO sub-group.

It is expected that the only significant overlap between sub-groups will be between IOO and Transparency Sub-groups. The Transparency recommendations that overlap with the IOO are:

⊙ Recommendation 13 – The exception for information requests which are "not reasonable, excessive or overly burdensome, not feasible, abusive, or vexatious or made by a vexatious or querulous individual" should be amended to require the consent of the Ombudsman before it is invoked.

⊙ Recommendation 19 – The Ombudsman's mandate regarding the DIDP should also be boosted to grant the office a stronger promotional role, including by integrating understanding of transparency and the DIDP into ICANN's broader outreach efforts, by publishing a list of the categories of information ICANN holds, and by reasonable monitoring and evaluation procedures, such as publishing the number of requests received, the proportion which were denied, in whole or in part, the average time taken to respond, etc.

The IOO Sub-Group approved the objectives of all the recommendations made by the external evaluator, but did modify some of the implementation requirements to allow for more flexibility and speed in implementation, especially when considering Bylaws changes. It is also important to note that these do not modify the Charter of the Office of the Ombudsman (section 5.2 of the ICANN Bylaws) or the Jurisdiction of the Office of the Ombudsman as documented in the ICANN Ombudsman Framework.

The proposed recommendations are:

1. The Ombuds Office should have a more strategic focus.

   2. The Ombudsman office should include procedures that:

   ⊙ Distinguish between different categories of complaints and explains how each will be handled.

   ⊙ Set out the kinds of matters where the Ombuds will usually not intervene – and where these matters are likely to be referred to another channel (with the complainant's permission).

   ⊙ Provides illustrative examples to deepen understanding of the Ombuds approach.

3. Once ICANN has agreed to a revised configuration for the Office of the Ombuds, a plan should be developed for a soft re-launch of the function, which should incorporate action to

emphasis the importance of the Ombuds function by all relevant parts of ICANN, including:

- ⊙ Board

- ⊙ CEO

- ⊙ Community groups

- ⊙ Complaints Officer

4. All relevant parts of ICANN should be required (should include the corporation, the Board and committees, and any body or group with democratic or delegated authority) to respond within 90 days (or 120 days with reason) to a formal request or report from the Office of the Ombuds. The response should indicate the substantive response along with reasons. Should the responding party not be able to meet the 120-day limit due to exceptional circumstances, that party can apply to the IOO to seek an additional extension prior to the expiration of the original 90-day delay. The application should be in writing, stating the nature of the exception and the expected time required to respond. The IOO will respond to such requests within a week.

5. The ICANN Office of the Ombuds should establish timelines for its own handling of complaints and report against these on a quarterly and annual basis.

6. The Office of the Ombuds should be configured so that it has formal mediation training and experience within its capabilities.

7. Ideally the Office of the Ombuds should be configured so that it has gender, and if possible other forms of diversity, within its staff resources. (The primary objective of this recommendation is to ensure that the Community has choices as to whom in the IOO they can bring their complaints to and feel more comfortable doing so.)

8. ICANN should establish an Ombuds Advisory Panel:

- ⊙ Made up of five members to act as advisers, supporters, and wise counsel for the Ombuds, and should be made up of a minimum of at least two members with Ombudsman experience and the remainder with extensive ICANN experience.

- ⊙ The Panel should be responsible for:

  - ○ Contributing to the selection process for new Ombuds, which would meet the various requirements of the Board and Community, including diversity.

  - ○ Recommending candidates for the position of Ombuds to the Board.

  - ○ Recommending terms of probation to the Board for new Ombuds.

  - ○ Recommend to the Board firing an Ombuds for cause.

  - ○ Contribute to an external evaluation of the IOO every five years.

○ Making recommendations regarding any potential involvement of the IOO in non-complaint work based on the criteria listed in recommendation 11.

⊙ The Panel cannot be considered as being part of the Ombuds office and cannot be considered additional Ombuds, but rather external advisors to the office.

⊙ Any such advisory panel would require the Ombuds to maintain its confidentiality engagements per the Bylaws.

9. The Ombuds employment contracts should be revised to strengthen independence by allowing for a:

⊙ Five-year fixed term (including a 12-month probationary period) and permitting only one extension of up to three years (the extension should be subject to a community based feedback mechanism to the Advisory Panel covering Ombuds performance over the previous years).

⊙ The Ombuds should only be able to be terminated with cause.

10. The Ombuds should have as part of their annual business plan a communications plan – including the formal annual report – publishing reports on activity, collecting and publishing statistics and complaint trend information, collecting user satisfaction information, and publicizing systemic improvements arising from the Ombuds' work.

11. The following points should be considered and clarified publicly when looking at Ombuds involvement in any non-complaints work:

⊙ Whether there is unique value that the Ombuds can add through the proposed role or function?

⊙ Whether the proposed reporting/accountability arrangements may compromise perceived independence?

⊙ Whether the proposed role/function would limit the Ombuds ability to subsequently review a matter?

⊙ Whether the workload of the proposed role/function would limit the Ombuds ability to prioritize their complaints-related work?

⊙ Whether any Ombuds involvement with the design of new or revised policy or process, meets the requirement of not, in any way, creating a 'stamp of approval'?

⊙ Whether the proposed Ombuds input may be seen as a 'short-cut' or substituting for full stakeholder consultation?

The additional recommendations by the Transparency Sub-Group with respect to involving the Ombuds in the DIDP process should be considered using the criteria in Recommendation 11. This specific point will be noted in the Public Comment process for this document to gauge if the Community supports these additional recommendations when considering the criteria in Recommendation 11.

Background

The CCWG-Accountability's Final Report for Work Stream 1 (WS1), Recommendation 12 proposed that a number of topics that were not essential for the transition and could not be completed in WS1 (due to time constraints of the transition) be undertaken in a Work Stream 2 (WS2) effort by the CCWG-Accountability. This recommendation was approved by the CCWG-Accountability's Chartering Organizations as well as the ICANN Board at its 10 March 2016 meeting. Annex 12 of the Final Report included the following requirement:

> *"Considering Enhancements to the Ombudsman's Role and Function*
>
> *Through the enhanced Request for Reconsideration process (see Recommendation #8: Improving ICANN's Request for Reconsideration-Accountability Process), has given the CCWG increased responsibility to the Ombudsman.*
>
> *The Ombudsman can perform a critical role in ensuring that ICANN is transparent and accountable, preventing and resolving disputes, supporting consensus-development, and protecting bottom-up, multistakeholder decision-making at ICANN. ICANN's Office of Ombudsman must have a clear charter that reflects, supports, and Mission, Commitments and Core Values, and must have sufficient authority and independence to ensure that it can perform these important roles effectively. As part of Work Stream 2, the CCWG will evaluate the current Ombudsman charter and operations against industry best practices and recommend any changes necessary to ensure that the ICANN Ombudsman has the tools, independence, and authority needed to be an effective voice for ICANN stakeholders."*

In addition to this, the ATRT2 recommendation for the evaluation of the IOO was transferred to the CCWG-Accountability-WS2 to avoid overlap or duplication of work. ATRT2

Recommendation 9.3 Review Ombudsman Role (page 7 & 58) read:

> *"The Board should review the Ombudsman role as defined in the bylaws to determine whether it is still appropriate as defined, or whether it needs to be expanded or otherwise revised to help deal with the issues such as:*
>
> *i.   A role in the continued process of review and reporting on Board and staff transparency.*
>
> *ii.   A role in helping employees deal with issues related to the public policy functions of ICANN, including policy, implementation and administration re-lated to policy and operational matters.*
>
> *iii.   A role in fair treatment of ICANN Anonymous Hotline users and other whistle blowers, and the protection of employees who decide there is a need to raise an issue that might be problematic for their continued employment."*

To undertake this work, the CCWG-Accountability WS2 created an IOO Sub-Group, which was charged with presenting a report to the CCWG-Accountability WS2 Plenary for consideration.

The Charter of the Office of the Ombuds can be found in the ICANN Bylaws at: https://www.icann.org/resources/pages/governance/bylaws-en/#article5 .

This is augmented by the ICANN Ombudsman Framework, which can be found at: https://www.icann.org/en/system/files/files/ombudsman-framework-26mar09-en.pdf .

Review Ombudsman Role

After some initial discussions, the IOO Sub-Group decided to focus its work on the external review of the IOO. This required:

⊙ Supporting the production of an RFP.

⊙ Supporting the selection of a contractor.

⊙ Meeting with the contractor to provide background.

⊙ Reviewing the draft report from the contractor.

⊙ Accepting the final report from the contractor.

The Request for Proposal for Assessment of the ICANN Office of Ombudsman is quite detailed and lays out the requirements, which align with those of Recommendation 12 of the WS1 Final Report, as well as the request from ATRT2, quite clearly and can be found in Annes 5.1.1of this document.

The final report of the external evaluator can be found in Annes 5.1.2 of this document and the Executive Summary of the report summarizes the report as follows:

> *Our review of the ICANN Ombuds function is set out below. The structure of the Report includes rather more explanatory material than first anticipated – because we encountered such a range of perspectives and expectations of what an ombuds function should involve.*
>
> *We identified that the ICANN ecosystem has different types of complaints – with different dynamics, requiring different processes and with different possible range of outcomes.*
>
> *We compared the ICANN environment and its ICANN ombuds function to a number of existing ombuds 'models' we are familiar with – in different sectors, styles of organisations and countries.*
>
> *We interviewed a cross-section of experienced ICANN people and in conjunction with the WS2 Ombuds Subgroup, conducted a survey of some 84 members of the ICANN world.*
>
> *We concluded that:*
>
> ⊙ *the Ombuds function is valued and provides an essential 'safety valve' for fairness*
>
> ⊙ *it does not however meet all expectations, with a number feeling that it does not have enough power or independence*
>
> ⊙ *there is no single 'model' that can be readily applied to the ICANN ombuds function and that to deliver confidence in fairness and to meet the range of*

expectations, it will need to adopt a multi-faceted approach

⊙ *the current ombuds function is close to what is needed, but could use some re-configuring and strengthening*

We also considered some of the suggestions that are being floated for non-complaints work that could be given to the Office of the Ombuds.

We identified five areas for improvement:

1. Clarify role and processes – manage expectations

ICANN's Ombuds function is multi-faceted. To achieve clarity and to manage stakeholder expectations, it needs both an overall 'umbrella' conception of its role (as 'keeper of fairness') and a set of practical distinctions as to how it will deal with complaints (and when it won't) from a suggested three groupings of potential matters: Governance; Corporation and Community

2. Standing and authority

The standing of the Ombuds Office needs to be strengthened. Some of this will come from other areas of recommendation – ie. Greater clarity and definition of its role, stronger perceived independence, greater transparency will all help. Recommended rule-changes (below) will assist. Standing is also a product of sustained effort by many to support the Office and keep the Ombuds function in the consciousness of the community.

While we do not see a current case for the Ombuds to have decision-making powers, we think that it should be clearer that their reports and recommendations carry weight and must be responded to (not necessarily complied with). We suggest amendments to the Bylaws to oblige timely responses.

We also think that there would be advantages if the Ombuds Office has internal mediation skills and experience.

3. Strengthen independence

There is a clear need to strengthen the perception of the Ombuds function's independence. We recommend the addition of an Ombuds advisory panel – independent of the Board - to take some of the oversight work currently done by the Governance Committee and to add a system of guidance and support for the Ombuds. We also suggest some detail change to the Ombuds employment.

4. Strengthen transparency

As part of recognizing community expectations, we recommend a refreshed focus on reporting and transparency and a greater emphasis from the Office on public reporting.

5. Policy for non-dispute roles

In dealing with proposals for the Ombuds taking on other 'honest-broker' roles, we suggest that the ICANN community should avoid responding in an ad-hoc way and develop a set of principles or a policy to set out the basis for any such roles.

The summary of the recommendations is presented here:

Recommendation 1. The statement in Article 5 of ICANN's Bylaws of the Ombuds Office's Charter should be changed to give the office a more strategic focus.

Recommendation 2. The Ombudsman Framework should be replaced by procedures that:

⊙ *Distinguish between different categories of complaints and explains how each will be handled.*

⊙ *Set out the kinds of matters where the Ombuds will usually not intervene – and where these matters are likely to be referred with the complainant's permission.*

⊙ *Provides illustrative examples to deepen understanding of the Ombuds approach.*

Recommendation 3. Once ICANN has agreed to a revised configuration for the Office of the Ombuds, a plan should be developed for a soft re-launch of the function, which should incorporate action to emphasize the importance of the Ombuds function by all relevant parts of ICANN, including the Board, CEO, Community groups, Complaints Officer, etc.

Recommendation 4. The ICANN Bylaws and any relevant rules of ICANN groups should be amended to oblige all relevant parts of ICANN (should include the Corporation, the Board and Committees, and any body or group with democratic or delegated authority) to respond within 90 days (or 120 days with reason) to a formal request or report from the Office of the Ombuds. The response should indicate the substantive response along with reasons.

Recommendation 5. The ICANN Office of the Ombuds should establish timeliness KPIs for its own handling of complaints and report against these on a quarterly and annual basis.

Recommendation 6. The Office of the Ombuds should be configured so that it has formal mediation training and experience within its capabilities.

Recommendation 7. The Office of the Ombuds should be ideally configured (subject to practicality) so that it has gender diversity within its staff resources.

Recommendation 8. ICANN should establish an Ombuds Advisory Panel, made up of five or six members to act as advisers, supporters, wise counsel and an accountability mechanism for the Ombuds. The Panel should be made up of a minimum of two members with ombudsman experience and three to four

members with extensive ICANN experience. The Panel should be responsible for commissioning an independent review of the Ombuds function every three to five years.

Recommendation 9. The Bylaws and the Ombuds employment contracts should be revised to strengthen independence by allowing for a five-year fixed term (including a 12-month probationary period) and permitting only one extension of up to three years. The Ombuds should only be able to be terminated with cause.

Recommendation 10. The Ombuds should have as part of their annual business plan an obligation to formally report annually, to publish reports on activity, to collect and publish statistics and complaint trend information, to collect user satisfaction information, and to publicize systemic improvements arising from the Ombuds' work.

Recommendation 11. With input from across the Community, ICANN should develop a policy for any Ombuds involvement in non-complaints work that addresses:

a. *Whether there is unique value that the Ombuds can add through the proposed role or function?*

b. *Whether the proposed reporting/accountability arrangements may compromise perceived independence?*

c. *Whether the proposed role/function would limit the Ombuds ability to subsequently review a matter?*

d. *Whether the workload of the proposed role/function would limit the Ombuds ability to prioritize their complaints-related work?*

e. *Whether any Ombuds involvement with the design of new or revised policy or process, creates the impression of a 'seal of approval'?*

f. *Whether the proposed Ombuds input may be seen as a "short-cut" or substituting for full stakeholder consultation?*

The IOO Sub-Group accepted these recommendations in July 2017 and noted that it would consider how best to incorporate these in its draft recommendations.

Recommendations from Other CCWG-Accountability WS2 Sub-Groups for the IOO

Because the CCWG-Accountability WS2 created eight sub-groups to work on the various aspects of WS1 Recommendation 12, it was understood that there could be overlaps between these sub-groups in their recommendations and the IOO Sub-Group had to consider the recommendations from the other sub-groups that affected the IOO.

All sub-groups having completed their recommendations, the current set of overlaps are:

- Diversity – No explicit recommendation

- Guidelines for Standards of Conduct Presumed to be in Good Faith Associated with Exercising Removal of Individual ICANN Board Directors – None

- Human Rights - No explicit recommendation

- Jurisdiction – No explicit recommendation

- Ombudsman – N/A

- SO/AC Accountability - No explicit recommendation, but note the following from the latest version of the SO/AC Accountability Recommendations:

    - *Therefore, our group's conclusion is that the IRP should not be made applicable to activities of SO/AC/Groups. The appropriate mechanism for individuals to challenge an AC or SO action or inaction is though ICANN's Ombuds Office, whose bylaws and charter are adequate to handle such complaints.*

        We note that duties and powers of the Ombuds Office may be further enhanced and clarified through recommendations of the CCWG Work Stream 2 project "Considering enhancements to the Ombudsman's role and function", as provided in ICANN Bylaws.

- Staff Accountability – No explicit recommendation

- Transparency – Explicit recommendations:

    - Recommendation 13 – The exception for information requests which are "not reasonable, excessive or overly burdensome, not feasible, abusive, or vexatious or made by a vexatious or querulous individual" should be amended to require the consent of the Ombudsman before it is invoked.

    - Recommendation 19 – The Ombudsman's mandate regarding the DIDP should also be boosted to grant the office a stronger promotional role, including by integrating understanding of transparency and the DIDP into ICANN's broader outreach efforts, by publishing a list of the categories of information ICANN holds and by reasonable monitoring and evaluation procedures, such as publishing the number of requests

received, the proportion which were denied, in whole or in part, the average time taken to respond, and so on.

The IOO Sub-Group will consider the impact of these recommendations in its own recommendations.

Recommendations

Note: The IOO Sub-Group approved the objectives of all the recommendations made by the external evaluator, but did modify some of the implementation requirements to allow for more flexibility and speed in implementation, especially when considering Bylaws changes. It is also important to note that these do not modify the Charter of the Office of the Ombudsman (section 5.2 of the ICANN Bylaws) or the Jurisdiction of the Office of the Ombudsman as documented in the ICANN Ombudsman Framework.

1. The Ombuds Office should have a more strategic focus.

2. The Ombudsman office should include procedures that:

    a. Distinguish between different categories of complaints and explains how each will be handled.

    b. Set out the kinds of matters where the Ombuds will usually not intervene – and where these matters are likely to be referred to another channel (with the complainant's permission).

    c. Provide illustrative examples to deepen understanding of the Ombuds approach.

3. Once ICANN has agreed to a revised configuration for the Office of the Ombuds, a plan should be developed for a soft re-launch of the function, which should incorporate action to emphasis the importance of the Ombuds function by all relevant parts of ICANN, including:

    a. Board

    b. CEO

    c. Community groups

    d. Complaints Officer

4. All relevant parts of ICANN should be required (should include the Corporation, the Board and Committees, and any body or group with democratic or delegated authority) to respond within 90 days (or 120 days with reason) to a formal request or report from the Office of the Ombuds. The response should indicate the substantive response along with reasons. Should the responding party not be able to meet the 120-day limit due to exceptional circumstances, that party can apply to the IOO to seek an additional extension prior to the expiration of the original 90-day delay. The application should be in writing, stating the nature of the exception and the expected time required to respond. The IOO will respond to such requests within a week.

5. The ICANN Office of the Ombuds should establish timelines (KPIs) for its own handling of complaints and report against these on a quarterly and annual basis.

6. The Office of the Ombuds should be configured so that it has formal mediation training and experience within its capabilities.

7. Ideally, the Office of the Ombuds should be configured so that it has gender, and if possible other forms of diversity, within its staff resources. (The primary objective of this recommendation is to ensure that the Community has choices as to whom in the IOO they can bring their complaints to and feel more comfortable doing so.)

8. ICANN should establish an Ombuds Advisory Panel:

    a. Made up of five members to act as advisers, supporters, wise counsel for the Ombuds and should be made up of a minimum of at least two members with Ombudsman experience and the remainder with extensive ICANN experience.

    b. The Panel should be responsible for:

        I. Contributing to the selection process for new Ombuds, which would meet the various requirements of the Board and Community, including diversity.

        II. Recommending candidates for the position of Ombuds to the Board.

        III. Recommending terms of probation to the Board for new Ombuds.

        IV. Recommend to the Board firing an Ombuds for cause.

        V. Contribute to an external evaluation of the IOO every five years.

        VI. Making recommendations regarding any potential involvement of the IOO in non-complaint work based on the criteria listed in Recommendation 11.

    c. The Panel cannot be considered as being part of the Ombuds office and cannot be considered additional Ombuds, but rather external advisors to the office.

    d. Any such advisory panel would require the Ombuds to maintain its confidentiality engagements per the Bylaws.

9. The Ombuds employment contracts should be revised to strengthen independence by allowing for a:

    a. Five-year fixed term (including a 12-month probationary period) and permitting only one extension of up to three years (the extension should be subject to a Community-based feedback mechanism to the Advisory Panel covering the Ombuds' performance over the previous years).

    b. The Ombuds should only be able to be terminated with cause.

10. The Ombuds should have as part of their annual business plan a communications plan – including the formal annual report – publishing reports on activity, collecting and publishing statistics and complaint trend information, collecting user satisfaction information, and

publicizing systemic improvements arising from the Ombuds' work.

11. The following points should be considered and clarified publicly when looking at Ombuds involvement in any non-complaints work:

- ⊙ Whether there is unique value that the Ombuds can add through the proposed role or function?

- ⊙ Whether the proposed reporting/accountability arrangements may compromise perceived independence?

- ⊙ Whether the proposed role/function would limit the Ombuds ability to subsequently review a matter?

- ⊙ Whether the workload of the proposed role/function would limit the Ombuds ability to prioritize their complaints-related work?

- ⊙ Whether any Ombuds involvement with the design of new or revised policy or process, meets the requirement of not, in any way, creating a "stamp of approval"?

- ⊙ Whether the proposed Ombuds input may be seen as a "short-cut" or substituting for full stakeholder consultation?

The additional recommendations by the Transparency Sub-Group with respect to involving the Ombuds in the DIDP process should be considered using the criteria in Recommendation 11. This specific point will be noted in the Public Comment process for this document to gauge if the Community supports these additional recommendations when considering the criteria in Recommendation 11.

Annex 5.1.1

**Project Overview
to the
Request for Proposal
For
Assessment of the ICANN Office of Ombudsman**

Date of Issue: TBD

1.0   Introduction

1.1   About this Document

The Internet Corporation for Assigned Names and Numbers ("ICANN") is seeking a provider to conduct an independent assessment of the Office of Ombudsman, as defined in Article 5 of ICANN Bylaws. This assessment is part of the overall objective to enhance ICANN accountability alongside the IANA stewardship transition and it will be supported by the Working Stream 2 Process and more specifically by the ICANN Ombuds Office Drafting Team (IOO-DT) a multistakeholder group. The assessment is also in line with the recommendation issued by the Second Accountability and Transparency Review Team (ATRT2) , see Final Report Section 9.3.

In seeking a comprehensive proposal for these services, ICANN is placing maximum emphasis on several key components of value including expertise with similar processes, multistakeholder community and policymaking, demonstrated practices, and the ability to work within the guidelines established in this RFP. Additional ideas and suggestions are welcome.

Note: This 'Project Overview', even if it provides all the information relevant for the RFP such as the RFP background, scope, requirements, deliverables and timeline, does not constitute the complete RFP packet by itself. There are several other documents included as part of the RFP packet that require participants to provide information to ICANN in a structured format. For a full list of documents included in the RFP, along with detailed instructions for responding to the RFP and use of the ICANN Sourcing tool, refer to the Instructions document provided separately.

1.2   Overview of the Internet Corporation for Assigned Names and Numbers (ICANN)

The Internet Corporation for Assigned Names and Numbers' (ICANN) mission is to help ensure a stable, secure and unified global Internet. To reach another person on the Internet, you have to type an address into your computer - a name or a number. That address has to be unique so computers know where to find each other. ICANN helps coordinate and support these unique identifiers across the world.

See www.icann.org for more information.

1.3   Background to the ICANN Office of Ombudsman

The ICANN Ombudsman is independent, impartial and neutral. The Ombudsman's function is to act as an informal dispute resolution office for the ICANN community, who may wish to lodge a complaint about ICANN staff, board or problems in supporting organizations. The purpose of the office is to ensure that the members of the ICANN community have been treated fairly. The Office of Ombudsman is impartial and will attempt to resolve complaints about unfair treatment, using techniques like mediation, shuttle diplomacy and if needed, formal investigation. The Ombudsman cannot make, change or set aside a policy, administrative or Board decision, act, or omission, but may investigate these events, and to use ADR technique to resolve them and make recommendations as to changes.

More information

[ICANN Ombudsman Homepage](#)

[ICANN Ombudsman Framework](#)

[About ICANN's current Ombudsman](#)

[Ombudsman Annual Reports](#)

2.0   Ombudsman Assessment

2.1   Period of this Review

This is a one-time review. The final report as well as any attachments should be delivered no later than 15 April 2017.

2.2   Scope of the Review

The Office of the Ombudsman is defined in the ICANN Bylaws, Article 5, Section 5.1 - Section 5.5. For more information, see: https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf

https://www.icann.org/ombudsman

Within ICANN, its stakeholders came together to make recommendations on enhancements to ICANN's accountability, through the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability). The CCWG-Accountability determined in the first phase of its work that the role of the Ombudsman should be considered for further enhancements.

As defined in the CCWG-Accountability Work Stream 1 Report (Annex 12):

> *Through the enhanced Request for Reconsideration process (see Recommendation #8: Improving ICANN's Request for Reconsideration Process), the CCWG-Accountability has given increased responsibility to the Ombudsman.*
>
> *The Ombudsman can perform a critical role in ensuring that ICANN is transparent and accountable, preventing and resolving disputes, supporting consensus-development, and protecting bottom-up, multistakeholder decision-making at ICANN. ICANN's Office of Ombudsman must have a clear charter that reflects, supports, and respects ICANN's Mission, Commitments and Core Values, and must have sufficient authority and independence to ensure that it can perform those important roles effectively. As part of Work Stream 2, the CCWG will evaluate the current Ombudsman charter and operations against industry best practices and recommend any changes necessary to ensure that the ICANN Ombudsman has the tools, independence, and authority needed to be an effective voice for ICANN stakeholders.*

For more information, please see: https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-workstream-1-recs-23feb16-en.pdf

As the CCWG-Accountability was deliberating and developing its recommendations, ICANN was working on the implementation of a recommendation from the Second Accountability and Transparency Review Team that called for a review of the role of the ICANN Ombudsman.[1]

As ICANN was conducting a search for a reviewer to implement the ATRT2 recommendation, the CCWG-Accountability work clearly indicated that the role of the Ombudsman would be reviewed during Work Stream 2. Moreover, the CCWG-Accountability was making recommendations for modifications to the Ombudsman's responsibilities. To avoid duplication of effort, ICANN noted that the ATRT2 recommendation appeared to be overtaken by the CCWG-Accountability work, and further work on the ATRT2 recommendation was removed from ICANN's ATRT2 implementation workplan.

The CCWG-Accountability's next phase (or Work Stream 2) includes consideration of what further enhancements can be made to the Ombudsman role and function.

The CCWG-Accountability's Work Stream 2 efforts on the Ombudsman kicked off in mid2016, and can be followed at: https://community.icann.org/display/WEIA/Ombudsman. As part of their work, the Ombudsman subgroup has agreed to consider the findings of an independent assessment of the Ombudsman role (similar to the assessment anticipated as part of the ATRT2 implementation). To that end, an independent assessment of the Office of the ICANN Ombudsman will be coordinated with the Ombudsman subgroup. The independent assessment of the Office of the Ombudsman is expected to take approximately two months.

ICANN is seeking qualified reviewers to conduct the assessment in an efficient and effective manner. The information outlined below illustrates the scope of work and the criteria for selection.

The assessment is planned to start in [DATE] and conclude in [DATE] 2017.

2.3   Scope of Work

The objective of this RFP is to identify an independent reviewer *to conduct a comprehensive assessment of the current Office of the Ombudsman charter and operations, including its unique role in the ICANN community, against relevant best practices and provide*

---

[1] The ATRT2 Final Report Recommendation 9.3 (Review of Ombudsman Role) states:

The Board should review the Ombudsman role as defined in the bylaws to determine whether it is still appropriate as defined, or whether it needs to expanded or otherwise revised to help deal with the issues such as:
  a. A role in the continued process of review and reporting on Board and staff transparency.
  b. A role in helping employees deal with issues related to the public policy functions of ICANN, including policy, implementation and administration related to policy and operational matters.
  c. A role in fair treatment of ICANN Anonymous Hotline users and other whistleblowers, and the protection of employees who decide there is a need to raise an issue that might be problematic for their continued employment.

recommendations necessary to ensure that the Office of the Ombudsman has the tools, independence, and authority needed to be an effective voice for ICANN stakeholders.

The Independent Reviewer will be responsible for delivering a Report, incorporating inputs as received through the community input processes.

2.4   Review Work Method and Criteria

The work methods are expected to include the following:

- Examination of documentation, records and reports
- One-on-one interviews
- Observation of the current Ombudsman Office structure and operations
- Online surveys comprised of quantitative and qualitative elements focused on evaluation criteria. These surveys will aim to collect feedback from all of ICANN's Supporting Organizations (SOs) and Advisory Committees (ACs); the ICANN Board of Directors; interested members from ICANN community; ICANN employees.
- Consultation with the ICANN Community, notably the IOO-DT to assure the review is conducted

    according to remit and is based on relevant facts and figures.

ICANN will supply the criteria to be used in conducting the Assessment of the office of Ombudsman, which were developed in collaboration with the WS2 subgroup. These criteria include but are not limited to the following areas:

1) Evaluation of the current Office of the Ombudsman existing charter and operation against relevant best practices; determination of whether it is fulfilling its purpose within the ICANN structure;

2) To determine whether any factor affects the independence, impartiality and fairness of the ombuds office considering its current structure.

3) Assertion of whether there are any additional roles to be assumed by the Office of the Ombudsman within ICANN; and

4) Determination of how the enhanced role of the Ombudsman would interact with the other ICANN accountability mechanisms, to avoid duplication and optimize its effectiveness; and

5) Based on the findings from the comprehensive and in-depth analysis conducted, the review report shall provide suggestions and recommendations for any change in structure or operations which is desirable to enhance and improve the Office of the Ombudsman's independence and effectiveness within ICANN;

2.5   Structure of the Assessment Report

The review report should include the following sections:

1) **Executive Summary**: This section should provide a clear and easy to understand summary of findings and recommendations.

2) **Facts:** This section should provide data on all aspects as described in the Scope of Work section above.

3) **Analysis:** This section must provide an in-depth analysis of the data collected, and show correlations amongst the various data sets.

4) **Conclusions:**

   a.   Based on the findings from analyzing the data collected, the report must identify elements that are working well and those that need improvement.

   b.   The report should provide suggestions and recommendations on ways to improve independence and effectiveness of the office of the Ombudsman

2.6   Other

The final report and any attached documents will be submitted in the English Language. The report will be submitted to CCWG-Accountability Work Stream 2 as an electronic document.

3.0   High Level Selection Criteria

The decision to select a final provider as an outcome of this RFP will be based on, but not limited to, the following selection criteria:

1)   Understanding of the assignment
   - Understanding of the assignment, timeline and expected deliverables
2)   Knowledge and expertise
   - Strong knowledge and understanding on the roles and functions of the Ombudsman office
   - Demonstrated experience in conducting broadly similar examinations of the Ombudsman office
   - Demonstrated experience in conducting such a review for a global organization that consist of employees and/or volunteers:
     o   coming from different part of the World
     o   living and working in different cultural environment
     o   using multiple languages
     o   looking for gender equality

- o having diverse policies and privacy concerns
- Demonstrated understanding of not-for-profit or non-governmental organizations
- Commitment to working with ICANN's multistakeholder setup, including a demonstrated understanding of and commitment to ICANN's requirements for transparency and accountability
- Basic knowledge of the multistakeholder model policymaking and an understanding of ICANN's organization as well as ICANN community
- Suitability of proposed CVs

3) Proposed methodology

- Work organization, project management approach, timelines
- Suitability of tools and methods of work
- Clarity of deliverables
- Suitability for engaging volunteers within volunteer-based organizations 4) Flexibility, including but not limited to:
- Geographic, gender and cultural diversity
- Meeting the timeline
- Ability to adjust to circumstances that could extend the assessment
- General adaptability

4) Reference checks (see template)
5) Financial value
6) Independence including no conflict of interest

4.0   High Level Business Requirements

In order to be considered, the providers must be able to demonstrate ability to meet the following business requirements:

i.   Ability to provide a complete response based on ICANN specifications by the designated due date (see below).

ii.   Availability to participate in finalist presentations via conference call/remote participation (see below).

iii. Ability to execute a professional services agreement substantially in accordance with the terms and conditions of ICANN's Contractor Consulting Agreement (contact ICANN staff for a copy). iv. Ability to begin work on or around 20 February 2017 and complete on or around 15 April 2017.

v.   Conduct of periodic update calls, frequency to be determined.

vi.   Demonstrated ability to develop work methods, data gathering mechanisms and evaluation/assessment approaches based on the specific objective and quantifiable criteria supplied by ICANN.

vii. Ability to conduct examination work using remote tools.

viii. Ability to provide the following deliverables (note that deliverables and dates may change due to community work schedules)

ix.   Ability to travel to ICANN58, should it be deemed relevant and fit within the work plan.

	Deliverable description	Estimated Due Date	Notes
a)	Work plan and timeline	1 March	
b)	Conducting interviews (skype/telephone)	1 March onwards	
c)	Design and launch online survey	5 March	ICANN58 starts 11 March
d)	Preliminary findings for discussion with Review Working Party	1 April	
h)	Final Report issued and posted	15 April	

5.0   Project Timeline

The following dates have been established as milestones for this RFP. ICANN reserves the right to modify or change this timeline at any time as necessary. All responses (including proposals, supporting documentation, questions, etc.) must be submitted via the ICANN Sourcing Tool. See the Instructions document for further instructions. Access to the ICANN Sourcing Tool may be obtained by sending a request to review_rfp@icann.org

Activity	Estimated Dates	Lead
RFP published	9 January 2017	Multistakeholder Strategy and Strategic Initiatives Staff (MSSI)
Participants submit any RFPrelated questions to ICANN	20 January 2017 by 23:59 UTC	RFP Candidates
ICANN responds to participant questions	25 January 2017	ICANN Organization
RFP due date	**31 January2017 by 23:59 UTC**	**RFP Candidates**
Preliminary evaluation of responses	1 February-8 February 2017	ICANN Organization, with input from the IOO-DT
Target for final evaluations, contracting and award	20 February 2017	ICANN Organization, with input from the IOO-DT

Start of Review	1 March 2017	Independent Examiner/MSSI Staff
Final Report for discussion with the Ombudsman Subgroup	1 April	Independent Examiner
Final Report issued and posted	**15 April 2017**	**Independent Examiner/ ICANN Organization**

6.0   Terms and Conditions

General Terms and Conditions

1. Submission of a proposal shall constitute Respondent's acknowledgment and acceptance of all the specifications, requirements and terms and conditions in this RFP.

2. All costs of preparing and submitting its proposal, responding to or providing any other assistance to ICANN in connection with this RFP will be borne by the Respondent.

3. All submitted proposals including any supporting materials or documentation will become the property of ICANN. If Respondent's proposal contains any proprietary information that should not be disclosed or used by ICANN other than for the purposes of evaluating the proposal, that information should be marked with appropriate confidentiality markings.

Discrepancies, Omissions and Additional Information

1. Respondent is responsible for examining this RFP and all addenda. Failure to do so will be at the sole risk of Respondent. Should Respondent find discrepancies, omissions, unclear or ambiguous intent or meaning, or should any question arise concerning this RFP, Respondent must notify ICANN of such findings immediately in writing via e-mail no later than three (3) days prior to the deadline for bid submissions. Should such matters remain unresolved by ICANN, in writing, prior to Respondent's preparation of its proposal, such matters must be addressed in Respondent's proposal.

2. ICANN is not responsible for oral statements made by its employees, agents, or representatives concerning this RFP. If Respondent requires additional information, Respondent must request that the issuer of this RFP furnish such information in writing.

3. A Respondent's proposal is presumed to represent its best efforts to respond to the RFP. Any significant inconsistency, if unexplained, raises a fundamental issue of the Respondent's understanding of the nature and scope of the work required and of its ability to perform the contract as proposed and may be cause for rejection of the proposal. The burden of proof as to cost credibility rests with the Respondent.

4. If necessary, supplemental information to this RFP will be provided to all prospective Respondents receiving this RFP. All supplemental information issued by ICANN will form part of this RFP. ICANN is not responsible for any failure by prospective Respondents to receive supplemental information.

Assessment and Award

1. ICANN reserves the right, without penalty and at its discretion, to accept or reject any proposal, withdraw this RFP, make no award, to waive or permit the correction of any informality or irregularity and to disregard any non-conforming or conditional proposal.

2. ICANN may request a Respondent to provide further information or documentation to support Respondent's proposal and its ability to provide the products and/or services contemplated by this RFP.

3. ICANN is not obliged to accept the lowest priced proposal. Price is only one of the determining factors for the successful award.

4. ICANN will assess proposals based on compliant responses to the requirements set out in this RFP, any further issued clarifications (if any) and consideration of any other issues or evidence relevant to the Respondent's ability to successfully provide and implement the products and/or services contemplated by this RFP and in the best interests of ICANN.

5. ICANN reserves the right to enter into contractual negotiations and if necessary, modify any terms and conditions of a final contract with the Respondent whose proposal offers the best value to ICANN.

Annex 5.1.2 – Final Report of the External Evaluator (separate file due to formatting issues)

Annex 5.1.3 – Other Considerations and Comments

Comments on independence from Farzneh Badii

1. I don't think we can solve the problem of independence by giving the ombudspersons a 5 years contract. I have provided my reasons before. If by 5 years fixed contract you mean the Ombuds office as an entity should be given a fixed term contract that is fine. But ombudspersons getting fixed five-year contract won't solve the problem.

2. Ombuds has to be an office and not a person. At the moment it's a person. I think to maintain the independence of the office, we need to have preferably an external organization that provides ombuds services and its revenue is not only dependent on ICANN. That way we can ensure independence.

3. Under no circumstances, the ombudspersons should socialize and befriend community members (this is a very obvious independence element, have you ever encountered the decision maker of your case at a social event talking and smiling at the party you filed a complaint against? It is written in first year legal text books that independence is very much affected by social encounters and interactions)

Additional comments by External Evaluator

1. The ICANN Ombuds function is quite unusual – it is neither an in-house Ombuds, nor a Government Ombuds, nor an Industry or sector Ombuds – so very difficult to provide solid comparisons with 'industry best practice'.

2. Reflecting this, the Panel proposed is something of a hybrid – a little like a governing body, a little like a stakeholder advisory group, a little like an expert advisory committee. It is intended to provide a breadth of perspectives to act as a sounding board and wise counsel to the Ombuds Office – and to advise the Board (as the decision-maker) on key matters it must decide about the Ombuds Office.

3. To our knowledge there is no directly comparable existing panel. The Energy and Water Ombudsman of Queensland (EWOQ) is a government (statutory) body which is nonetheless funded by industry fees and levies. The relevant Minister of the State Government is the governing authority – but with no say in operations or complaint decision-making. He or she takes advice from an Advisory Council – on approving an annual budget, on appointing an Ombudsman and on any proposals for change to the law. Not quite the same as the proposed ICANN Panel – but with some similarities.

4. It is important to recognise that Independence is only one aspect of an effective Ombuds function – and it must be considered in balance with other objectives such as credibility, accessibility, efficiency, accountability and so forth. To illustrate, a private legal mediator with experience in family law matters and mid-level commercial disputes could be contracted to consider ICANN complaints – they may get top marks for independence however they would likely get very poor marks for background knowledge, technical credibility and accessibility. (It takes more than independence to achieve recommendations or decisions

that will be accepted).

5. We considered the idea of an external mediation/law firm and rejected it because of what we considered was its poor fit with the ICANN environment (norms vary widely across the community, rapidly evolving, only some aspects governed by black letter law, need for intimate understanding of cultures and interests of different segments of the community, etc). Our experience of external ombuds functions such as these is that they become very legalistic (to compensate for lack of knowledge) and almost invariably have much higher rejection rates (rejecting the complaint). The view becomes not what was "fair in all the circumstances", but "did the person or entity that is complained about breach any rule".

6. Fixed term contracts and remuneration were only considered to be one small part of the independence framework – but an obvious one that needed fixing.

7. Socializing is, I agree with FB, a problematic issue. We would not support a blanket ban on the Ombuds Office staff circulating at Conferences and participating in what I would call 'light touch' social events. It is valuable for the Ombuds staff faces to be known and for them to create an impression of approachability. It is not however, appropriate for them to be seen as a regular 'member' of one or other community group or faction, nor aligned closely with staff or Board members, etc. That is a matter of applying the appropriate mature, professional behaviors – talking to all, circulating around the 'room', avoiding late night drinking sessions, absenting oneself from sensitive discussions, not discussing specific complaints - in other words, engaging but maintaining a professional 'distance'.

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Annex 5.2 – External Evaluation of the Office of the Ombuds – CCWG-Accountability WS2 – March 2018
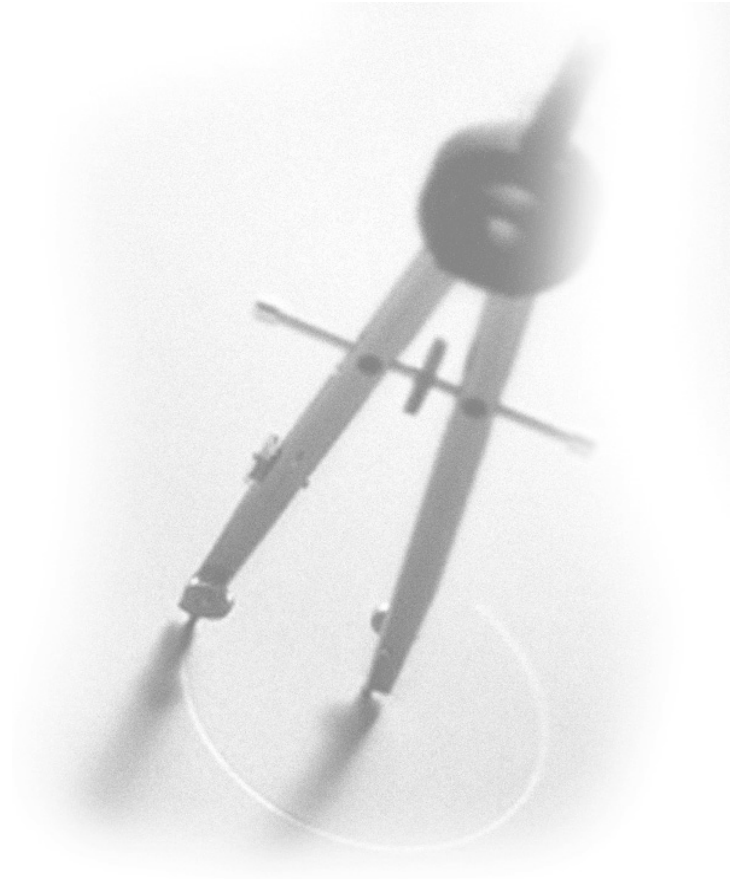
ICANN

Independent Assessment

Office of the Ombuds

Internet Corporation for Assigned Names
and Numbers (ICANN)

July 2017

cameron. ralph. khoury

Contents

Introduction

This review of the Office of the Ombuds is being undertaken by ICANN as one element of the overall objective of enhancing ICANN accountability launched alongside the IANA stewardship transition. It is supported by the Work Stream 2 process and in particular the Ombuds Office Subgroup within that process.

The aim of the review is to reflect on the extent to which the Office of the Ombuds is currently serving the needs of the ICANN multi-stakeholder community and to provide recommendations as to the roles, responsibilities and structure of the Office under the enhanced accountability and transparency framework that is being furthered by the Work Stream 2 process.

The Office of the Ombudsman is mandated by ICANN's Bylaws and was established in 2004. The Ombudsman is a full time appointment and reports directly to the Board. The current Ombudsman, Herb Waye, is the third Ombudsman to be appointed.

Our process included:

INVESTIGATION

1. A review of Office of the Ombudsman materials including the Ombudsman Framework, past review reports, annual reports.

2. Meeting with the ICANN Ombuds Office WS2 Subgroup

3. Face to face interviews with community members and ICANN staff attending ICANN58 including: members of the Board, members of the Subgroup, members of constituent bodies, members of the community, senior members of staff

4. An on-line survey was undertaken (5 languages offered) seeking additional input from members of the community. In a limited period, an excellent 84 community responses were received, including 3 that we arranged to be translated.

ANALYSIS

5. Analysis and development of ideas - built upon the existing Ombudsman Framework, a review of academic and association literature about Ombuds functions and from our experience working with a range of quite different disputes resolution functions.

REPORT

6. Testing emerging ideas with the Subgroup and staff

7. Review by the Subgroup and staff of draft report and recommendations

8. Revised report provided through the WS2 processes – ultimately to the ICANN Board

Our review of the ICANN Ombuds function is set out below. The structure of the Report includes rather more explanatory material than first anticipated – because we encountered such a range of perspectives and expectations of what an ombuds function should involve.

We identified that the ICANN ecosystem has different types of complaints – with different dynamics, requiring different processes and with different possible range of outcomes.

We compared the ICANN environment and its ICANN ombuds function to a number of existing ombuds 'models' we are familiar with – in different sectors, styles of organisations and countries.

We interviewed a cross-section of experienced ICANN people and in conjunction with the WS2 Ombuds Subgroup, conducted a survey of some 84 members of the ICANN world.

We concluded that:

- the Ombuds function is valued and provides an essential 'safety valve' for fairness

- it does not however meet all expectations, with a number feeling that it does not have enough power or independence

- there is no single 'model' that can be readily applied to the ICANN ombuds function and that to deliver confidence in fairness and to meet the range of expectations, it will need to adopt a multi-faceted approach

- the current ombuds function is close to what is needed, but could use some re-configuring and strengthening

We also considered some of the suggestions that are being floated for non-complaints work that could be given to the Office of the Ombuds.

We identified five areas for improvement:

1. **Clarify role and processes – manage expectations**

    ICANN's Ombuds function is multi-faceted. To achieve clarity and to manage stakeholder expectations, it needs both an overall 'umbrella' conception of its role (as 'keeper of fairness') and a set of practical distinctions as to how it will deal with complaints (and when it won't) from a suggested three groupings of potential matters: Governance; Corporation and Community

2. **Standing and authority**

    The standing of the Ombuds Office needs to be strengthened. Some of this will come from other areas of recommendation – ie. greater clarity and definition of its role, stronger perceived independence, greater transparency will all help. Recommended rule-changes (below) will assist. Standing is also a product of sustained effort by many to support the Office and keep the Ombuds function in the consciousness of the community.

While we do not see a current case for the Ombuds to have decision-making powers, we think that it should be clearer that their reports and recommendations carry weight and must be responded to (not necessarily complied with). We suggest amendments to the Bylaws to oblige timely responses.

We also think that there would be advantages if the Ombuds Office has internal mediation skills and experience.

3. Strengthen independence

There is a clear need to strengthen the perception of the Ombuds function's independence. We recommend the addition of an Ombuds advisory panel – independent of the Board - to take some of the oversight work currently done by the Governance Committee and to add a system of guidance and support for the Ombuds. We also suggest some detail change to the Ombuds

employment.

4. Strengthen transparency

As part of recognising community expectations, we recommend a refreshed focus on reporting and transparency and a greater emphasis from the Office on public reporting.

5. Policy for non-dispute roles

In dealing with proposals for the Ombuds taking on other 'honest-broker' roles, we suggest that the ICANN community should avoid responding in an ad-hoc way and develop a set of principles or a policy to set out the basis for any such roles.

Our recommendations are discussed in detail at Page 35 and a Summary of them is provided at Attachment A – Page 48.

Definitions

We found that some terms were often confused in discussions, so we provide the following definitions – in the interests of clarity.

- ADR – Alternative Disputes Resolution – generally refers to resolution outside of a court room, can include common ombuds techniques such as early assessment or investigation, shuttle negotiation, conciliation, arbitration, mediation, etc

- Community – we have used this term for the 'informal' part of the ICANN ecosystem – interested and active members, informal member groupings, working parties, etc

- Governance – means formal representative structures (including elected and some appointed members) from the Board down, designed to advise or make decisions, with some democratic or delegated authority

- ICANN ecosystem – for the avoidance of what seems to be a common confusion, we have used this term for the entire universe of ICANN – including the corporation, Board, constituent bodies, informal members and groups, etc

- Office – the group of staff/resources that deliver the ICANN function – reporting to the Ombudsperson

- Office of the Ombudsman or ICANN Ombudsman – may be used for accuracy where it refers to the ICANN Office, By-laws or the person who occupied the role historically

- Ombuds – (capitalised) refers to the ICANN role or function – we are using this as the preferred future term, replacing 'ombudsman'

- ombudsman or ombuds – (no capitalisation) refers generically to the person or the role in other domains

- Ombudsperson – 'the' ICANN Ombuds – the most senior person within the office

- Single matter – a complaint or dispute relating to a single set of circumstances or events, whether it involves an individual or a group

- Systemic matter – a fairness issue that may affect many people or groups – typically an issue with a policy, process or system

- Technical – refers to matters with a technical dimension including infotech, internet, legal, economic, contractual, etc

Current Situation

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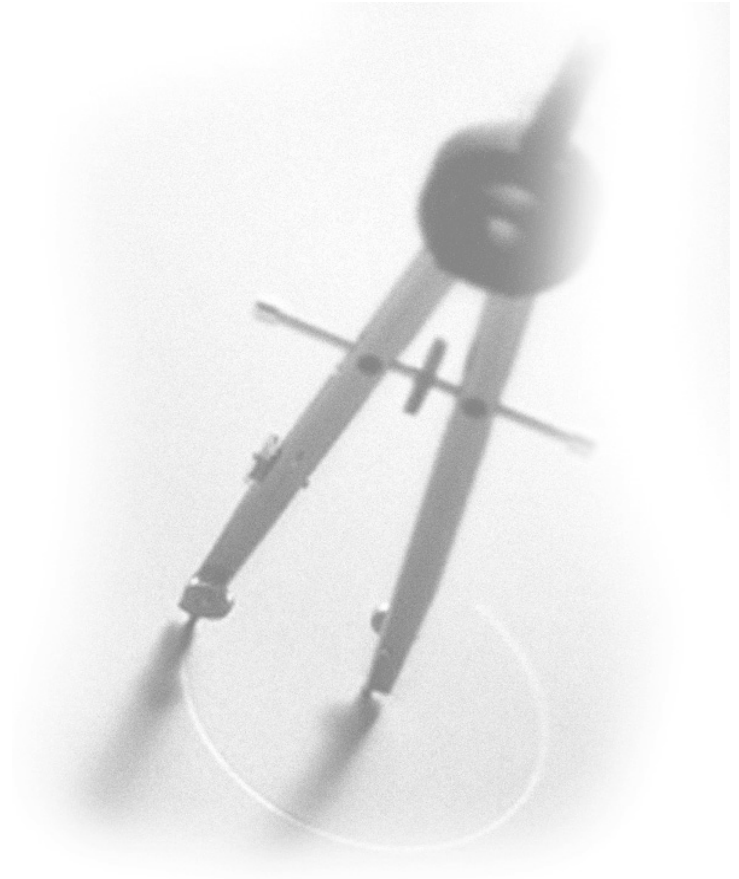
1. ICANN's mission as stated in its Bylaws is to coordinate at the overall level the global systems of unique identifiers and to ensure their stable and secure operation. Its Strategic Plan outlines its vision of "an independent, global organisation trusted worldwide to coordinate the global internet's systems of unique identifiers to support a single, open globally operable internet".

2. ICANN is guided by core declared values including diversity, fairness, integrity, creativeness, effectiveness, responsiveness and transparency.

3. To deliver on its mission and vision, ICANN has developed a unique multi-stakeholder model of governance, peopled by volunteers, that includes the ICANN Board, Board committees, Supporting Organisations, Advisory Committees and a complex web of subgroups including business constituencies and end users organised in geographical groupings.

4. In considering organisational and community design, it is critical to remember that the ICANN ecosystem is, in the scheme of systems of global organisation, extremely young. There is little in the way of precedent to follow, no obvious previous comparable area of international administration and coordination to copy from.

5. It is a unique and highly fluid network of organisations, communities of interest and individuals. It operates in an environment of rapid growth, of technological and political change and as a consequence members of the ICANN community almost continuously confront new issues.

6. Some features change organically as participants and markets evolve behaviours, a few characteristics evolve through government or regulatory action (or inaction) and many aspects evolve through a laborious process of community consultation. Some aspects of standards and policy are highly technical, some are shaped significantly by economic or legal considerations, others more values-driven.

7. The ICANN community is one of great passions and firmly held beliefs – and capable of expressing these in a robust way. It is also capable of quite some suspicion and mistrust – perhaps not surprising when one considers the cultural, language, political and commercial interest differences that exist within this ecosystem.

8. The enhancement of accountability within ICANN is an important issue in the community. For many we spoke to, it has much to do with shifting from a North American way of thinking to a more global way of thinking. (This has particular significance for the Office of the Ombuds as the common North American models of ombudsman differ in important respects from models that exist elsewhere in the world.)

From our discussions with stakeholders, we identify a number of different types of complaints that arise or may arise in the ICANN environment.

1. Complaints that corporation staff have not treated a member of the community fairly. These complaints can span matters from travel reimbursement issues to complaints about failures by the Contractual Compliance Department to enforce contracted party obligations.

2. Complaints about policy settings. An example of this is the policy that frames arrangements with contracted parties - a complaint might assert that ICANN policy facilitates unfairness by contracted parties.

3. Complaints about significant ICANN processes, for example, the new gTLD application process.

4. Complaints that ICANN governors (Board and ICANN community committees) have not treated a member of the community fairly. For example, disputes can arise about elections and membership of committees.

5. Complaints about the conduct of an ICANN contracted party such as a Registrar.

6. Complaints that members of ICANN community have not treated each other fairly, including alleged harassment or breaches of standards of behaviour – or disputes between groups of ICANN community members.

7. Complaints about the inadequacy of redress avenues –discussed below.

The next pages discuss the avenues available within ICANN for resolution of the various complaint types.

ICANN complaint avenues

1. Office of the Ombudsman

The scope and functioning of the Office of the Ombudsman is defined by ICANN's Bylaws and procedures made pursuant to those Bylaws.

a)   Bylaws

Article 5 of the Bylaws specifies the charter of the Ombudsman shall be to act as "a neutral dispute resolution practitioner" for members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly or inappropriately. "The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints … clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results."

The Bylaws entrench some independence measures. The Ombudsman reports to the Board and presents the Office's proposed budget direct to the Board. The Ombudsman is only able to be dismissed by a Board vote with a 75% majority. The Bylaws prohibit any impeding of contact between the Ombudsman and the ICANN community.

Section 5.3(c) sets out matters that are excluded from the Ombudsman's jurisdiction:

- internal administrative matters,
- personnel matters,
- issues relating to membership on the Board, or
- issues related to vendor/supplier relations.

The Ombudsman has a broad right of access to information to enable evaluation of complaints but may not publish confidential information.

The Bylaws oblige the Ombudsman to build awareness of the function through routine interaction with the ICANN community and online availability. ICANN staff and the Board are also required to assist in promoting awareness by directing ICANN community members who voice problems or concerns to the Ombudsman.

Section 5.3(d) authorises the Ombudsman to make reports to the Board and to post these to ICANN's website unless the Ombudsman determines that this is not appropriate. A consolidated annual report must be prepared. This must include a description of trends or common elements of complaints and recommendations of steps to minimise complaints

b)   Ombudsman Framework

Section 5.3(c) obliges the Office of the Ombudsman to develop procedures for complaints handling. These can include the discretion not to accept or to decline to act on a complaint or question that is insufficiently concrete or that are related to ICANN's interactions with the community and are not appropriate for the Ombudsman's review. The Ombudsman Framework was developed by the first ICANN Ombudsman to address this requirement.

The Framework reserves to the Ombudsman the discretion to decline a complaint where:

- the complainant knew or ought to have known of the decision being complained of;
- the subject matter of the complaint primarily affects a person other than the complainant and the complainant does not have sufficient interest in it;
- the complaint is repetitive, trivial, vexatious, frivolous, non-substantive, otherwise abusive or not made in good faith;
- further action by the Ombudsman is not necessary to resolve the complaint;
- the complaint is abandoned or withdrawn by the complainant; or
- the complainant revokes the alternative dispute resolution process by engaging in either a formal review process or outside legal process.

Where jurisdiction is declined, the Ombudsman must inform the complainant.

The Framework also specifies that the Ombudsman does not have the power to make, change or set aside a policy, administrative or Board decision, act or omission, although the Ombudsman does have the power to investigate and use alternative dispute resolution techniques to try and resolve the complaint. Where the Ombudsman investigates and decides that successful resolution is unlikely, the Ombudsman shall advise the complainant of the formal review procedures.

c)   ICANN Community Anti-harassment Policy and Terms of Participation, March 2017

A recent innovation, ICANN now has a specific policy that sets out the Ombudsman's role, process and powers where a community complaint is made about inappropriate behaviour. The Ombudsman will make inquiries to ascertain the facts and will determine whether inappropriate behaviour has occurred and, if so, what remedial action is appropriate.

This may include limiting the individual responsible for the behaviour from participation in the ICANN process and/ or requiring a written apology as a condition of future participation.

d)   Caseload

The volume of complaints have varied over the life of the Office and in the early years were affected by some spamming campaigns. The complaint numbers below are for the 10 calendar years to 2016 and so are not consistent with historical Annual Report figures.

Ombudsman complaint numbers
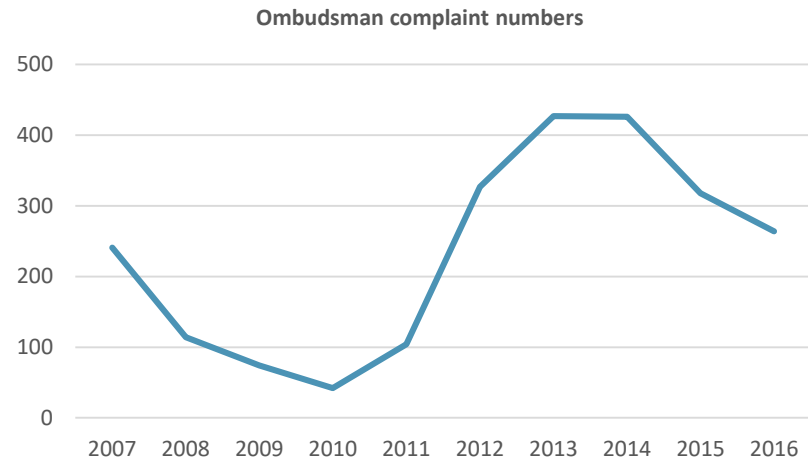
It is difficult to draw conclusions from the data, although we gather from interview that there was something of a loss of confidence in the Office during the middle years shown and there have been surges associated with particular issues. There have also been some data consistency issues which should be addressed for the future with the implementation during 2016 of a new case management system.

The numbers in the chart on the previous page include complaints that were found to be out of jurisdiction. There is not consistent data for this for the whole of the 10 year period above, however the chart below shows, for a 5 year period, the large percentage of complaints that have been categorised as outside jurisdiction.
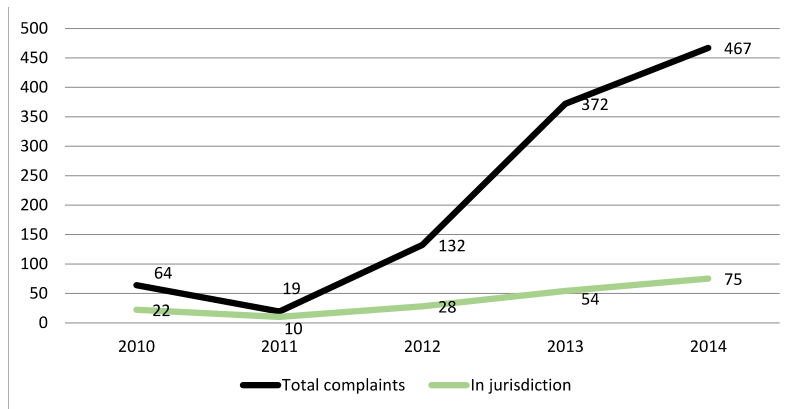
Most commonly, complaints that are outside jurisdiction relate either to registrar decisions or to the transfer of domain names and the outcome for the majority of complainants is that their complaint is referred elsewhere.

2. Contractual Compliance

This Department is responsible for ensuring that ICANN's contracted parties fulfil the requirements in their legal agreements.
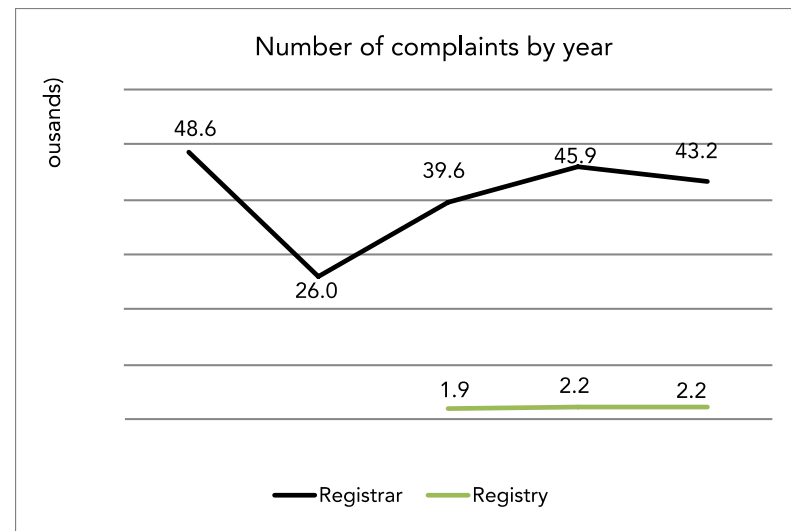
As the chart above illustrates, Contractual Compliance receive a very large volume of complaints - about matters such as domain transfers, domain deletion, domain renewal, customer service issues, Whois format etc.

3. Reconsideration Requests

Consistent with Section 4.2 of the Bylaws, ICANN's Board Governance Committee can be asked to reconsider an action or inaction by the ICANN Board or staff. There are a few prerequisite criteria:

- The person requesting reconsideration must have been adversely affected.

- The action or inaction must have been in contradiction of ICANN's mission, commitments, core values or established policies or have been taken without consideration of material information or in reliance on false or inaccurate information.

- The request cannot be in relation to a matter excluded under the Bylaws (excluded matters include disputes regarding country code top-level domain delegations, internet numbering resources, protocol parameters etc.

The Board Governance Committee has some power to summarily dismiss Reconsideration Requests and, where this power is not exercised, makes recommendations to the Board about the merits of Reconsideration Requests. As a result of a recent change to the Bylaws, the Ombudsman now has a role in the process and provides the Board Governance Committee with their evaluation of the merits of the Reconsideration Request. The current Ombudsman is in the process of retaining a legal firm to provide expert advice to assist him in this role.

In recent times, there have been around 15 to 30 Reconsideration Requests per year. Numbers are expected to further increase as a result of Bylaw changes made last year. In part because of this, the Board passed a resolution in February 2017 that responsibility for

Reconsideration Requests should be moved from the Governance Committee to a new Accountability Committee of the Board. This is currently the subject of community consultation.

4. Independent Review Process

Section 4.3 of the Bylaws obliges ICANN to have an independent third party review process to ensure (amongst other things) that ICANN does not exceed its Mission and otherwise complies with its Articles of Association and Bylaws. Again there are some exclusions.

This is intended to be a mechanism for resolving disputes that is an alternative to legal action. ICANN has appointed the US-based International Centre for Dispute Resolution as the third party to arbitrate these disputes.

ICANN's website lists about 20 disputes as utilising this channel.

5. Complaints Officer

The complaints landscape for ICANN has recently changed again with the appointment of a Complaints officer for ICANN (the corporation). The intention is that this person, reporting to ICANN's General Counsel, will have responsibility for overseeing the handling of complaints about actions of the corporation, reporting on them and facilitating their resolution.

We understand the role is intended to be very operational, across all types of complaints within the corporation and very much a part of the CEO's commitment to continuous improvement. The role is to ensure that complaints across the corporation are recognised, handled well and consistently, reported on, facilitated if necessary and that the information is used to guide systemic improvement.

This Complaints Officer role is a quite common feature of service organisations – in effect being the second line of response to service complaints – analogous to a Customer Service department where matters are escalated if they are unable to be resolved at the frontline.

There is a communique on the ICANN website that sets out some of the key intended differences between the roles of the ICANN Complaints Office and the Ombudsman - (https://www.icann.org/news/blog/clarifying-the-roles-of-the-icann-complaints-office-and-ombudsman).We are conscious that the ICANN Complaints Officer role is in its early stages of development and may well change over the coming months.

As a general rule, a community such as ICANN will have multiple paths for complaints – each configured to best suit the types of complaints that arise. Ideally, there should be coverage of all reasonably predictable complaints, although this will necessarily be an evolving situation. The table overleaf illustrates the main ICANN complaints/disputes channels as they stand at the moment.

Comparison of complaint handling channels

|	Office of Ombudsman	Compliance Department	Reconsideration Request	Independent Review Process	Complaints Officer
Who can be complained about	Board /staff/ community body or member	Contracted party	Board/ staff	Board/ staff	Staff
Decision maker	ombudsman – reporting to the Board	Staff	ombudsman/ Board Governance Committee/ Board	Third party, expert arbitrator	Staff
Nature of process	Confidential process except as needed to pursue complaint, with complainant's agreement	Confidential process except as needed to pursue complaint, with complainant's agreement	Documents posted to website including request, Governance Committee recommendation, Board decision	Proceedings conducted on record, filed documents and decisions posted to ICANN website (trade secret confidentiality may be possible)	Transparency is the default but this may be restricted by the complainant
Formality	Informal	Informal	Some formality	Highly formal – international arbitration rules of procedure apply	Informal
Likely timeframe (absent any special urgency)	Initial response within 1 – 2 days	1 - 2 weeks	Up to 135 days	Intended to conclude within 6 months but in practice often much lengthier	Intended to be quick
Cost	No charge	No charge	Extraordinary costs can be recovered from requestor (but in practice this has not occurred)	Fees and cost orders made	No charge

Whilst these alternative avenues of complaint clearly enrich the accountability framework, it complicates understanding of the role of the Office of the Ombudsman. The Office can operate both as an alternative avenue for these other pathways and as a point of escalation for other avenues - eg. someone dissatisfied with the summary dismissal of a Reconsideration Request by the Governance Committee or a person dissatisfied with an Independent Review Panel decision.

Placeholder – diagram of Ombuds interactions with other ICANN complaints channels – to be completed by ICANN staff

ICANN community views
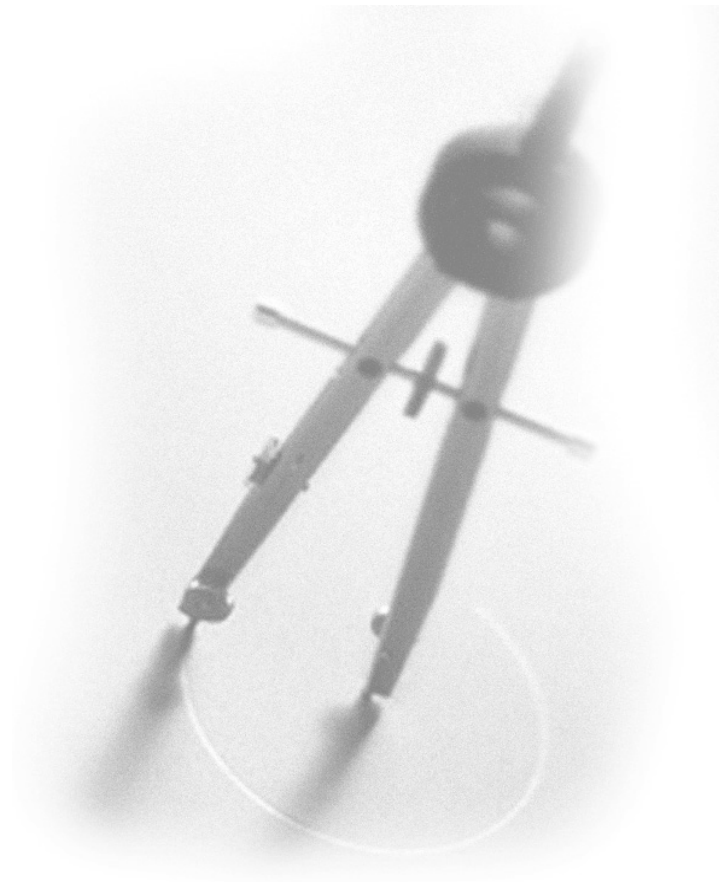
While not everyone within a community can be expected to know the detail of how an ombuds function should or is actually working, critical to the effectiveness of an ombuds function is the extent to which it provides stakeholders with confidence in the fairness of the various community systems and processes.

There were two parts to our investigation of stakeholder perspectives. We reached out to the community and interviewed a number of stakeholders – some suggested and some volunteered. With the assistance of the Subgroup and ICANN staff, we also developed a survey to test the ICANN community's expectations and experience of the ICANN Ombuds function. The survey was confidential to the Reviewers and was open for a little over two weeks. We received responses from 84 community members – we understand that this is an excellent response rate for ICANN. More detail of the survey results are reproduced at Attachment B.

Respondent demographics

Based on advice from those experienced with ICANN surveys, we were satisfied that we received input from a reasonable cross-section of the community. There was representation from the 5 ICANN regions, although it is difficult to assess proportionality as the community is not 'registered' or strictly defined.

The gender split was 71% male/29% female – which we understand is not unusual. Respondents' experience ranged also from those quite new to ICANN participation and those with many years of involvement. Around 40% of respondents said they had had a complaint/dispute related to ICANN and 60% had not. A small number of our interviewees also completed a survey response.

It is of course, important to recognise that the views are unlikely to be representative of the whole ICANN community. This is a self-selecting

sample – with very high exposure to the ICANN Ombuds.

Q1c. Which ICANN region do you belong to? (n=84)
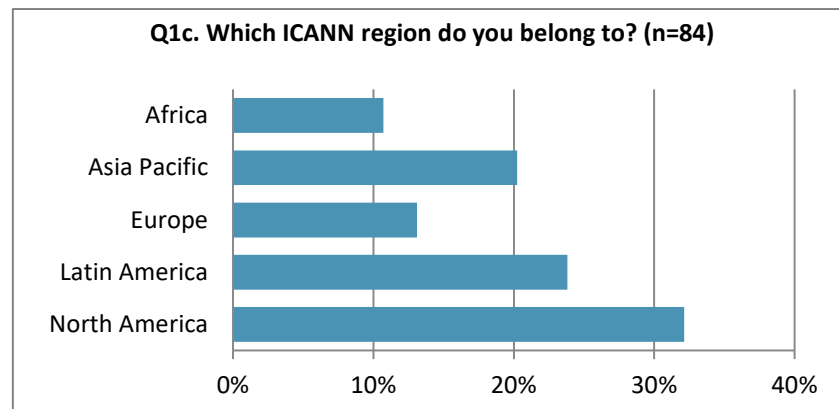
Respondent awareness

In most environments, we do not expect high general awareness of the existence of Ombuds functions – as it is usually only important to members of a community when they have a problem. In ICANN, however, awareness initiatives such as presence at meetings led us to expect that the Office enjoys a sound level of awareness.
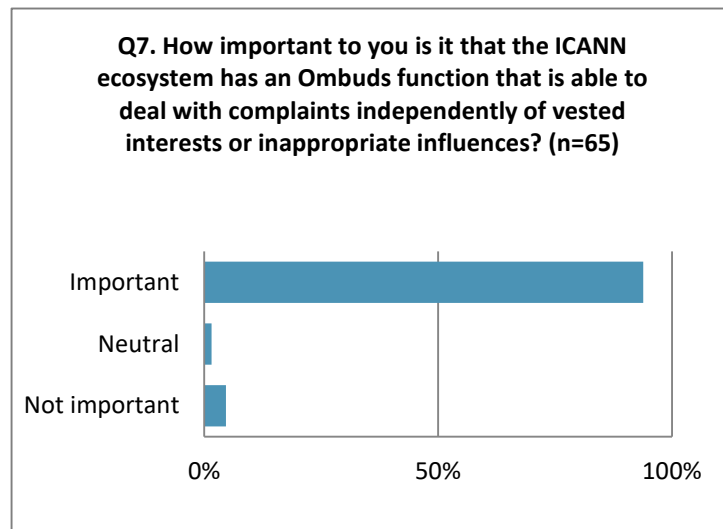
This impression was supported by the survey responses. Only 18% indicated that they had not been aware of the existence of the Office prior to the survey and 56% said they had become aware of the Office either very soon after joining or within 2 years.

It cannot be assumed that the community generally have the awareness levels of our respondents. Also there is a difference between general awareness of the existence of the Office and a higher-level awareness of what it is for, what it can do and what to expect of it.

Importance of Ombuds function

The survey affirmed the clear message from the interviews of the importance to the community of having a dedicated ICANN Ombuds function.

Q7. How important to you is it that the ICANN ecosystem has an Ombuds function that is able to deal with complaints independently of vested interests or inappropriate influences? (n=65)

To understand survey respondents expectations of the Office of the Ombuds, there were questions that asked them to rate the importance of roles and powers that an ombuds function sometimes have.

While the 'typical' functions of providing information, investigation, trying to resolve disputes, escalating important matters, conducting own-motion enquiries and providing transparency all rated with very high importance, it was noteworthy that the greatest diversity of view was around whether the Ombuds function should have decision-making powers or should be able to make binding orders. In our view, this is one of the most fundamental differences present in the range of possible designs for an Ombuds function.
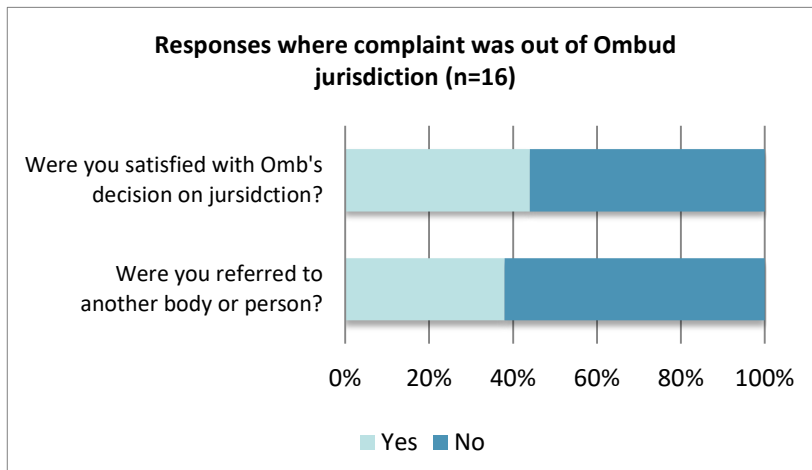
Confidence in the Office of the Ombuds

Respondents were asked to rate stakeholder confidence in the Office of the Ombuds' independence, transparency and accountability. These three confidence elements were rated similarly, with around 1/3rd rating confidence as High, around 1/3rd rating it as Medium or Low and around 1/3rd unable to answer.

Again to test confidence in the Office, the survey asked respondents who had personally had a complaint if they had considered taking it to the Ombuds and if not why not. Some 28% of the 32 respondents to this question had not considered the Ombudsman as a pathway – sometimes citing ignorance of the Ombudsman's remit, or more commonly and more troubling, that they believed that the Ombuds was ineffectual.
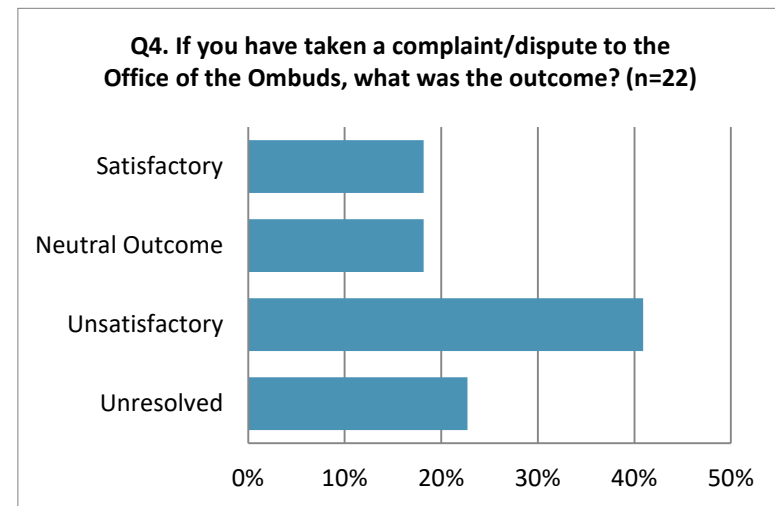
Out of jurisdiction complaints

16 survey respondents (19% of all respondents) reported that they had experienced a complaint that the Office of the Ombuds had found to be outside jurisdiction. The following charts report these respondents' views.

Responses where complaint was out of Ombud jurisdiction (n=16)

Were you satisfied with Omb's decision on jursidction?

Were you referred to another body or person?

0%   20%   40%   60%   80%   100%

■ Yes ■ No

Here we caution that our sample size was small and may well be quite unrepresentative. In recent years, out-of-jurisdiction complaints outnumber in-jurisdiction matters by around 6 times and our sample size is nothing like that. Based on experience in other settings, we would expect a much lower level of satisfaction with out-of-jurisdiction complaints. So, it may not be a fully representative sample. Nevertheless, the results do suggest some expectation that the Ombuds should be able to help with a greater range of complaints than is currently the case.

Reported outcomes for in-jurisdiction complaints

Around 1 in 5 respondents who had taken a matter to the Ombuds reported a satisfactory outcome – another 1 in 5 reported a neutral outcome and the remaining 64% reported an unsatisfactory or unresolved outcome.

Q4. If you have taken a complaint/dispute to the Office of the Ombuds, what was the outcome? (n=22)

Satisfactory

Neutral Outcome

Unsatisfactory

Unresolved

0%   10%   20%   30%   40%   50%

This can be a significant issue for overall confidence levels. The results suggest that only 1 in 5 of those who do have their matter handled by the Office of the Ombuds are likely to speak positively to others about their experience. Whilst this result appears disappointing, our experience is that complainants can have high – often unrealistically high - expectations of what can be achieved through an ombuds function, and can be very disappointed when those expectations are not realised.

Ombuds processes for in-jurisdiction complaints

Whilst not discounting the importance of outcome satisfaction ratings, we find that process ratings are a more important indicator of how well the function is operating.

The survey asked a number of detailed questions about the user's experience of the process – including listening, understanding of the issues, depth of investigation, timeliness, confidentiality, independence, rigour and fairness, etc.

Q6. If the Ombuds dealt with your complaint, how would you rate your experience of the process? (n=21 to 22)
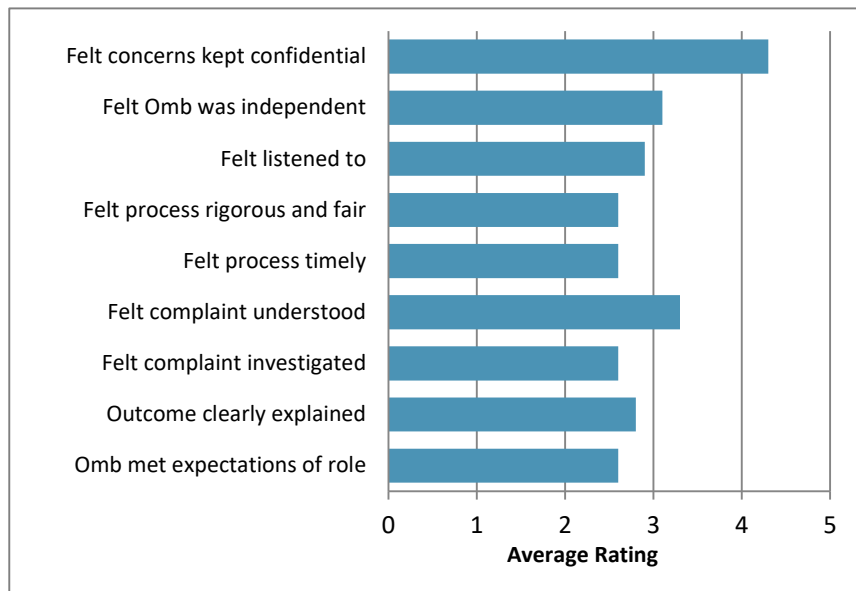
We considered these results in the context of those obtained in the survey conducted in 2008 by the first ICANN Ombudsman.   Given how new the function was, it is perhaps not surprising that the 2008 survey included only 7 people who had made a complaint to the Ombudsman that was within jurisdiction. Their average responses to the 2008 survey (converted here from a 10 point to a 5 point rating scale) were as follows:

- Extent Ombudsman met timeliness expectations: 2.5 rating

- Extent Ombudsman met confidentiality expectations: 3.7 rating

- Extent Ombudsman met overall expectations: 3.1 rating

The 2008 survey also asked respondents to rate other dimensions relevant to the Office of the Ombudsman's handling of their complaint ie. professional manner, respect, explaining the Ombudsman's jurisdiction, providing an appropriate referral and updating or corresponding with the complainant, These ratings could not readily be compared with the process ratings derived from our survey. Suffice to say, that the 2008 survey produced average ratings of these other dimensions in the range of 3 to 3.5. (again when converted to a 5 point scale).

The conclusion in the 2008 report was that people were "generally satisfied' with the Office of the Ombudsman. But, as cautioned in the Third Party comment on the Client Survey, the number of respondents to the survey who had experienced an in-jurisdiction complaint was very small and that free text comment was quite negative.
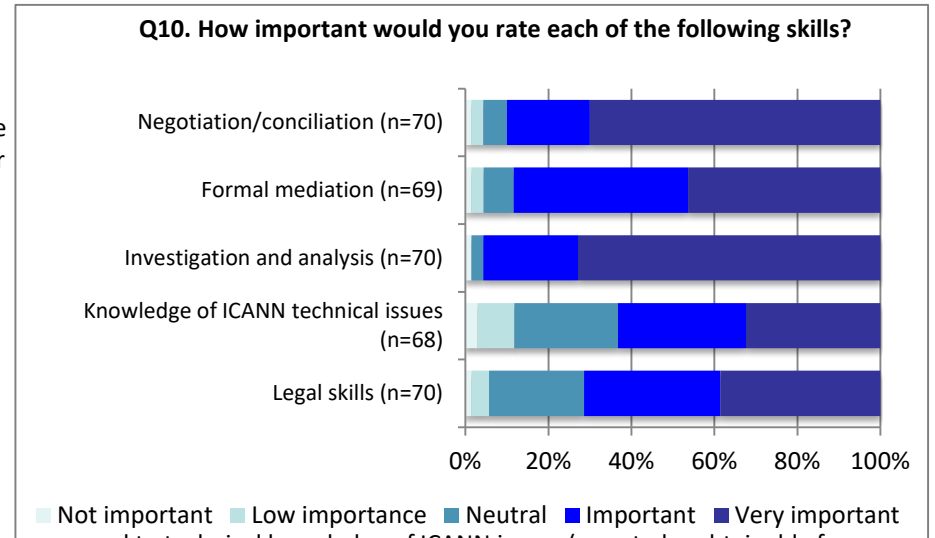
Comparing our survey – also drawn from a small sample size, albeit three times that of the 2008 survey and encompassing complainants who between them had experienced the Office of the Ombudsman as it evolved over the tenure of the three occupants of that Office - there were higher timeliness and confidentiality ratings and a lower 'overall' rating for in-jurisdiction complaints than for the 2008 survey.

Our survey found considerable variation between respondents in their ratings, with almost diametrically opposed commentary on some questions (see Attachment). This is not uncommon where respondents self-select; often they do so because they have either had a very good or very bad experience. Those who have had a more 'middle of the road' experience may be less motivated to respond to a survey.

Taking all these issues into consideration and based on our experience of other environments, our conclusion is that our survey results do not point to a particular process problem for in-jurisdiction complaints handled by the Office of the Ombudsman. However, the satisfaction levels are a little lower than we are accustomed to seeing.

Ombuds Office skillset

To further test what respondents were looking for from the Ombuds function, we asked respondents to rate the importance of a range of possible skills for an Ombuds function to possess. Here the most interesting response was those that had lesser importance. Rated most highly were negotiation/ conciliation, investigation and analysis. A wider diversity of views applied to legal skills with some thinking that this was not an advantage at all,

Q10. How important would you rate each of the following skills?

Negotiation/conciliation (n=70)
Formal mediation (n=69)
Investigation and analysis (n=70)
Knowledge of ICANN technical issues (n=68)
Legal skills (n=70)

Not important   Low importance   Neutral   Important   Very important

and to technical knowledge of ICANN issues (seen to be obtainable from others) and formal mediation skills.

Additional area of unfairness

We also asked respondents to identify possible areas of potential unfairness that the Ombuds could be looking at – and it was evident that there were a range of issues that respondents thought could be matters for the Ombuds to take an active interest in. The focus here was on more action on bullying, gender biases, community gTLD applications and hidden conflicts of interest. To this list, we would have to add some of the dissatisfaction we saw with out-of-jurisdiction decisions.

Our interviews with the ICANN community included briefings about policy initiatives that contemplate the possibility of new functions for the Office of the Ombuds. These projects involve issues of integrity or fairness where there is a sense that the involvement of an 'honest broker' would strengthen the operation or credibility of the policy or process concerned. Examples of these ideas include:

1. **Diversity**

Work Stream 2 includes a project to enhance ICANN diversity and identify possible structures that could follow, promote and support that strengthening.

The Diversity subgroup is in the process of drafting a paper that reports on the extent of diversity within the ICANN community. Recommendations under consideration include the establishment of an Office of Diversity and Inclusion within ICANN to gather, analyse and report on data about diversity and make concrete proposals to enhance diversity - eg. minimal diversity requirements for panels during ICANN events and diversity enhancement metrics for inclusion in ICANN's strategic plan.

In the course of our interviews, it was mooted that the Office of the Ombuds could fulfil the role of Office of Diversity as an added-on to its current functions.

2. **Document Disclosure**

Work Stream 2 includes a project to improve ICANN's Documentary Information Disclosure Policy (DIDP). The Transparency subgroup has released a paper for public consultation that proposes better access rights including procedures for lodging requests, clearer information about how requests will be processed and clearer timeframes for responding to requests. The paper (page 10 - 11) proposes:

> " A further recommendation is that the Ombudsman's mandate regarding transparency should be boosted to grant the office a stronger promotional role, including specific steps to raise public awareness about the DIDP and how it works and by integrating understanding of transparency and the DIDP into ICANN's broader outreach efforts.
>
> ….
>
> Monitoring and evaluation are also essential to a successful right to information policy, and either the Ombudsman or the Complaints Officer should be tasked with carrying out reasonable measures to track and report basic statistics on the DIDP's use, such as the number of requests received, the proportion which were denied, in whole or in part, the average time taken to respond, and so on."

There is awareness, however, that if the Ombuds plays a central role in processes of this type, this will limit the Ombuds' ability to be a 'house of review' should a subsequent complaint arise. This is undoubtedly true and suggests the need for caution in broadening the role.

We discuss these two ideas in our Recommendations section.

Assessment
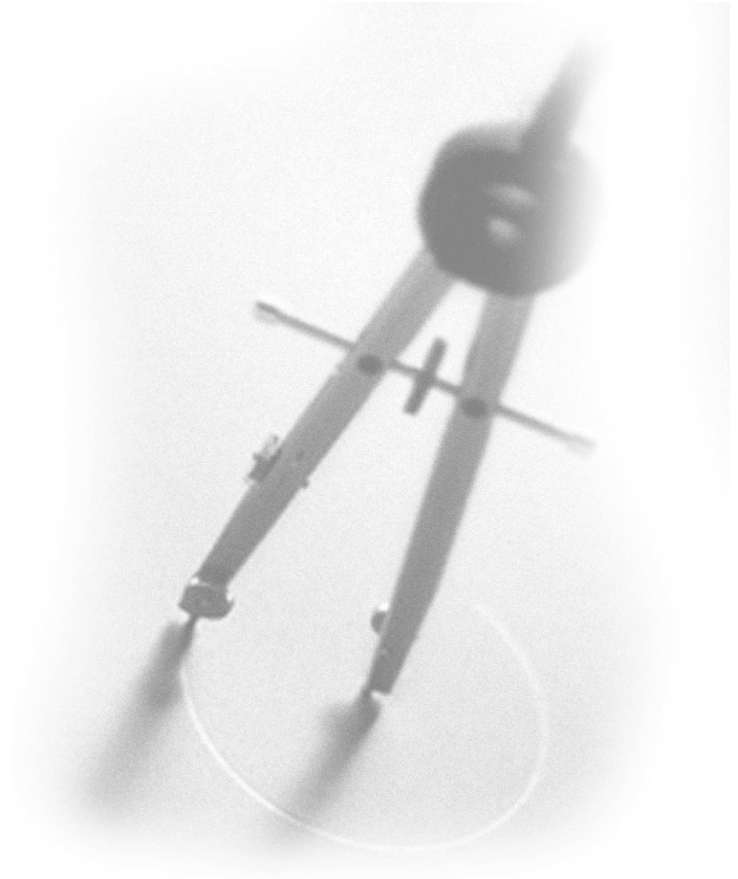
One way in which an ombuds function can be designed is to follow one of the existing models of ombuds. There are many types of ombudsman in different parts of the world and in different environments. They are almost always explicitly directed to the objective of fairness, and usually have some reference to fairness in their mission or terms of reference.

Their configuration, sources of authority, structures, investigative powers, techniques and remediation powers vary considerably. The language and terms used also vary – including any attempt to categorise them. Labels used in one part of the world may not be recognised in other parts.

Some ombuds (or dispute resolution services) are much more legalistic than others. Some have little or no formal powers beyond persuasion. Some put great emphasis on formal mediation processes while others emphasise summary binding decisions based on a desk review of written material. Some have a focus on customer service relations while others focus on systemic improvement of processes. Some can order significant compensation and others can 'stand in the shoes' of the original decision-maker and replace their decision.

It is a niche, complex domain and for this review, we do not think that an academic analysis of all possible variations of ombudsman types is necessary. We have simplified down to a few categories for the purposes of explanation.

The table overleaf provides a summary of the key features of four different types of ombuds functions. Note that the descriptions

generalise to what we have observed as the most typical features. Even within these categories there are variations.

On our analysis, in its current role, the ICANN Ombuds function would be classified as a blend of an internal ombudsman (in the sense of being internal to the community) and an executive ombudsman – (external to the Corporation - serving users of the corporation's services).

There is value in recognising that there are many different ways to design an ombuds function and potential to borrow aspects from any of them. As we invariably conclude in all of our assignments – each environment has unique requirements and characteristics and must develop its own model of an ombuds function. This is particularly true for ICANN, an environment with a greater claim to unique requirements than most.

Type	Description	Examples	Source of authority	Structure	Complainants	Investigative powers	Techniques	Remediation powers
Legislative	Appointed by government (national, state, provincial or municipal level) to ensure fair treatment of the population	Ombudsman for Hong Kong, Income Tax Ombudsman for India	Typically a specific piece of legislation	Independent of the departments or agencies, reporting to the elected government, funded by government	External users of government services	Extensive powers to enquire, including 'own motion'	Require documents, interviews, require responses, mediation	Recommendations to the agency, public reporting, reporting to the elected government
Internal / organisation	Deals with complaints arising from within the organisation – usually those that have not been able to be resolved previously.	United Nations Ombudsman Service, Merck & Co.	An internal policy, job description or charter	Often a small independent office within the organisation, funded by CEO or Board	Internal members that have not been able to resolve a matter through normal channels or have no confidence in them	Mainly informal enquiries, can request document trail	Review personnel files, other documentation, shuttle negotiation, conciliation	Persuasion, recommendation, referring to Senior Management/ CEO
Executive	Appointed by an agency as an internal dispute resolution resource for complaints generated by customers or an external community	Internal Bank or Newspaper Ombudsman, ICANN Ombudsman	An internal policy or charter, constitution or rules of the organisation or community	Small independent office within organisation, funded by organisation, reporting to CEO or Board	Customers or members of community seeking fairness review of decision, sometimes a step before going to an external ombudsman	Mainly informal enquiries, can request document trail	Review documentation, shuttle negotiation, conciliation, mediation, recommendation to CEO/Board	Persuasion, recommendation, reporting to the CEO/Board, some have delegated compensation power
Industry /sector	Typically established to be an independent review of complaints previously dealt with – and to identify systemic service issues.	Financial Ombudsman Service UK, Telecommunications Industry Ombudsman Australia, Financial System Mediator Armenia	Membership of ombudsman scheme a condition of a license/approval to operate – compliance is a contractual obligation of membership	Separate legal structure, funded by industry through fees and levies – sometimes subject to regulatory oversight, periodic independent reviews	Customers of member firms, generally must have first taken complaint to firm first who are dissatisfied with firm response	Require written response from firm, can review documents, can interview parties, can refer case to independent expert	Most resolved through negotiation, conciliation or mediation – but can generally make a binding decision	Can generally order compensation be paid, change of a decision or restitution of a previous position

Another way to approach the design of an Ombuds function is by way of assessment against a set of standards, with the assumption that where there are gaps – the system can be strengthened.   Of course, there are as many ways to define the criteria or measures that an ombudsman function should be held to as there are different models of ombuds. There are many versions that we are aware of – including:

- The International Standards Organisation (ISO) standards 10002 (complaints handling in organisations) and 10003 (dispute resolution external to organisations)

- International Ombudsman Association Standards of Practice

- United States Ombudsman Association Governmental Ombudsman Standards

- Benchmarks for Industry-based External Dispute Resolution Schemes (Australia)

- African Ombudsman and Mediators Association - OR Tambo Minimum Standards for Effective Ombudsman Institution and Cooperation

- The first ICANN Ombudsman, Frank Fowlie identified 54 detailed criteria that he considered to be applicable in the ICANN context (see below).

To generalise once again, most of the standards that we are familiar with, including the latter, address in different degrees of detail, the following key dimensions:

1. **Accessibility** – *people are aware of the Ombuds' existence and role and capabilities, with ready access to the service at low or no cost*

2. **Independence** – *the Ombuds is impartial and independent of inappropriate influence*

3. **Fairness** – *Ombuds are fair in their process – including confidentiality, giving parties a chance to put their position, providing assistance if needed, providing natural justice to both parties*

4. **Timeliness** – *Ombuds processes are responsive and provide timely outcomes*

5. **Efficiency** – *that the effort required by parties are kept to a practical minimum and that the costs are kept reasonable*

6. **Transparency** – *within the constraints of confidentiality, the Ombuds report on the issues, providing guidance to others and for the future*

7. **Accountability** – *that the Ombuds function is effectively held accountable for delivering on these standards*

This is not an exhaustive catalogue of the dimensions of the various Ombuds standards, however for our purposes, this brief list captures the essential themes and we will use it for discussion purposes.

The first ICANN Ombudsman's (Frank Fowlie) summary of Evaluation Criteria and Standards applicable to the ICANN Ombuds function

1 Alignment

2 Autonomy – arm's length – Independence

3 Due process – Natural Justice Principles applied

4 Sufficient resources

5 Access to Information, documents, staff

6 Community buy-in

7 Clear mandate

8 Recourse – moral suasion – public criticism

9 Accessibility (promotion – availability to the community)

10 Power of own motion

11 Annual report

12 Established terms of reference (TOR)

13 Qualified – knowledgeable incumbent

14 Advisory group

15 Active public relations campaign – community education

16 Structural autonomy and accountability

17 Filing system

18 Database

19 Balanced time management

20 Reporting relationship with advisory and budget group

21 Review of start up policy – TOR

22 Independence

23 Impartiality and fairness

24 Credibility of the review process

25 Confidentiality

26 Independence established by higher jurisdiction

27 Independence – Separate from the organisation it reviews

28 Independence – Appointed by super majority

29 Independence – Long fixed term – reappointment possible

30 Independence – For cause removal by supermajority

31 Independence – High fixed salary

32 Independence – Appropriate budget – accountability of spending

33 Independence – Sole authority to hire staff

34 Independence – Someone can always exercise the ombudsman role

35 Independence – Decisions not reviewable

36 Impartiality and fairness – Qualifications

37 Impartiality and fairness – Supermajority to hire or remove

38 Impartiality and fairness – No conflict of interest in activities

39 Impartiality and fairness – Direct access to ombuds no fee required

40 Impartiality and fairness – Power of recommendations and public criticism

41 Impartiality and fairness – Required to consult on adverse findings

42 Impartiality and fairness – Ombuds is an advocate for fairness, not the parties

43 Credible review – Broad jurisdiction

44 Credible review – No parties exempt from complaining

45 Credible review – Organisation not permitted to impede

46 Credible review – Grounds for review are broad, and focus on fairness

47 Credible review – Reports problems and recommendations, has ability to publish

48 Credible review – Findings not reviewable

49 Credible review – Ombuds cannot make binding orders

50 Confidentiality – Ombudsman has power to decide level of information to be disclosed

51 Confidentiality – Ombudsman will resist testifying

52 Broad range of enquiry available

53 Discretionary power to refuse complaints and to publicize

54 Identify complaint patterns and trends

Suggested Ombuds Effectiveness Criteria	Brief CRK assessment
1. **Accessibility** – people are aware of the Ombuds' existence and role and capabilities, with ready access to the service at low or no cost	Sound awareness of its existence, however less so as to its standing, role, capability, webpage and in-person presence at conferences.
2. **Independence** – the Ombuds is impartial and independent of inappropriate influence	Sound. Structure and Bylaws are supportive, however some perceive Ombuds not fully free to act – this is deduced (rightly or wrongly) from eg. limited number of Ombuds reports, a perception that the Board not always responsive where Ombuds report is issued, Ombuds' at risk pay and limited period of tenure/ re-appointment vulnerability.
3. **Fairness** – Ombuds are fair in their process – including confidentiality, giving parties a chance to put their position, providing assistance if needed, providing natural justice to both parties	Sound approach and processes, however expectations not managed well. Scope of complaints within jurisdiction narrowed from by-laws. Complainants often disappointed that process and possible outcomes/remedies not what they expected – seen as 'unfair'.
4. **Timeliness** – that Ombuds processes are responsive and provide timely outcomes	Good turnaround for most complaints – however some matters where insufficient clarity to the complainant as to the status or where the Ombuds cannot assist.
5. **Efficiency** – that the effort required by parties are kept to a practical minimum and that the costs are kept reasonable	Strong - No cost to parties, information provision not onerous, informal processes are low effort for parties (although some interviewees were not sure that the value to the community warrants cost).
6. **Transparency** – within the constraints of confidentiality, that the Ombuds report on the issues, providing guidance to others and for the future	Somewhat limited – Statistics no longer publicly reported (last website published report is for the year ending 30 June 2014). Confidentiality cited as reason not to report more fully on nature of complaints (most recent investigation report was published in March 2012). Only one own-motion report as to a systemic issue has been undertaken during the 12 year period of the Office. No response apparent.
7. **Accountability** – that the Ombuds function is effectively held accountable for delivering on these standards	Limited – Users not currently providing regular feedback. Reporting to Board/ Committees is regular but not as analytical as we have seen. Lack of ombuds knowledge in oversight Board committees (Governance and Compensation Committees) limits ability to set KPIs and evaluate. Absence of wise counsel and meaningful oversight means Ombuds effort can seem to follow personal interests, preferences or skills of occupant of Office.

Imperatives for change - discussion
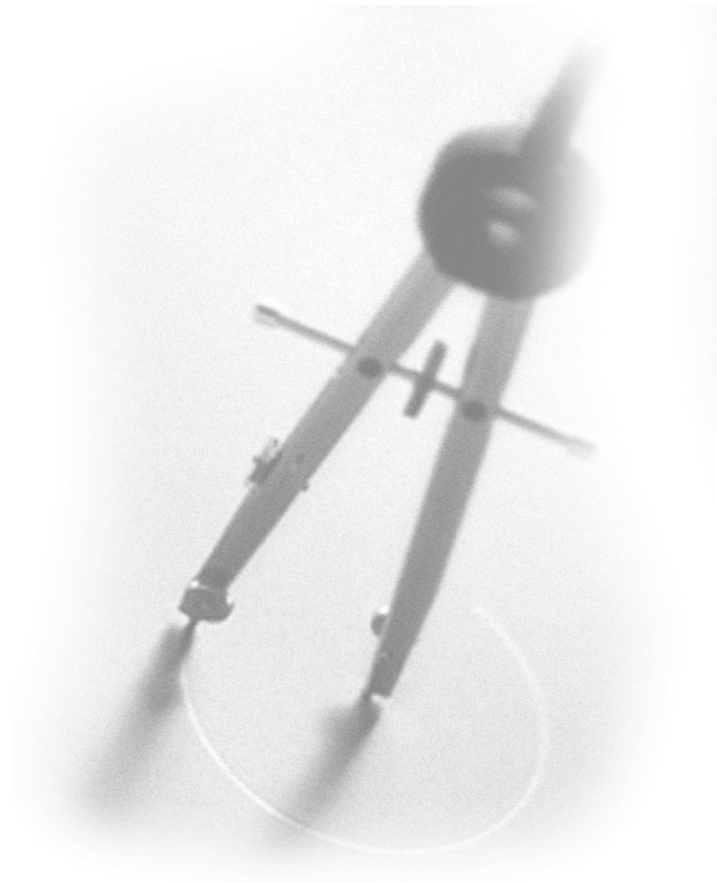
In considering this Review, we have taken into account the unique nature of the ICANN environment, the experience of the first ten years or so of the ICANN Office, interviews of ICANN community members, staff and the current and immediately preceding occupant of the Office, survey feedback from ICANN community members (including more than 20 community members who have used the Office), a review of the Bylaws, Ombuds Framework and other relevant documents including Ombudsmen reports and correspondence pertaining to 10 recent complaints, a review of some of the literature, an analysis of how the ICANN Ombuds fits in to established models, an analysis of evaluation frameworks and our own assessment of the effectiveness against a simplified evaluation criteria.

Issues we have identified include:

1. The presence of the Ombuds function adds value to the ICANN environment and is seen as important by the majority of stakeholders we received input from.

2. The current complaints handling 'reach' or scope of the Office is broadly sensible for the environment but is not well understood in the community.

3. The current Ombuds function has both 'internal' and 'executive' or 'industry' roles and is multi-faceted (different complaint populations, techniques, powers) but this is also not clear to the community.

4. There are differing expectations in the community of what an

ombuds function can do – some seeing the ICANN Ombuds as doing what it is supposed to do and others seeing the current operation as quite ineffectual.

5. The operation and philosophy of the current operation is weighted to the characteristics of an internal ombuds function (informality, minimum process, looking for low key resolution of matters) however many of its stakeholders view it as more like an executive or industry ombudsman with attendant expectations of greater independence, formality, predictable process, remediation powers and transparency. (See Page 25 for more description.)

6. There is an expressed expectation from some that the Ombuds function should have 'powers' and should be able to 'fix stuff' – while others do not see this as part of their role.

7. There is desire to utilise the independence and fairness-remit of the Office outside of traditional complaints handling to assure the integrity of related processes – but recognition that this limits the ability of the Office to conciliate subsequent disputes should they arise.

8. In the sections below, we discuss some of the design tensions that apply in the ICANN environment.

We often hear the view expressed that an ombuds function should be able to 'fix' an unfair decision. We understand the frustration, however there are practical limits to any ombuds function having the powers to revisit an organisation's decisions.

Frequently, the decisions being made are highly technical (including economic, legal or other dimensions) and unless the Ombuds has deep expertise in that area of technicality, their capacity to become the replacement decision-maker is limited.

In other cases, the original decision is required to be made by a democratically elected body and an unelected Ombuds, no matter the grounds cannot credibly set aside such a decision.

Often an ombuds role is designed to be more about identifying opportunities for improved practices – to avoid future problems – than changing past situations. But some executive-style ombuds also facilitate a decision-maker's re-examination of a past situation or an apology, explanation, customer service goodwill 'gesture' or (as in the case of a Bank Ombudsman) the awarding of compensation.

At one level, ICANN's environment is no different to any other ombuds environment. People want a visible, accessible, independent ombuds with standing, with a clear role, who has fair processes and one who can make a difference – 'fix things'.

It is this last dimension that has the greatest impact over time in our experience on the perceived effectiveness of an Ombuds. As one of our respondents put it ". . . otherwise, what is the point?" If an Ombuds cannot fix things, then they will lose standing, will be seen to be professional apologists whose sole role is to placate complainants. People

will stop using them. People will say bad things about them. Good people will not want to do the job.

For members of this community, part of the challenge is to recognise that there are a number of limitations to what an ICANN Ombuds can reasonably be expected to be able to 'fix' in the ICANN environment.

We do not think that it would be appropriate for the Ombuds to be making replacement technical decisions themselves – even if they could identify some unfairness. The credibility of technical decisions relies heavily on the credentials of those making them. The Ombuds may sensibly be able to require a technical body to revisit the decision or the policy or process.

Equally, we do not think that compensation powers are generally appropriate in the ICANN complaints landscape. We think that loss would generally be very difficult to establish and measure. There are already established processes for some matters that can be utilised as an alternative to court proceedings. We are also aware that some disputes involving commercial players could involve very large sums of money – inappropriate for a single unelected decision-maker.

We also think that some of the disputes between groups or individuals, while lending themselves to alternative dispute resolution, are unlikely to be satisfactorily resolved by the Ombuds "finding" for one party or the other.

We can see greater value possible from the Ombuds Office contributing more to systemic improvement based on their learnings from complaints that are brought to them.

We have been provided with two examples of new ideas for involving the ICANN Ombuds (see page 23) and we are aware that the Ombuds has new responsibilities as part of the Reconsideration Request process (see page 13).

There is an attraction to utilising the ICANN Ombuds for integrity-related processes. They could either be as a 'stamp of approval' (eg. this process or policy has been approved as sound by the Ombuds) or as a 'gatekeeper' who checks, and so provides assurance about, the appropriate application of a process in a specific situation.

In general, we accept that it is for the organisation to decide about this type of involvement, however they should be clear about what the benefits and risks are. We encourage organisations to avoid ad-hoc decision-making about the 'current idea' but to establish some principles to guide current and future decisions.

There are significant tensions that need to be taken into account.

1. Much of any ombuds function's value is derived from its perceived independence and its ability to take a 'fresh, uninvolved second look' at a matter (or policy or process). To the extent that the ombuds is involved in either the design of the process or the underlying operation of it – their ability to review is diminished.

2. 'Borrowing' an ombuds' perceived independence to lend credibility to another process is not without cost - inevitably, the 'borrowing' diminishes apparent independence. The question for any organisation is what is the risk/benefit ratio?

3. It is difficult for an ombuds function to give a 'stamp of approval' to

process design. Risks include not fully understanding the proposal through a lack of technical expertise, not anticipating all possible scenarios of unfairness in advance, of being drawn into unreasonable timelines and a rushed judgement or being expected to be 'part of the 'team'.

3. If the ombuds is asked to be a part of the implementation of a process (eg. by vetting applications or decision-maker responses), it becomes even clearer that the ombuds cannot credibly provide an avenue of review.

4. In either case, there is also a generalised risk of close involvement with management or governance decision-making. An ombuds independence is in part a function of its structure and in part of its 'separation' from the day-to-day decision-making of the organisation. The closer it is perceived to be, the more its perceived independence will be diminished.

There are also ways in which some of these risks can be mitigated with careful design of an ombuds' involvement. For instance, rather than being asked to 'endorse' a new policy, an ombuds can be asked to provide a risk-assessment – eg. what parts of this new policy or process may give rise to concerns of unfairness and what ways can that risk could be mitigated. The responsibility remains with management, however the ombuds' valuable input is accessed without implying a 'guarantee'.

Similarly, instead of an operational vetting role, the ombuds can have input to the design of the process or the guidelines that will be used by others or could be asked to periodically review a sample of matters for fairness.

Ombuds Office structural issues

We have described the ICANN Ombuds function as a combination of internal and external in configuration. This is part of the reason that there are varied expectations amongst stakeholders.

To take independence as an example, in an internal ombuds environment, having an ombuds reporting to the Board or CEO is as independent as things can get. Having specific, articulated powers is not essential, as having the ear of the CEO (or sometimes the Board) provides all the power that may be needed. Documented processes are less important because the idea is that the Ombuds can 'stroll the corridors of power' and use relationships and suasion to achieve results.

For an external ombudsman, the emphasis is different. For a complainant from 'outside', the access to the CEO or Board is not necessarily seen as 'independent' – in fact can be seen as the opposite. For credibility, external ombuds functions often need quite separate legal and governance structures. For example, 'industry' ombuds will often have an independent board of directors, often made up of equal number of industry directors and consumer directors, with an independent chair. While the industry pays for the ombuds service through fees and levies and must be consulted about that funding, the ombuds strategy, business planning and budget will be set by that independent board and they will be accountable to that board.

For an external ombuds to be credible, they must be seen to be able to 'fix things'. If they have powers to fix things (ie. change decisions, require action, order compensation, etc) – for fairness, these must be carefully documented and constrained. Similarly, their processes must be well-defined because they will be subject to scrutiny and challenge.

It is clear that these 'standard' definitions do not necessarily readily map to the ICANN environment. While some see the Office of the Ombuds as 'internal' to the ICANN ecosystem – it is clear that many members of the community see the 'inner circle' – office holders, members of high level bodies, etc – as separate ('them' not 'us') and have expectations more aligned to an 'external' ombuds.

We briefly examined whether a structurally 'external' Ombuds function would suit the ICANN environment. (Some communities or organisations employ an external 'ombuds as a service' – these are typically legal firms or specialist mediation firms). We concluded that the unique nature of the ICANN environment would not lend itself to this. We think being part of the ICANN world and being across the issues of the day, with deep knowledge of the community is essential and a fee-for-service ombuds function would not effectively deliver this.

Clearly, it is difficult for the ICANN Ombuds function to meet all of these differing sets of expectations. For clarity and to better meet expectations, we think there should be explicit pathways and distinct approaches for different groups of complaints.

Recommendations
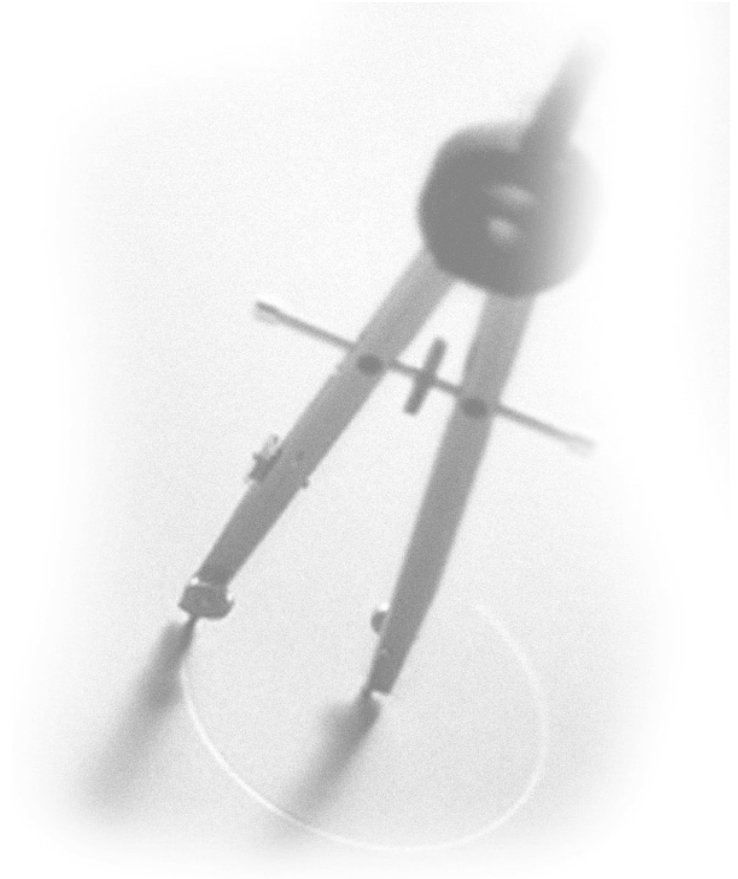
Overview

It is our view that the current ICANN Ombuds function is for the most part sound and has been contributing to a level of confidence in the overall fairness of ICANN processes.   We do not see an imperative for radical change, however this is a complicated environment and a multi-faceted approach to the Ombuds role will be needed to meet the range of expectations.

We have segmented the opportunities for improvement under the following headings. Each group of recommendations are set out in detail in sections to follow. A summary of the Recommendations v. the suggested Criteria and our Assessment is overleaf.

1. **Clarify role and processes – manage expectations**

    ICANN's Ombuds function is multi-faceted. To achieve clarity it needs both an overall 'umbrella' conception of its role (as 'keeper of fairness') and a set of practical distinctions as to how it will deal with complaints (and when it won't) from the main three groupings of potential matters: Governance, Community and Corporation

2. **Standing and authority**

    The standing of the Ombuds Office needs to be strengthened. Some of this will come from other areas of recommendation – eg. greater clarity and definition of its role, stronger perceived independence, greater transparency. Recommended rule-changes (below) will assist. Standing is also a product of sustained effort by many to support the Office and keep the Ombuds function in the consciousness of the community.

    While we do not see a current case for the Ombuds to have decision-making powers, we think that it should be clearer that

their reports and recommendations must be responded to (not necessarily complied with). We suggest amendments to the Bylaws to oblige timely responses.

We also think that there would be advantages if the Ombuds Office has internal mediation skills and experience (as had the second Ombudsman).

3. **Strengthen independence**

    There is a clear need to strengthen the perception of the Ombuds function's independence. We recommend the addition of an Ombuds advisory panel – independent of the Board - to take some of the oversight work currently done by the Governance Committee and to add a system of guidance and support for the Ombuds. We also suggest some detail change to the Ombuds employment.

4. **Strengthen transparency**

    As part of recognising community expectations, we recommend a refreshed focus on reporting and transparency and a greater emphasis from the Office on public reporting.

5. **Policy for non-dispute roles**

    In dealing with proposals for the Ombuds taking on other 'honest-broker' roles, we suggest that the ICANN community should avoid responding in an ad-hoc way and develop a set of principles or a policy to set out the basis for any such roles.

Recommendations c/w Criteria and assessment

Key Ombuds Effectiveness Criteria (see page 27 for description)	Current CRK assessment	Relevant Recommendations
1. Accessibility	Sound awareness of its existence, however less so as to its standing, role, capability	Re-launch of revised Ombuds function - with revised By-laws, refreshed website, graphics for complaint paths, what to expect, more information about complaints that are outside jurisdiction and where these can be directed.
2. Independence	Sound. Structure and Bylaws are supportive, however some perceive Ombuds not fully free to act	Establish Ombuds Advisory Panel – widely respected ICANN community members, experienced (former) ombudsmen – manage performance oversight. Lead evaluation of function every 3 years. Remove performance pay. Term 5 + 3 year optional – capped. Avoid involvement in operations.
3. Fairness	Sound approach and processes, however expectations not managed well. Complainants often disappointed that process and possible outcomes/remedies not what they expected.	Define 3+ distinct complaints paths. Publish procedures, rights of parties. Change of Bylaws to oblige ICANN body to respond to an Ombuds written report within specified timeframe. Communications material refreshed and upgraded to enhance focus on systemic improvement.
4. Timeliness	Good turnaround for most complaints – however some matters where insufficient clarity to the complainant as to the status/ where the Ombuds cannot assist.	Establish timeliness KPIs eg. for providing initial written response to complaint (outside jurisdiction/ outlining intended action, for resolution of complaint etc), usual resolution timeframe for different types of complaints.
5. Efficiency	Strong - No cost to parties, information provision not onerous, informal processes are low effort for parties. Some questioning of Office of the Ombuds value proposition.	Ensure Office of Ombuds has mediation skills and experience. Value proposition to come from better reporting. More own-motion enquiries. Enable Ombuds risk assessments.
6. Transparency	Limited – Statistics no longer publicly reported. Confidentiality cited as reason not to report more fully on nature of complaints. Only one own-motion report as to a systemic issue has been undertaken during the 10 year period of the Office.	Oblige Complaints Officer to share complaints data with Ombuds. Ombuds to be more proactive in own motion investigating. Reporting to be more fulsome, more robust, more frequent.
7. Accountability	Limited - Users of Office not currently asked to complete feedback forms. Reporting to Board/ Board Committees is regular but not highly analytical). Lack of Ombuds expertise by oversight Board committees.	Written feedback forms to be provided to users of Office and results collated and analysed in Ombuds Annual Reports. Ombuds Advisory Panel, establishment of KPIs for Office, more structured periodic evaluation of Office.

We have observed and discussed a number of ways in which the ICANN community have different conceptions of the Ombuds role. Better understanding of what the roles are is the first step to managing expectations.

ICANN's Ombuds function is multi-faceted. What it can sensibly do with one type of complaint from one part of the ICANN world – will not necessarily apply in another. It will not be straightforward to achieve that clarity of understanding.

We think it needs both an overall 'umbrella' conception of its role (as in the By-laws) and a set of practical distinctions as to how it will deal (and when it won't) with different sources and types of complaints within the ICANN ecosystem (within the Framework).

The current purpose (in the Bylaws) of problem-solver, while essential, can be built upon to give the Ombuds function a more strategic focus. We think it should be seen as the independent 'keeper of fairness' – with a greater emphasis on continuous improvement of the fairness of ICANN processes and decision-making. The aim is to make it clearer that the Office has a role to identify systemic improvements that arise out of single matters it is involved in.

Further to this dimension of the proposed role, with safeguards, we think that the Office can be called upon to have input to policy, system and process design when appropriate – not by giving a stamp of approval, but by providing a fairness risk assessment.

On the other hand, unless there are significant unique benefits, we do not generally support the Ombuds function being drawn into operational roles as part of other complaints or review processes. This will only serve to limit her or his ability to review any related matters and diminish the

perception of independence (see discussion at Page 33).

Recommendation 1. The statement in Article 5 of ICANN's Bylaws of the Ombuds Office's Charter should be changed to give the Office a more strategic focus.

The following illustrates (this is a suggested starting point - of course, this would have to be drafted in ICANN language):

The purpose of the ICANN Ombuds function is to ensure that ICANN rules, policies, processes, systems, governance and behaviours are fair and and seen to be fair through:

- *Reviewing single situations that are brought as a complaint – and making recommendations for reconsideration or changed decisions if appropriate.*
- *Arranging or personally conducting conciliation and mediation of disputes*
- *Ensuring that complaint-handling by others within the ICANN environment is fair*
- *Reviewing processes, policies and systems for fairness*
- *Publishing reports that cast light on fairness issues within the broader ICANN community*
- *Contributing to continuous improvement within the ICANN environment through input to design of policy, processes and systems*

As a companion to this high level role definition, we think that the Ombuds function should set out its approach to different types or groups of complaints at a very practical level. We have suggested three groupings of complaints (the groupings should be tested and validated by the Ombuds and key ICANN people):

a) Governance

Complaints about actions or omissions of the Board or Committees and other formal ICANN groupings, committees, panels, etc. Generally elected or appointed positions with some democratic or delegated authority.

b) Community

Complaints about actions or omissions of individual members of the community, including informal groupings, working groups, etc.

c) Corporation

Complaints about staff actions or omissions, generally this would be a review of a matter already put through staff or corporation processes and not resolved.

The idea is illustrated in the diagram below. The intention is that for each grouping, the Ombuds website sets out how those complaints will be dealt with including the specific jurisdiction carve outs, the preferred

techniques and processes and possible outcomes. Careful consideration should be given to the carve outs – these should be no broader than necessary, whilst recognising that the Office will only disappoint if it takes on matters where there is no scope for the Office to add value.

Clearer processes and procedures would also we think help address an issue that emerged during our surveying – that several respondents did not know what had happened to their complaint, whether it was still on foot or not.
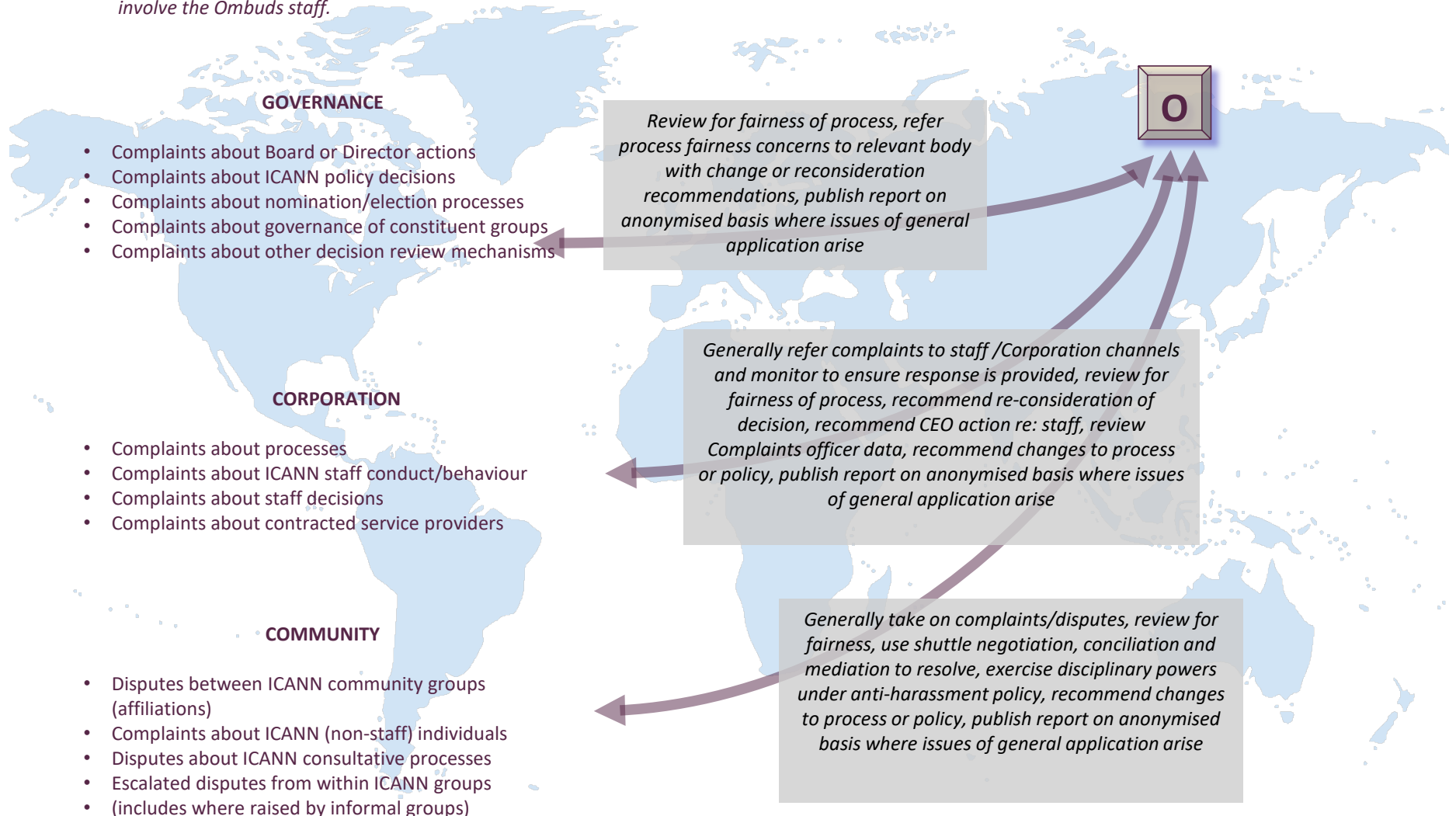
Recommendation 2.   The Ombudsman Framework should be replaced by procedures that:

- *Distinguish between different categories of complaints and explains how each will be handled;*

- *Set out the kinds of matters where the Ombuds will usually not intervene – and where these matters are likely to be referred to another channel (with the complainant's permission); and*

- *provides illustrative examples to deepen understanding of the Ombuds approach.*

Proposed ICANN Ombuds role

The proposed ICANN Ombuds role needs to be tailored to the nature of the complaint. We set out here our suggestions for the usual approach for the 3 different categories of complaints we have identified. Settling the detail and language will require a cooperative approach and must involve the Ombuds staff.

GOVERNANCE

- Complaints about Board or Director actions
- Complaints about ICANN policy decisions
- Complaints about nomination/election processes
- Complaints about governance of constituent groups
- Complaints about other decision review mechanisms

Review for fairness of process, refer process fairness concerns to relevant body with change or reconsideration recommendations, publish report on anonymised basis where issues of general application arise

O

CORPORATION

- Complaints about processes
- Complaints about ICANN staff conduct/behaviour
- Complaints about staff decisions
- Complaints about contracted service providers

Generally refer complaints to staff /Corporation channels and monitor to ensure response is provided, review for fairness of process, recommend re-consideration of decision, recommend CEO action re: staff, review Complaints officer data, recommend changes to process or policy, publish report on anonymised basis where issues of general application arise

COMMUNITY

- Disputes between ICANN community groups (affiliations)
- Complaints about ICANN (non-staff) individuals
- Disputes about ICANN consultative processes
- Escalated disputes from within ICANN groups
- (includes where raised by informal groups)

Generally take on complaints/disputes, review for fairness, use shuttle negotiation, conciliation and mediation to resolve, exercise disciplinary powers under anti-harassment policy, recommend changes to process or policy, publish report on anonymised basis where issues of general application arise

A number of the comments we received at interview and from the questionnaires indicated a sense from observers that the Office of the Ombuds did not have sufficient 'standing' within ICANN.

This is a vexed but not unusual issue for ombuds functions all over the world. It is also somewhat amorphous – in large part a function of the stakeholders' perception of many subtle signals – eg. how the Ombuds is treated, the way they speak at forums, how their reports are framed and the language used, how the senior executives and the Board speak about them, how the permanent selections are carried out and how stories circulate about what the Ombuds has 'fixed'.

It will take concerted effort from many players to adopt and promulgate a new ombuds 'model'.

Recommendation 3. Once ICANN has agreed to a revised configuration for the Office of the Ombuds, a plan should be developed for a soft re-launch of the function, which should incorporate action to emphasis the importance of the Ombuds function by all relevant parts of ICANN, including the Board, CEO, Community groups, Complaints Officer, etc.

We believe that there is support from the community for an Ombuds function that is more forthright, more obviously active and pro-active, more willing to make reports and clear recommendations. We do however, recognise that this Ombuds function will not generally be a 'wielder of power' – rather a wielder of influence – as the By-laws state – 'an advocate for fairness'.

For community disputes that involve harassment, the new Anti-Harassment Policy and Terms of Participation gives the Ombuds disciplinary powers. This will enhance the Ombuds' ability to satisfactorily resolve a complaint where a community member has suffered from inappropriate conduct.

We have not advocated for enforcement-type powers for other community complaints or governance complaints, however we do think it would be sensible for the By-laws to leave open the possibility of enabling selective Ombuds decision powers in the future – such as the one above for matters of harassment.

As discussed earlier, we see the Ombuds as a 'wielder of influence' rather than 'wielder of power'. The Office of the Ombuds would, however, be a more effective 'wielder of influence' if the Bylaws were amended to provide that, where the Ombuds issues a written report recommending process change, a response to that report must be provided by the relevant part of ICANN (whether this is the Board, the corporation or a community body or group).

We would suggest that the Bylaws should specify that response is required within 90 days (or 120 days with reason). (These times can of course be adjusted by ICANN to fit in with current practice if desired). Of course, the responding body should not be obliged to accept the recommendation - but must provide reasons for their position. The Ombuds' report and the response to it should be published on the Ombuds' webpage with an alert on the ICANN website or newsletters, unless there is sound reason in the Ombuds' view to not do so.

Recommendation 4. The ICANN By-laws and any relevant rules of ICANN groups should be amended to oblige all relevant parts of ICANN (should include the Corporation, the Board and Committees and any body or group with democratic or delegated authority) to respond within 90 days (or 120 days with reason) to a formal request or report from the Office of the Ombuds. The response should indicate the substantive response along with reasons.

For the Ombuds part in this improved framework of responsiveness and accountability, the Office of the Ombuds should develop its own timeliness KPIs for handling complaints.

Recommendation 5. The ICANN Office of the Ombuds should establish timeliness KPIs for its own handling of complaints and report against these on a quarterly and annual basis.

Finally to the issue of skills: it seems to us that investigation and conciliation skills are the core skill sets for the Ombuds function. Whilst legal skills may enhance an Ombuds' confidence in dealing with such matters as Reconsideration Requests and in writing investigation and own motion reports, there is equally a risk that legal training could encourage an overly formal approach.

On the other hand, having formal mediation training and experience within the Ombuds function would, we think, be a distinct advantage. This would better enable Ombuds to lead the parties to a resolution (and

could only assist the public standing of the Ombuds function). This should be a flexibly-framed obligation to allow for different ways of achieving this.

Recommendation 6. The Office of the Ombuds should be configured so that it has formal mediation training and experience within its capabilities.

Subject to the limitations of a very small office, given the great cultural and religious diversity within a global community, we also think it would be very useful for there to be at least gender diversity (and hopefully other forms) within the Office. Not only would this be setting a good example, but would enable a wider range of ways of responding to sometimes highly sensitive complaints.

Recommendation 7. The Office of the Ombuds should be ideally configured (subject to practicality) so that it has gender, and if possible other forms of diversity within its staff resources.

The Ombudsperson currently reports to the Board through the Governance Committee and has her or his remuneration set by the Board's Compensation Committee. These Committees are not expert in the dispute resolution space and (it seems to us) have struggled to devise a meaningful framework of accountability and performance oversight.

Nor are these Committees well placed to operate as a sounding board, encouraging the Ombuds or providing advice on how to take on difficult issues. From our consultations, it is clear that this reporting structure can encourage a perception that the Board and the Committees are more interested in defending the organisation than supporting an Ombuds challenge to it.

We think that this reporting structure also paves the way for subtle differences of emphasis in how any particular Ombuds goes about their business - something that was remarked upon in our survey.   That difference might reflect their personal philosophy, their personal skillset and preferences and also their relationship with the CEO or Board which may impact their sense of how far they would be 'allowed' to go.

These are perfectly understandable biases of an individual, however they can make quite a difference to the way the function is seen and the extent to which members of the community have confidence in it.

One of the intended impacts of our recommendations is to create more of a public framework of expectations around the Ombuds function – so that personal preferences are seen to play less of a part in what gets done.

With this in mind, we suggest a change to the reporting/ accountability structure. We suggest that an independent Ombuds Advisory Panel could be formed (approved by the Board in consultation with the community)

and populated with 3 or 4 well respected and experienced ICANN community members, together with two experienced current or former ombudsmen from other organisations.

We think that the two ombudsmen should not be ex-ICANN - rather they should be from two different environments (say an industry or government ombuds and a corporate ombuds).

To illustrate what we have in mind for the ICANN panellists, (please forgive our ignorance of the nuances) perhaps one member with extensive community experience on the user side, one with supplier and/or business experience and one Board member with an interest/experience in dispute resolution.

The aim would be to create a group capable of advising on priorities, guiding and influencing Ombuds behaviours, balancing personal biases, helping Ombuds ensure that the right balance in priorities is struck, holding the Office accountable for meeting its KPIs, overseeing evaluation of performance, assisting with selection of a successor Ombudsperson and reviewing and recommending a budget to the Board.

This panel need not be very expensive, meeting face-to-face perhaps once per year and generally meeting by teleconference, perhaps every two months or so. We think this initiative would be well received by those that are sceptical of the independence of the current arrangements and should act as an enormously helpful resource for the Ombuds.

We also think that the Ombuds at-risk performance pay is seen to diminish apparent independence, however would be much less so if in the hands of the Panel.

Typically, external ombuds functions are subject to periodic independent review (usually every 3-5 years). This is a mechanism designed to balance the need for an ombuds to have independence and autonomy in handling day-to-day matters with some accountability to the community.

(We understand that the Board is considering its oversight of accountability mechanisms more generally and is beginning consultation with the ICANN community about the establishment of a new Board Accountability Mechanisms Committee. Our proposal for a panel to oversight the Ombuds function would need to be framed consistently with that initiative.)

Recommendation 8. ICANN should establish an Ombuds Advisory Panel, made up of 5 or 6 members to act as advisers, supporters, wise counsel and an accountability mechanism for the Ombuds. The Panel should be made up of a minimum of 2 members with ombudsman experience and 3-4 members with extensive ICANN experience. The Panel should be responsible for commissioning an independent review of the Ombuds function every 3-5 years.

Lastly, we think that independence could be strengthened by a stronger commitment to a fixed term for Ombuds contracts. We suggest a 5 year term with a 12 month probation period administered by the Ombuds Advisory Panel plus one possible extension of no more than a further 3 years.

Recommendation 9. The By-laws and the Ombuds employment contracts should be revised to strengthen independence by allowing for a 5 year fixed term (including a 12 month probationary period) and permitting only one extension of up to 3 years. The Ombuds should only be able to be terminated with cause.

We think that the Office of the Ombuds should provide more transparency as to its operations as a way of enhancing understanding and building confidence in its remit. Whilst generalised information via the Ombudsman blog helps with general awareness, where there is specific information about the approach to a particular complaint or category of complaint, we fine that this builds a more detailed understanding of the Ombuds function – and its limits.

In the early years of the Office, there were generally 2 or 3 anonymised investigation reports published on the website per year. We think that the Office should try and identify at least this number for publication each year. Other complaints resolved through conciliation (ie. without an investigation report) could also be used as the basis of an anonymised case study that is published on the website – this is a tool commonly used by other Ombuds functions to enhance understanding of the Office's approach to commonly occurring complaints and the type of outcome likely to be achieved.

In making these suggestions, we recognise that even anonymised publication can sometimes infringe confidentiality and that confidentiality must be inviolate. However a strong focus on 'quietly' resolving problems is limiting the extent to which the Office has profile, standing and can shine a light on issues.

Transparency is also enhanced by the collation of survey feedback from users of the Office and the collation, analysis and public reporting of this data in Annual Reports. Regular surveying would also enhance the Office's understanding of community expectations and perceptions and so position the Office to respond to these.

Lastly, we note Annual Reports used to be published on the Ombudsman's webpage but this has not occurred since 2014. We understand that one is planned for July this year, which is important we think.

By way of comparison, external ombudsman functions typically prepare and publish on their website detailed Annual Reports with statistical and narrative analysis of users of the Office, types of complaints, referrals of out-of-jurisdiction complaints, outcomes for in-jurisdiction complaints, mode of resolution, timeframes, trends, systemic issues, outreach activity, survey feedback etc.

We think that the Office should research other ombudsman function reports with a view to adopting a more detailed, analytical report in the interests of enhanced transparency.

Recommendation 10. The Ombuds should have as part of their annual business plan, a communications plan, including the formal annual report, publishing reports on activity, collecting and publishing statistics and complaint trend information, collecting user satisfaction information and publicising systemic improvements arising from the Ombuds' work.

In our discussion of this topic, we concluded that some caution is needed in assigning non-complaints functions to the Ombuds – for reasons of maintaining the ability to independently review a matter for a complainant, for the risk that the Ombuds comes to be seen as part of the corporation's line of control (a staff function) and for the general perception of the Ombuds independence and integrity.

That said, we understand that the Ombuds is seen as an honest broker and a valuable part of the ICANN community and we can see why ideas for involving the Ombuds Office would arise. We can also imagine that there may be functions which, on balance would benefit from Ombuds involvement.

At this stage, based on the examples we have been alerted to, we see three possible avenues for Ombuds involvement:

- operational (where particular types of matters pass through the Ombuds office)
- particular responsibility for implementation/ monitoring of a 'fairness' policy
- design (where the Ombuds is asked to 'approve' a new or revised policy or process for fairness).

It is difficult for outsiders to weigh up the potential cost or risk to benefit of involving the Ombuds. Equally, it is difficult to anticipate every future circumstance in which this might become an issue.

To avoid ad-hoc consideration of these issues and the risk of inconsistency, we recommend that ICANN develop a brief policy covering the Ombuds potential involvement in these non-complaint parts of ICANN life. This could become part of a revised Ombuds Framework or sit independently.

We think that the policy presumption should be in the negative – ie. that the Ombuds should <u>not</u> take on non-complaints roles unless certain tests are met. This is more likely to ensure that the cost/benefit assessment will be properly addressed.

Recommendation 11.   With input from across the community, ICANN should develop a policy for any Ombuds involvement in non-complaints work that addresses:

a)   *Whether there is unique value that the Ombuds can add through the proposed role or function?*

b)   *Whether the proposed reporting/accountability arrangements may compromise perceived independence?*

c)   *Whether the proposed role/function would limit the Ombuds ability to subsequently review a matter?*

d)   *Whether the workload of the proposed role/function would limit the Ombuds ability to prioritise their complaints-related work?*

e)   *Whether any Ombuds involvement with the design of new or revised policy or process, creates the impression of a 'seal of approval'?*

f)   *Whether the proposed Ombuds input may be seen as a 'short-cut' or substituting for full stakeholder consultation?*

We have used the two examples alongside throughout the Report and of course, have been asked if we have a recommendation for how these functions might be done – if the Ombuds is not to be made responsible.

It seems that the options are either a staff function or a community function. Generally we are neutral on the best way to do this type of work. As a general guide, if the function will require a great deal of interaction and collaboration with the Corporation, we would recommend a staff function – with obligations to consult with the community.

If on the other hand, the task is quite independent and not reliant on heavy staff input, then it could easily be the responsibility of a community body or person – with an obligation to consult with staff.

EXAMPLE

We think it would be appropriate for the Ombuds to have input to the design of the proposed new DIDP and to provide information or refer people to it, but not to be expected to replace management's responsibility to implement, promote and routinely report on it. The Office could conduct an 'own-motion' review of the operation of the function after a time, but this should be at its own discretion taking into account its other priorities.

EXAMPLE

We would have concerns about the Ombuds function taking on the role of Office of Diversity (as floated with us). As above, the Ombuds could assist, but we think this is better as a staff or community responsibility.

First, it will be quite a workload in the first few years. Second, this is a likely issue for complaints and the Ombuds would be unable to credibly review such a complaint, particularly if it was against guidelines or the implementation of guidelines the Ombuds had been responsible for.

Third, the process of corporation functions and various ICANN groups adopting new policy will inevitably involve those groups seeking the Ombuds 'seal of approval' – eg. "will this implementation be OK?". Again, that would compromise the Ombuds independence.

Recommendation 1. The statement in Article 5 of ICANN's Bylaws of the Ombuds Office's Charter should be changed to give the Office a more strategic focus.

Recommendation 2.   The Ombudsman Framework should be replaced by procedures that:

- *Distinguish between different categories of complaints and explains how each will be handled;*

- *Set out the kinds of matters where the Ombuds will usually not intervene – and where these matters are likely to be referred to another channel (with the complainant's permission); and*

- *provides illustrative examples to deepen understanding of the Ombuds approach.*

Recommendation 3. Once ICANN has agreed to a revised configuration for the Office of the Ombuds, a plan should be developed for a soft re-launch of the function, which should incorporate action to emphasis the importance of the Ombuds function by all relevant parts of ICANN, including the Board, CEO, Community groups, Complaints Officer, etc.

Recommendation 4. The ICANN By-laws and any relevant rules of ICANN groups should be amended to oblige all relevant parts of ICANN (should include the Corporation, the Board and Committees and any body or group with democratic or delegated authority) to respond within 90 days (or 120 days with reason) to a formal request or report from the Office of the Ombuds. The response should indicate the substantive response along with reasons.

Recommendation 5. The ICANN Office of the Ombuds should establish timeliness KPIs for its own handling of complaints and report against these on a quarterly and annual basis.

Recommendation 6. The Office of the Ombuds should be configured so that it has formal mediation training and experience within its capabilities.

Recommendation 7. The Office of the Ombuds should be ideally configured (subject to practicality) so that it has gender, and if possible other forms of diversity within its staff resources.

Recommendation 8. ICANN should establish an Ombuds Advisory Panel, made up of 5 or 6 members to act as advisers, supporters, wise counsel and an accountability mechanism for the Ombuds. The Panel should be made up of a minimum of 2 members with ombudsman experience and 3-4 members with extensive ICANN experience. The Panel should be responsible for commissioning an independent review of the Ombuds function every 3-5 years.

Recommendation 9. The By-laws and the Ombuds employment contracts should be revised to strengthen independence by allowing for a 5 year fixed term (including a 12 month probationary period) and permitting only one extension of up to 3 years. The Ombuds should only be able to be terminated with cause.

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Recommendation 10. The Ombuds should have as part of their annual business plan, a communications plan, including the formal annual report, publishing reports on activity, collecting and publishing statistics and complaint trend information, collecting user satisfaction information and publicising systemic improvements arising from the Ombuds' work.

Recommendation 11.   With input from across the community, ICANN should develop a policy for any Ombuds involvement in non-complaints work that addresses:

a)   *Whether there is unique value that the Ombuds can add through the proposed role or function?*

b)   *Whether the proposed reporting/accountability arrangements may compromise perceived independence?*

c)   *Whether the proposed role/function would limit the Ombuds ability to subsequently review a matter?*

d)   *Whether the workload of the proposed role/function would limit the Ombuds ability to prioritise their complaints-related work?*

e)   *Whether any Ombuds involvement with the design of new or revised policy or process, creates the impression of a 'seal of approval'?*

f)   *Whether the proposed Ombuds input may be seen as a 'short-cut' or substituting for full stakeholder consultation?*

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Survey results - May 2017

This collates the 84 community responses we received. The survey did not require a response to all questions, just to those that were relevant to the respondent. For each question, we have indicated the number of responses we received.

There were a number of opportunities to provide free text comments. Some comments were lengthy – we have extracted from the survey the essence of these. Not all comments have been included and some detail has been omitted – some were not relevant to the question, to preserve confidentiality or if the comment was personal to an incumbent Ombudsman rather than about the Office. We have also lightly edited some language issues in comments and, in a few cases, listed the comment under a different question where this made more sense.

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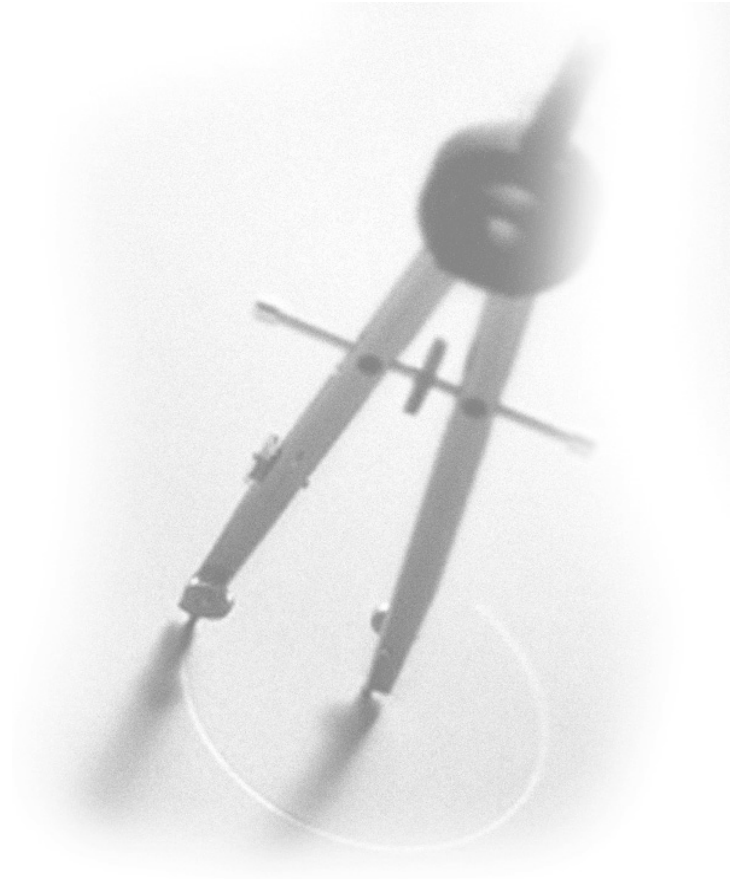
Q1b. What is your affiliation within the ICANN community? (n=84)

| Affiliation	Number (sub-affiliation)
ASO	1
At large	20 (AFRALO (5), EURALO (1), LACRALO (12), NARALO (2))
Board director	1
Board member	1
ccNSO	4
GAC	1
GNSO	35 (BC (4), Contracted party (14), IPC (1), NCSG (5), NCUC (5), NPOC (2), no sub-affiliation given (4))
RSSAC	1
SSAC	1
None given	19

Q1c. Which ICANN region do you belong to? (n=84)

- North America 32%
- Latin America 24%
- Europe 13%
- Asia Pacific 20%
- Africa 11%
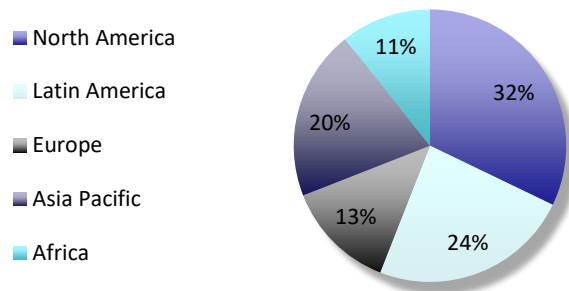
Q1d. What is your gender? (n=75)
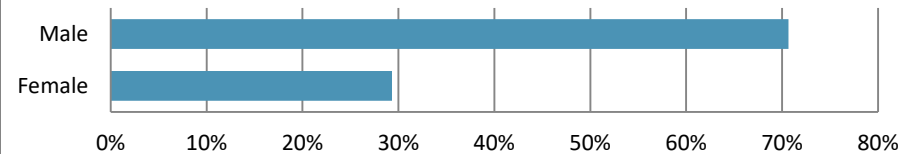
Q1e. How many years have you been an active member of the ICANN community? (n=74)
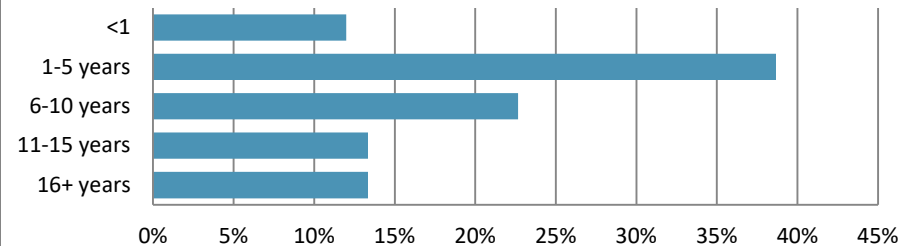
Q1f. How many ICANN meetings have you attended? (n=74)
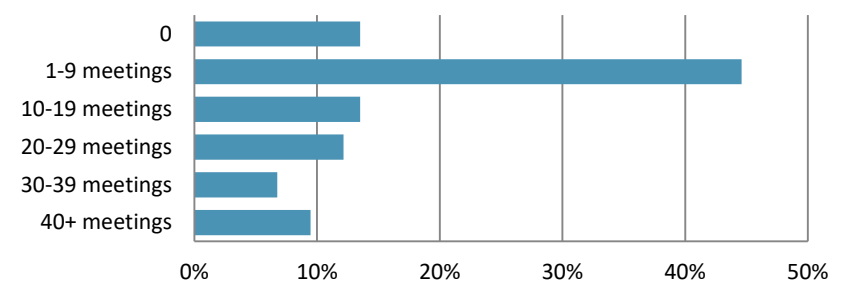
Q2-3. Disputes

Q2. When did you become aware of the Office of the Ombudsman as an avenue for dealing with disputes or complaints within the ICANN ecosystem? (n= 82)

Categories (top to bottom):
- More than 4 years after I joined
- Between 2 years and 4 years after I joined
- Between 6 months and 2 years after I…
- Very soon after I joined
- Since inception in 2005
- I was not aware

(x-axis: 0% to 35%)
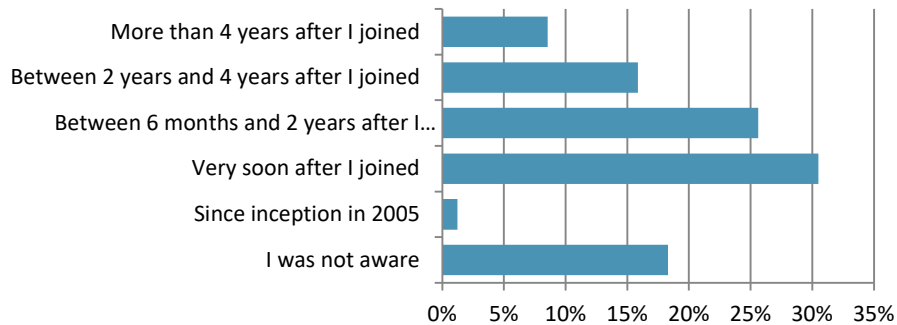
Q3. Have you had a complaint/dispute related to the ICANN ecosystem? (n=82)

- Have you ever had a complaint/dispute related to the ICANN ecosystem?
- If yes, did you consider approaching the Office of the Ombudsman? (n=33)

(x-axis: 0% to 100%) — Legend: ■ Yes ■ No
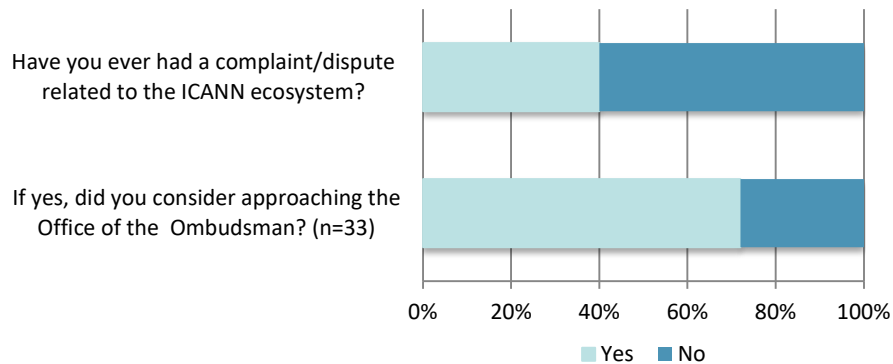
If you had a complaint/dispute but did not approach the Office of the Ombudsman, why not?

- Dispute resolution policy and mechanisms at the time were adequate.
- Complaint was dealt with through participation in working groups.
- It did not exist at the time.
- I had also heard about how ineffectual the Ombudsman often was, without much real authority to produce change or take action.
- I am not sure if they dealt with my issues.
- Back then when I had the complaint/dispute; I had never fully understood the role/functions of the Office of the Ombudsman. That was why I did not approach them.
- It was solved internally within my constituency.
- It became clear that the Office either had no power or was encouraged not to wield it.
- We did not think that the Ombudsman would be able to help to resolve the problem.
- Felt that nothing would be done by him. He made no effort to know us or seem open to dialogue.
- I felt my constituency would not change their position regardless.
- I have a problem with information being gathered about me.
- There wasn't an Ombudsman at that point in time.

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Q4. If you have taken a complaint/dispute to the Office of the Ombudsman, what was the outcome? (n=22)
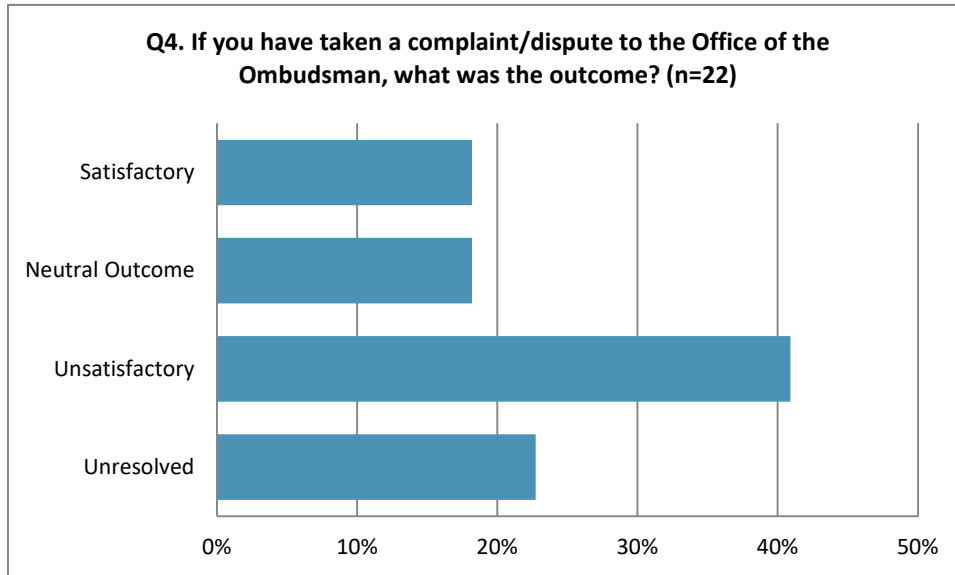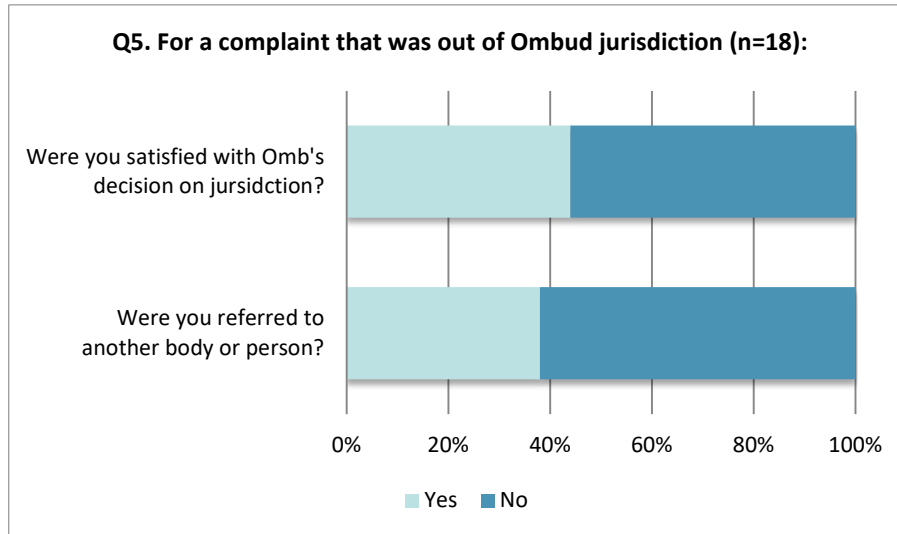

Comments

- The Ombudsman's office promptly dealt with and resolved the issues raised, as appropriate.
- The Ombudsman obtained an apology from the person I complained about.
- The outcome in my opinion was sensible and I agreed with the suggestion they made but the complainer did not.
- Very satisfactory.
- The outcome was an Ombudsman report delivered to the ICANN Board, that remained unheard and with no practical impact or consequence.
- No unfairness found, after no thorough investigation.

- To let things cool off, and then provide a new framework for looking at things.
- Neutral, the issue was unsatisfactorily engaged.
- A waste of time
- The Ombudsman suggested a response. It's not known to me whether there was engagement with the other Party. The issue remained so I looked for other ways to solve the issue.
- Adverse for me, but the better question is what was the process and where was it documented, if at all?
- Disappointment and frustration, as the Office acted, rather than as an Ombud, as an institutional means of placating complainants and protecting the ICANN Board, Staff, and corporation.
- Lots of talks, at the end an uneasy compromise that in fact did not solve the problem.
- The outcome not satisfactory. There was a breach of confidentiality with information provided to the Ombudsman.
- I got an insincere apology from the offending party.
- He sat on it.
- It is more than a year, and my complaint is still unresolved.
- In progress.
- Nothing.
- The Office agreed that it had jurisdiction but failed to act, simply pushing paper until we gave up.
- The whole community was involved looking for a solution, however the Ombudsman made a suggestion not a decision. The suggestion was a good one in my view, but generated further problems since those complaining did not accepted the proposal.
- The issue was under the purview of the Ombudsman but it just wasn't handled satisfactorily.

**Q5. For a complaint that was out of Ombud jurisdiction (n=18):**

Comments:

- It was Ombudsman's jurisdiction but expected actions were not taken.
- I believe the office (or the person in charge) was neither impartial nor independent or was too timid to act against ICANN, the corporation.
- No, all the interventions or answers to our problems were vague and imprecise. The Ombudsman failed to help us and we continued exactly the same as before consulting them.
- There was no outcome and that was very annoying and frustrating. If someone takes the time to file a complaint, there should be an outcome.
- We had a violation of ICANN's Bylaws and the Ombudsman Office claimed it didn't have jurisdiction.
- We felt that every time the complaint was against ICANN and ICANN staff, the Ombudsman did everything to avoid getting involved and referred us to the very people we complained about.
- The Office failed to issue any decision at all.
- Useless. The Ombudsman said it didn't have jurisdiction to deal with a violation of ICANN Bylaws, so we had to go to an IRP at great expense for an independent panel to say that ICANN violated its Bylaws.
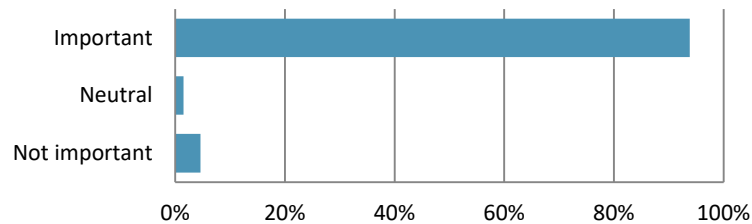
Q6. If the Ombudsman dealt with your complaint, how would you rate your experience of the process?
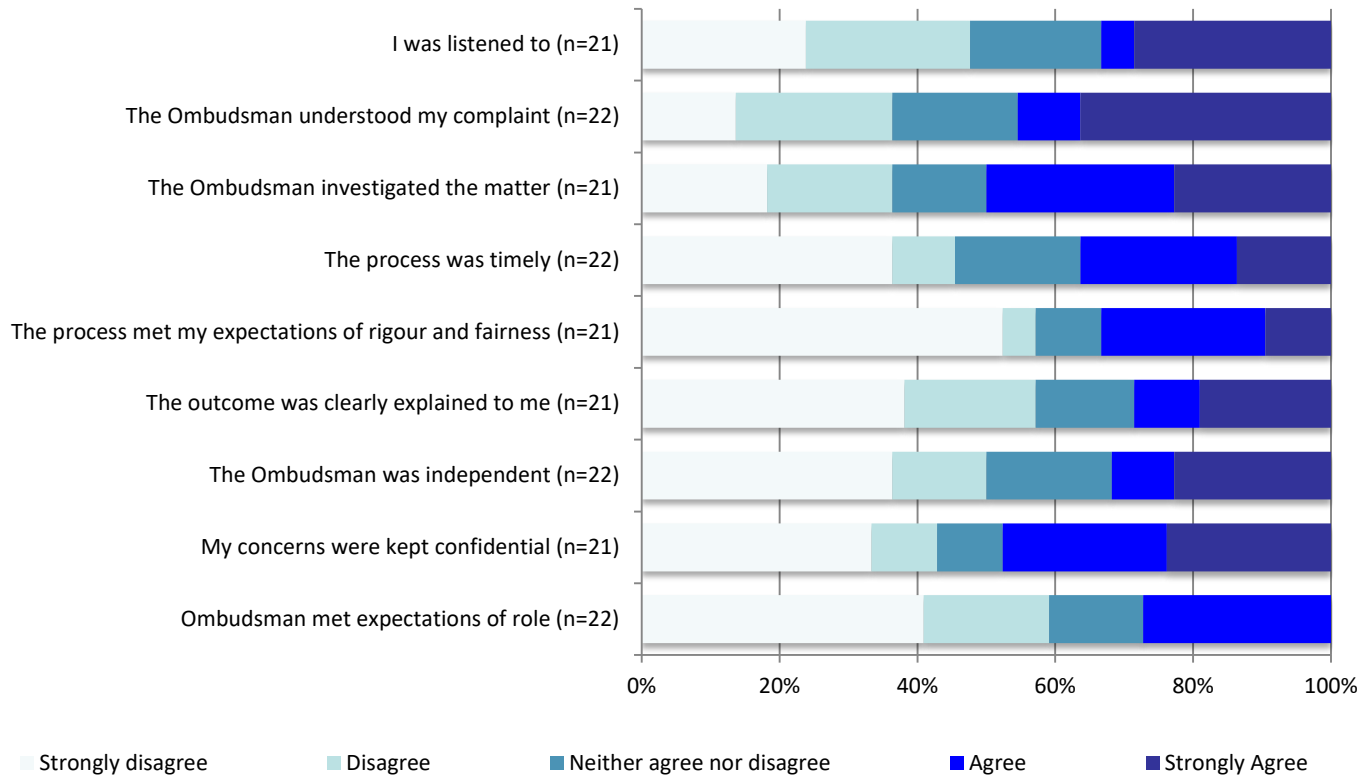
**Q7. How important to you is it that the ICANN ecosystem has an Ombuds function that is able to deal with complaints independently of vested interests or inappropriate influences? (n=65)**

Q8. Does the current Office of the Ombudsman meet your expectations of the role? (For example, for independence, confidentiality, impartiality, effectiveness of the dispute resolution process.) (n=42)
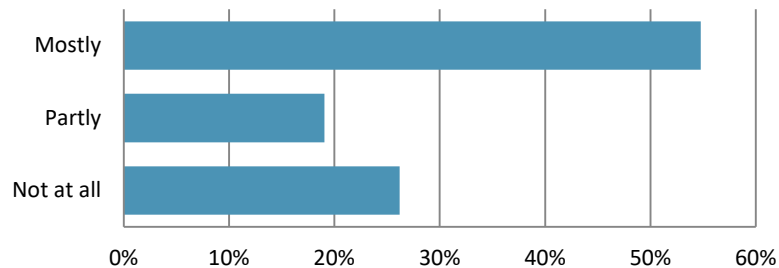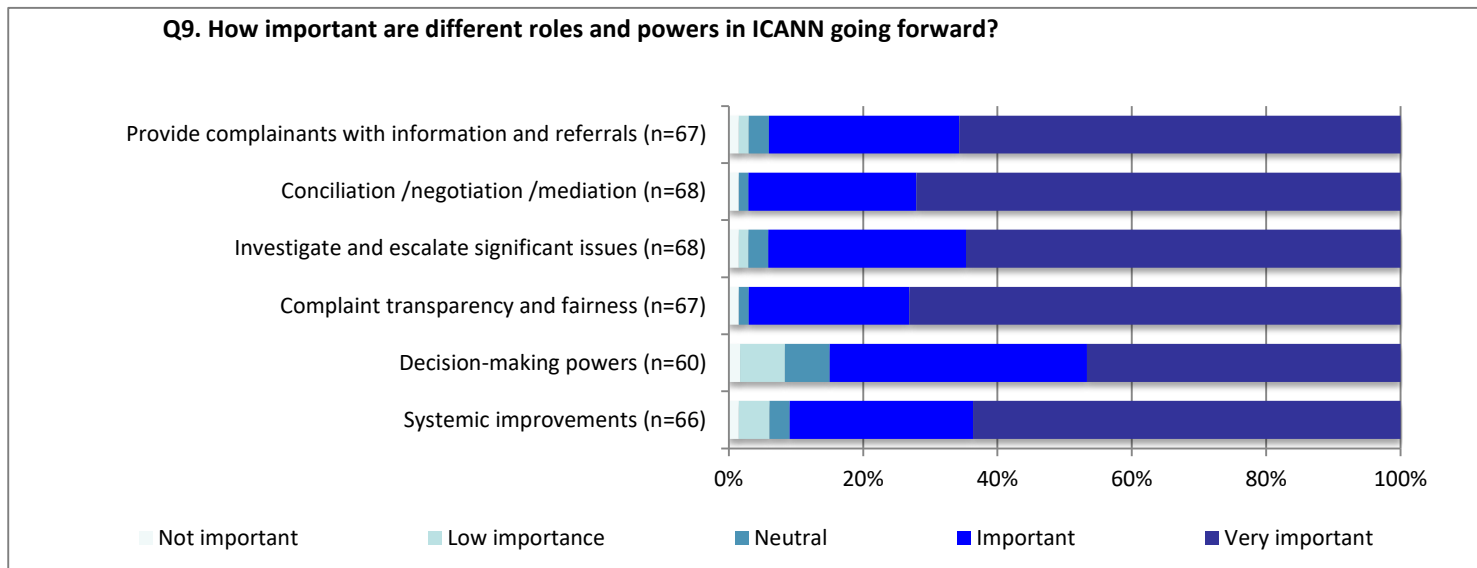

Comments as to whether expectations met:

- Yes, mostly.
- Needs sound processes and procedures as to how it operates.
- Independence from the Board has to be absolute. He has to have power to intervene in a timely way, not after the fact.
- The environment needs to support the Ombuds so he has real standing in the ICANN ecosystem.
- The Office is important to assist with disputes.
- Should take on more cases and not find ways to not take them on. Err of the side of doing more, not less.
- Ombudsman is a tool of the Board to deflect criticism. A joke.
- Ombudsman must be picked from the community; he/she should have strong record of advocacy within ICANN and enjoy general respect and be vigorous, vocal and proactive in the exercise of his/her duties
- Little is heard of any case - if any ever were reported.
- It is a very important role for the purpose of fulfilling ICANN's mission, especially in relation to internal functioning in accordance with the principles of equity, transparency and trust in the system.
- I have serious doubts about confidentiality.
- The office of the Ombudsman must deliver a fair, speedy, enforceable and unbiased disputed resolution mechanism. If the decisions are not enforceable then there is no point in approaching the ombudsman.
- Does not appear to act in any way independently nor offer a place for complainants to go when the ICANN ecosystem has failed.
- The ombudsman is not independent as he or she is contracted by ICANN.
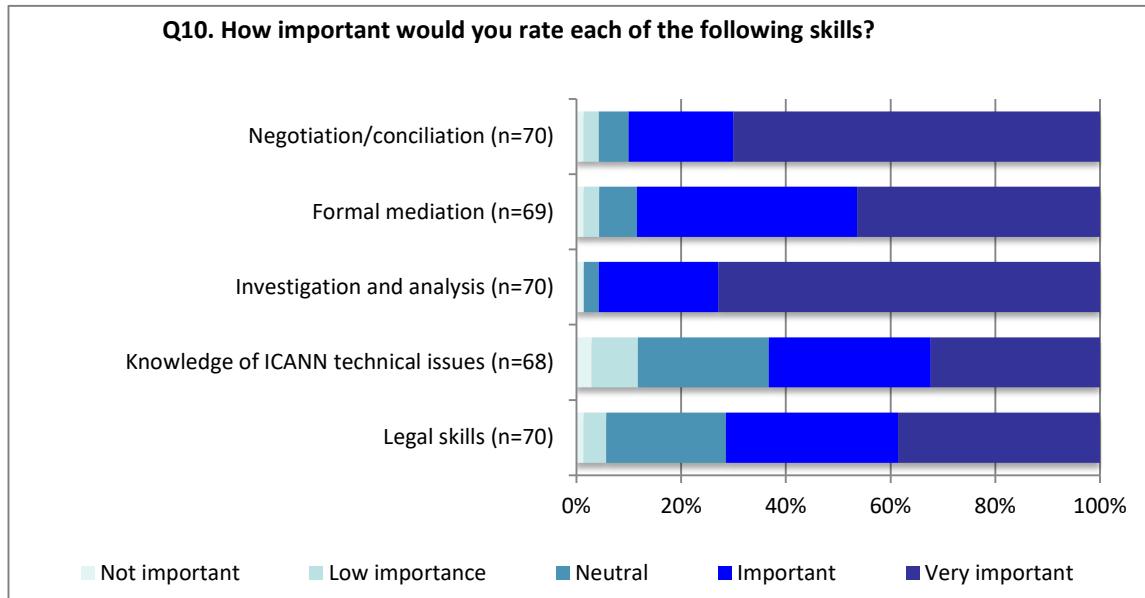
Q9. How important are different roles and powers in ICANN going forward?

Bar chart legend: Not important, Low importance, Neutral, Important, Very important

Categories:
- Provide complainants with information and referrals (n=67)
- Conciliation /negotiation /mediation (n=68)
- Investigate and escalate significant issues (n=68)
- Complaint transparency and fairness (n=67)
- Decision-making powers (n=60)
- Systemic improvements (n=66)

X-axis: 0%, 20%, 40%, 60%, 80%, 100%

Comments:

- When it comes to decision-making powers, the Ombudsman's powers should be equal to that of others.

- The Ombudsman office should not act as law enforcement body - particularly given the subjective and often ad hoc nature of ICANN policy.

- Whether the Ombuds should have decision-making powers will depend on the overall role of the Ombuds within the organisation.

- The office should be strengthened.

- In my experience, it's not typical that the Office of the Ombudsman are decision makers. More often than not they are facilitators and reporters.

- Office as point of first contact should have transparent policies for when to investigate and when to hand-off to others (ICANN legal, whatever).

- Rather than provide monetary compensation, I would recommend that the Ombudsman have the power to refer a matter or recommendation for compensation to an outside independent review for adjudication.

- Urgent and enforceable orders are necessary, else the purpose of the mechanism will be defeated.

- ICANN must resist the urge to make the Ombudsman the investigator of problems and also the same entity that is responsible for doling out punishments. For example, this proposal was put forth as part of the sexual harassment policy.

Q10. How important would you rate each of the following skills?

Legend: Not important | Low importance | Neutral | Important | Very important
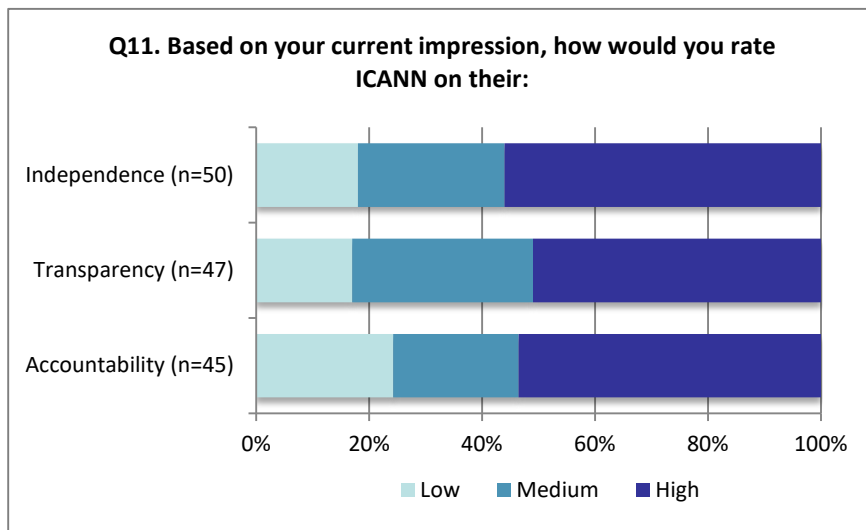
Comments:

- It could be useful to provide feedback about where processes are failing but I don't believe that the Ombudsman itself should be responsible for devising process or policy change.

- It would be a mistake to give a direct role of mediation or of negotiation. This direct involvement in the solution of the problem, will lower its role that needs to be "above the parties" and always on the side of the weaker stakeholder. I would prefer a role in which the problems are clearly analyzed, possible remedies are identified and suggested to the Board, and the possibility (but only in the case the Board will not act or will take the wrong decision) to overturn Board decisions when the general interest of the whole ICANN communities system are endangered.

- While the Ombudsman needs an excellent grasp of the milieu and how ICANN operates, a detailed knowledge of the domain name system is not required. These are people functions that we are examining here. Legal knowledge is useful, but I am not convinced that being a lawyer per se leads to better investigation, listening, trust, and conciliation or mediation efforts. In fact, the contrary may be true. Trust is extremely important.

- An Ombudsman must be confident, proactive, knowledgeable, diplomatic, transparent and professional.

Q11. Based on your current impression, how would you rate ICANN on their:

Q12. Comments about whether the ICANN Office of the Ombudsman has changed over the time

- The more I get to know ICANN the more I realize that the Ombuds is a decoration that is there to make ICANN.org look good.
- Yes we are improving.
- Yes, it seems to me that each office holder seems to have operated with a different view of the priorities.

Q13. Can you give any examples of unfairness issues that you have experienced or have knowledge of that would be appropriate for the ICANN Office of the Ombudsman to examine?

- Community gTLD applications.
- Gender issues
- Bullying behaviours on email lists.
- Hidden conflicts of interest

**Q14. Further comments relevant to the ICANN Ombuds function?**

- It is an important function to maintain equity and trust, and also to prevent and avoid major conflicts.
- The office and this survey are waste of time and money
- The Ombuds should have a diverse staff and a good mix of cultural views.
- The remit (scope) needs to clearly spelled-out in ways that are easy to understand.
- The Ombuds role is necessary and appropriate. I am aware of a certain unease as to his/her jurisdiction and authority. However, I consider that is an inevitable component of the function; I am not against improvements and strengthening of the Ombuds' role, but I would not expect that to eliminate complaints, going forward.
- Transparency is hard to evaluate in situation where complaints being sent to an Ombudsman are deemed to be confidential.
- I think a panel of stakeholders would do a better job than a single person.
- We never designed the Ombudsman to be a formal part of the appeals process of dispute and objection proceeding. For it to be inserted into that process is a danger to due process. It is secret and that's utterly unfair to parties involved. It should be clear what goes into the Ombudsman office -- and what does not.
- For an ICANN that is no longer formally depending on a single government and that has moral obligations towards the global community, the higher risk is to fall into the hands of some strong stakeholders that have financial interests and direct returns on some decisions of the Board. To prevent this kind of highjack a strong, really independent and brave Ombudsman is an essential component.

Attachment C - Ombuds 'logic model'

The first Ombudsman Frank Fowlie contributed significant intellectual input to the establishment of the ICANN Ombuds. Amongst other things, he proposed a logic model for the ICANN Ombudsman function – the table shows our thinking tested against that model.

Ombuds objective	To ensure that ICANN rules, policies, processes, systems, governance and behaviours are fair and and seen to be fair.
Key functions	• Review single complaints or disputes and where appropriate investigate to gain deeper understanding of facts • For out-of-jurisdiction complaints, advise complainant if another person or body who can assist with complaint • Use ADR techniques to resolve complaints or disputes • Review for fairness and recommend improvements to processes • Exercise specific responsibilities re Reconsideration Requests and allegations of harassment • Provide transparency through active reporting • Provide ad-hoc advice on fairness matters to the community
Supporting activities	• Improve awareness of complaints avenues • Improve understanding of principles of fairness and their application • Contribute to ICANN debate and discussion in areas of expertise
Outputs	• Information resources including website • Documentation of complaints pathways and processes • Complaints forms, templates etc. • Written responses to complaints • Published reports on single matters and systemic issues • Annual reports • Information for periodic evaluation
Immediate outcomes	• Point of contact for advice and making complaints • Referral point for out-of-jurisdiction complaints • Substantive response for in-jurisdiction complaints
Intermediate outcomes	• Improved understanding of principles of fairness in ICANN context • Strengthened fairness of processes and behaviours • ICANN community and corporation held to account for fairness
Final outcomes	• Community and stakeholder confidence in ICANN fairness • High levels of trust and strong relationships within Community
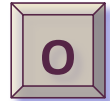
If any further information is required, please do not hesitate to contact:
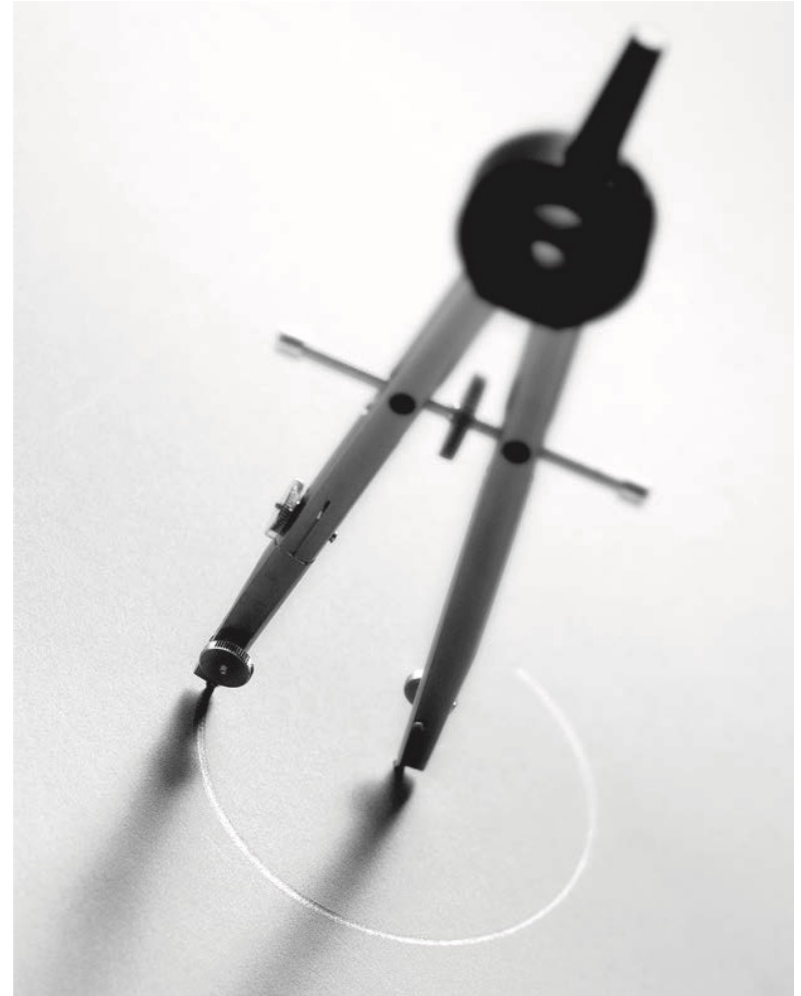
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Annex 6 – SO/AC Accountability Sub-Group Final Report and Recommendations – CCWG-Accountability WS2

1 May 2018

TABLE OF CONTENTS

Executive Summary

The SO/AC Accountability project for Work Stream 2 had its genesis early in the CCWG-Accountability track, when SO/AC representatives insisted on new powers to hold the ICANN corporation accountable to the global Internet community. ICANN Board members and staff then asked, "What about SO/AC accountability?" And, as one of the independent experts asked, "Who watches the watchers?" Those questions led to the creation of a Work Stream 2 project to recommend improvements to accountability, transparency, and participation within ICANN SOs, ACs, and Groups listed on page 5.

This draft report reflects several months of research and deliberation, starting with exploration of *to whom* ICANN SO/ACs are accountable. On that question, our working group reached quick consensus: each SO/AC is accountable to the segment of the global Internet community that each SO/AC was designated to represent in the ICANN Bylaws.

This conclusion was the basis for Track 1 of our work: reviewing accountability, transparency, and participation in ICANN with respect to the designated community of each SO/AC/Group. We were keen to examine the extent to which SOs/ACs/Groups were reaching out to, and open to, members of their designated community who were not yet participating. In Track 1, we recommend 29 Good Practices that each SO/AC/Group should implement, to the extent these practices are applicable and an improvement over present practices. We do not recommend that implementation of these practices be required. Nor do we recommend any changes to the ICANN Bylaws. We do recommend that Operational Standards for periodic Organizational Reviews conducted by ICANN could include an assessment of Good Practices implementation in the AC/SO subject to the review.

In Track 2, we considered the suggestion for a "Mutual Accountability Roundtable," originally described as a concept where "multiple actors are accountable to each other." That concept clashed with the fundamental consensus that ICANN SO/ACs are only accountable to the designated community they were created to serve and represent. The CCWG consensus view is <u>not</u> to recommend the Mutual Accountability Roundtable for formal implementation.

In Track 3, we assessed whether the Independent Review Process (IRP) should also be used to challenge AC/SO activities. On this question, we conclude that while the IRP *could* be made applicable by amending Bylaws significantly, the IRP should <u>not</u> be made applicable to SO/AC activities, because it is complex and expensive, and the ICANN Ombuds Office is already chartered to handle complaints regarding whether an SO/AC/Group acted in accord with ICANN Bylaws and individual charters.

The Mandate for SO/AC Accountability in Work Stream 2 (WS2)

This WS2 project obtains its mandate and scope from ICANN Bylaws and the CCWG Final Report. First, ICANN's new Bylaws reflect the CCWG Supplemental Final Proposal[1] on Work Stream 2 (WS2):

> *"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;"[2]*

This Bylaws mandate for this project specifically mentions capture, a concern raised by NTIA in Stress Tests 32-34, regarding internal capture by a subset of SO/AC members, and concern that incumbent members might exclude new entrants to an SO/AC.

This WS2 project was described in greater detail in the CCWG Final Proposal, Recommendation 12:[3]

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

- ⊙ Include the subject of SO/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/AC accountability as part of WS2.

- ⊙ Assess whether the IRP would also be applicable to SO/AC activities.

Regarding the first bullet above, Recommendation 9 of the CCWG-Accountability Final Proposal noted that SO/AC accountability could be improved by the accountability review process (ATRT), which includes:

d) assessing the extent to which ICANN's decisions are embraced, supported, and accepted by the public and the Internet community[4]

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[1] CCWG Final Proposal, 23-Feb-2016, at https://community.icann.org/pages/viewpage.action?pageId=58723827
[2] ICANN Bylaws, 27-May-2016, p. 135, https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf
[3] 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
[4] 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-Accountability Final Proposal noted that further enhancements to SO/AC accountability should be accommodated through the accountability review process.[5]

> The CCWG-Accountability recommends addressing the accountability of Supporting Organizations (SOs) and Advisory Committees (ACs) in a two-stage approach:
>
> 1. In Work Stream 1: Include the review of SO/AC accountability mechanisms in the independent structural reviews performed on a regular basis.
>
> 2. In Work Stream 2: Include the subject of SO/AC accountability as part of the work on the Accountability and Transparency Review process.

Per the Bylaws and CCWG-Accountability mandates, the SO/AC Accountability project team embarked on three tracks:

> 1. Review and develop recommendations to improve SO/AC processes for accountability, transparency, and participation that are helpful to prevent capture. (Note that we look only at SO/AC accountability within the scope of ICANN activities.)
>
> 2. Evaluate the proposed "Mutual Accountability Roundtable" to assess its viability and, if viable, undertake the necessary actions to implement it.
>
> 3. Assess whether the Independent Review Process (IRP) should be applied to SO/AC activities. The recommendations for each track are described next.

As a point of clarification, the scope of the SO/AC accountability recommendations are limited to SO/AC activities that occur within ICANN. At least one SO (the ASO) has definition and existence external to ICANN, and comprises formal, member-based bodies with clear and legally defined accountability to their members. Therefore, this ICANN-related accountability work applies only to the SO activities related to matters properly within the scope of ICANN.

---

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

Track 1. Review and Develop Recommendations to Improve SO/AC Processes for Accountability, Transparency, and Participation that are Helpful to Prevent Capture

The new Bylaws tasked us to:

> *"review and develop … recommendations on SO/AC accountability, including but not limited to improved processes for accountability, transparency, and participation that are helpful to prevent capture"*

Note that we look only at SO/AC accountability within the scope of ICANN activities.

First, we assumed that "accountability" of each SO/AC is to the designated community for each SO/AC, as defined in ICANN Bylaws:

⊙ ALAC is "the primary organizational home within ICANN for individual Internet users."

⊙ ASO is "the entity established by the Memorandum of Understanding [2004] between ICANN and the Number Resource Organization (NRO), an organization of the existing RIRs."

⊙ ccNSO is "ccTLD managers that have agreed to be members of ccNSO."

⊙ GAC is "open to all national governments [and to] distinct economies as recognized in international fora, and multinational governmental organizations and treaty organizations on the invitation of the GAC through its Chair."

⊙ GNSO is "open to registries, registrars, commercial stakeholders (BC, IPC, ISPCP), and non-commercial stakeholders."

⊙ RSSAC "members shall be appointed by the Board" to "advise the ICANN community and Board on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System."

⊙ SSAC members are "appointed by ICANN Board" to "advise the ICANN community and Board on matters relating to security and integrity of the Internet's name and address allocation systems."

This does not imply that each SO/AC makes its decisions without regard to the broader Internet community outside of its designated community. Rather, the global public interest is a fundamental consideration of the ICANN Board in approving and implementing advice and policy recommendations from SO/ACs.

Moreover, ICANN Bylaws require independent Organizational Reviews (Bylaws Sec 4.4) every five years, examining each SO, Council, and AC (other than the GAC) to determine:

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

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

Second, the project team solicited documentation from each SO/AC (and from Group constituencies and stakeholder groups) in order to review and assess existing mechanisms for accountability, transparency, and participation. We sought response to the following questions:

1. What is your interpretation of the designated community defined in the Bylaws? For example, do you view your designated community more broadly or narrowly than the Bylaws definition?

2. What are the published policies and procedures by which your SO/AC is accountable to the designated community that you serve?
   a. Your policies and efforts in outreach to individuals and organizations in your designated community who do not yet participate in your SO/AC.
   b. Your policies and procedures to determine whether individuals or organizations are eligible to participate in your meetings, discussions, working groups, elections, and approval of policies and positions.
   c. Transparency mechanisms for your SO/AC deliberations, decisions, and elections.
   d. Were these policies and procedures updated over the past decade? If so, could you clarify if they were updated to respond to specific community requests/concerns?

3. Mechanisms for challenging or appealing elections. Does your SO/AC have mechanisms by which your members can challenge or appeal decisions and elections? Please include link where they can be consulted.

4. Any unwritten policies related to accountability. Does your SO/AC maintain unwritten policies that are relevant to this exercise? If so, please describe as specifically as you are able.

We received responses from the following SO/AC/Groups, as of 3 March 2017:

⊙ ALAC (At-Large Advisory Committee)

⊙ ASO/NRO (Address Supporting Organization)

⊙ ccNSO (Country Code Names Supporting Organization)

⊙ GAC (Governmental Advisory Committee)

⊙ GNSO (Generic Names Supporting Organization)

⊙ GNSO-BC (Business Constituency)

⊙ GNSO-IPC (Intellectual Property Constituency)

⊙ GNSO-ISPCP (Internet Service Providers and Connectivity Providers)

- ⊙ GNSO-NCSG (Non-Commercial Stakeholders Group)

- ⊙ GNSO-NCUC (Non-Commercial Users Constituency)

- ⊙ GNSO NPOC (Not-for-Profit Operational Concerns Constituency)

- ⊙ GNSO-RySG (Registries Stakeholder Group)

- ⊙ GNSO-RrSG (Registrars Stakeholder Group)

- ⊙ RSSAC (Root Server System Advisory Committee)

- ⊙ SSAC (Security and Stability Advisory Committee)

All responses received are available at the work group wiki,
https://community.icann.org/pages/viewpage.action?pageId=59643284.

Below, we have detailed reviews of responses received. But first, we present a summary of our recommended Good Practices.

Summary of Good Practice Recommendations in SO/AC/Groups

Our review leads us to recommend that each SO/AC/Group should implement the following Good Practices, as applicable to their structure and purpose:

Accountability	1. SO/AC/Groups should document their decision-making methods, indicating any presiding officers, decision-making bodies, and whether decisions are binding or nonbinding. 2. SO/AC/Groups should document their procedures for members to challenge the process used for an election or formal decision. 3. SO/AC/Groups should document their procedures for non-members to challenge decisions regarding their eligibility to become a member. 4. SO/AC/Groups should document unwritten procedures and customs that have been developed in the course of practice, and make them part of their procedural operation documents, charters, and/or bylaws. 5. Each year, SO/AC/Groups should publish a brief report on what they have done during the prior year to improve accountability, transparency, and participation, describe where they might have fallen short, and any plans for future improvements. 6. Each Empowered Community (EC) Decisional Participant should publicly disclose any decision it submits to the EC. Publication should include description of processes followed to reach the decision. 7. Links to SO/AC transparency and accountability (policies, procedures, and documented practices) should be available from ICANN's main website, under "accountability." ICANN staff would have the responsibility to maintain those link on the ICANN website.
Transparency	1. Charter and operating guidelines should be published on a public webpage and updated whenever changes are made. 2. Members of the SO/AC/Group should be listed on a public webpage. 3. Officers of the SO/AC/Group should be listed on a public webpage. 4. Meetings and calls of SO/AC/Groups should normally be open to public observation. When a meeting is determined to be members-only, that should be explained publicly, giving specific reasons for holding a closed meeting. Examples of appropriate reasons include discussion of confidential topics such as: ⊙ Trade secrets or sensitive commercial information whose disclosure would cause harm to a person or organization's legitimate commercial or financial interests or competitive position. ⊙ Internal strategic planning whose disclosure would likely compromise the efficacy of the chosen course. ⊙ Information whose disclosure would constitute an invasion of personal privacy, such as medical records.

	⊙ Information whose disclosure has the potential to harm the security and stability of the Internet. ⊙ Information that, if disclosed, would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice. 5. Records of open meetings should be made publicly available. Records include notes, minutes, recordings, transcripts, and chat, as applicable. 6. Records of closed meetings should be made available to members and may be made publicly available at the discretion of the SO/AC/Group. Records include notes, minutes, recordings, transcripts, and chat, as applicable. 7. Filed comments and correspondence with ICANN should be published and publicly available.
Participation	1. Rules of eligibility and criteria for membership should be clearly outlined in the bylaws or in operational procedures. 2. Where membership must be applied for, the process of application and eligibility criteria should be publicly available. 3. Where membership must be applied for, there should be a process of appeal when application for membership is rejected. 4. An SO/AC/Group that elects its officers should consider term limits. 5. A publicly visible mailing list should be in place. 6. if ICANN were to expand the list of languages that it supports, this support should also be made available to SO/AC/Groups. 7. A glossary for explaining acronyms used by SO/AC/Groups is recommended.

Outreach	1. Each SO/AC/Group should publish newsletters or other communications that can help eligible non-members to understand the benefits and process of becoming a member. 2. Each SO/AC/Group should maintain a publicly accessible website/wiki page to advertise their outreach events and opportunities 3. Each SO/AC/Group should create a committee (of appropriate size) to manage outreach programs to attract additional eligible members, particularly from parts of their targeted community that may not be adequately participating. 4. Outreach objectives and potential activities should be mentioned in SO/AC/Group bylaws, charter, or procedures. 5. Each SO/AC/Group should have a strategy for outreach to parts of their targeted community that may not be significantly participating at the time, while also seeking diversity within membership.
Updates to policies and procedures	1. Each SO/AC/Group should review its policies and procedures at regular intervals and make changes to operational procedures and charter as indicated by the review. 2. Members of SO/AC/Groups should be involved in reviews of policies and procedures and should approve any revisions. 3. Internal reviews of SO/AC/Group policies and procedures should not be prolonged for more than one year, and temporary measures should be considered if the review extends longer.

As noted earlier, we do not recommend that the above Good Practices become part of ICANN Bylaws, or that SO/AC/Groups be required to implement these Good Practices. However, there was significant interest among CCWG-Accountability participants to see sustained attention to SO/AC/Group implementation of Good Practices.

Recommendation 10 of the CCWG-Accountability Final Proposal noted that further enhancements to SO/AC accountability should be accommodated through the accountability review process.[6]

> *"In Work Stream 2: Include the subject of SO/AC accountability as part of the work on the Accountability and Transparency Review process ATRT."*

However, public comments suggested that ATRT reviews would not have the capacity to also examine the extent to which SO/AC/Groups have implemented Good Practices.

Reflecting those comments, we recommend that the periodic Organizational Reviews conducted by ICANN could include an assessment of Good Practices in the AC/SO under review. Those reviews are already provided for in Section 4.4 of ICANN Bylaws:

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

*"The goal of the review, to be undertaken pursuant to such criteria and standards
as the Board shall direct, shall be to determine (i) whether that organization,
council or committee 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 that organization, council or committee is
accountable to its constituencies, stakeholder groups, organizations and
other stakeholders.**" (emphasis added)*

This existing ICANN Bylaws text would accommodate assessments of AC/SO implementation of
Good Practices. The Good Practices documented here could be reflected in the Operational
Standards[7]
developed by ICANN staff for Organizational Reviews. These Operational Standards should
also reflect CCWG-Accountability recommendations that SO/AC/Groups are only expected to
implement Good Practices to the extent that these practices are applicable and an improvement
over present practices, in the view of SO/AC/Group participants. Again, we do not recommend
that implementation of these practices be required by SO/AC/Groups.

Review and Recommendations Regarding SO/AC Accountability

The new Bylaws tasked us to:

*"review and develop … recommendations on SO/AC accountability,
including but not limited to improved processes for accountability,
transparency, and participation that are helpful to prevent capture"*

We asked each SO/AC/Group to describe:

*"3. Mechanisms for challenging or appealing elections. Does your SO/AC have
mechanisms by which your members can challenge or appeal decisions and
elections? Please include link where they can be consulted.*

*4. Any unwritten policies related to accountability. Does your SO/AC maintain
unwritten policies that are relevant to this exercise? If so, please describe as
specifically as you are able."*

Review: A summary of responses and resources provided on accountability, supplemented by
independent research by the SO/AC Accountability Working Group:

ALAC

⦿ ALAC is governed by a number of somewhat interrelated documents. Some are outdated
and in need of revision and others have been revised relatively recently. They include the
ICANN Bylaws, which are specific in Rules of Procedure, Operating Principles,
Memorandum of Understanding between ICANN and RALOs (actually with the organizations

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[7] Operational Standards for Reviews that are required in ICANN Bylaws Section 4.4

constituting the initial RALO members). These include:

- ICANN Bylaws: https://www.icann.org/resources/pages/governance/bylaws-en/#XI-2.4

- ALAC Rules of Procedure and associated documents: https://community.icann.org/display/atlarge/Rules+of+Procedure

- RALO documents (see "Organizing Documents" in left sidebar of each page) covering how the entity operates, how decisions are made, how leadership and other positions are selected.

  - https://atlarge.icann.org/ralos/afralo

  - https://atlarge.icann.org/ralos/apralo

  - https://atlarge.icann.org/ralos/euralo

  - https://atlarge.icann.org/ralos/lacralo

  - https://atlarge.icann.org/ralos/naralo

- In general, we do not have rules formally appealing decisions or elections. Some RALOs rely (somewhat inappropriately, but for historic reasons) on the United Nations General Assembly Rules of Procedure (UNGA RoP) and those do include a number of such recourses. On the relatively rare occasion where there has been unease over a decision, the processes within our own rules have been used to address the issue (usually by someone requesting that the issue be re-visited).

- We have only had three situations where the rules and processes we had in place could not address a situation. One was settled somewhat easily by the RALO Leadership deciding (with the support of the membership) to re-hold an election, but first to amend the Rules to cover the situation of a tie vote which had caused the problem.

- The other two were more problematic and occurred in one of the other RALOs. The first was (fortunately) ultimately addressed by a serendipitous action out of our control. The second involved invocation of the UNGA RoP and ended up in extreme crisis, which is still not settled.

- The ALAC RoP do provide to the recall of all appointments (including ALAC Chair and Leadership Team) and the dismissal of ALAC members (both those appointed by RALOs and the NomCom).

- The APRALO revised RoP have comparable recall/removal procedures and it is expected that as other RALOs revise their rules, there will be similar provisions.

ASO/NRO

- Operating procedures of the NRO NC are available at https://aso.icann.org/documents/operational-documents/operating-procedures-of-the-address-council-of-the-address-supporting-organization/.

- To help clarify the work the NRO NC undertakes, an annual work plan is provided to the community. For the current year work plan, see: https://aso.icann.org/documents/aso-ac-work-plan-2016/.

- With regard to disputes or appeals of elections of members of the NRO NC, any such procedures are found at the respective RIR election procedures. The process of decisions made by the NRO NC are available in its Operating Procedures document found at https://aso.icann.org/documents/operational-documents/operating-procedures-of-the-address-council-of-the-address-supporting-organization/.

- Unwritten: The ASO is committed to the open, transparent, and bottom-up nature of the multistakeholder model and, pursuant to this commitment, the ASO conducts itself accordingly.

ccNSO

- The ccNSO has developed a range of guidelines, which define and delineate the accountability of the ccNSO Council with respect to the ccNSO membership and broader ccTLD community. These guidelines and rules define, inter alia, internal ccNSO relation between the ccNSO Council and membership, allocation of travel funding, participation in working groups, and newly created bodies. All these rules should be considered internal rules in the sense of the ICANN Bylaws and can be found at https://ccnso.icann.org/about/guidelines.htm.

- The general rule is that any ccTLD, regardless of its membership of the ccNSO, is always welcome to participate in the meetings of the ccNSO, contribute to discussions, and participate in the work of the working groups. However, only ccNSO members elect ccNSO Councilors and ICANN Board members (seats 11 and 12), as well as vote on ccNSO policies.

- With respect to the formal policy development process, the ultimate decision is with the ccNSO members, as they will take the final vote on adoption of the recommended policy (see Annex B, section 13).

- The basic mechanism for appealing decisions is documented in the Rules of the ccNSO, https://ccnso.icann.org/about/ccnso-rules-dec04-en.pdf.

- Unwritten: Discussions in the context of the enhancing ICANN's Accountability and a survey launched by the ccNSO Council on community's expectations in respect to accountability of the ccNSO Council have resulted in an increased awareness and need for transparency of the ccNSO Council decision-making process and more transparency of the ccNSO Council working methods. Currently, the ccNSO is developing new practices and methods through its Guideline Review Committee, and the ccNSO Council already acts in accordance with some of these working methods, for example, by increasing community awareness about publication of ccNSO Council meeting agendas and background materials. These new practices and working methods will become effective after being discussed with the ccTLD community and adopted by the ccNSO Council.

GAC

- The GAC is accountable to its members, who are governments or distinct economies. GAC member representatives are accountable to their respective individual governments. Individual governments that are members of the GAC are accountable through their political and legal structures at the national level as well as any international arrangements to which they may be party.

- In addition to relevant sections of the Bylaws, GAC internal processes are detailed in the GAC Operating Principles (see https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles).

- There are no formal mechanisms by which members can challenge or appeal decisions or elections. Advice from the GAC to the Board is generally reached by consensus. If there is no consensus, the GAC Operating Principles (Article XII) require the GAC Chair to convey the full range of views expressed by members to the Board.

- Unwritten: The GAC has funded, through several of its members, an independent secretariat function, currently carried out under contract by the Australian Continuous Improvement Group (ACIG). The ability to have policy and procedural analysis and advice independent of ICANN corporate support has enhanced the GAC's ability to communicate effectively with members and the broader community on substantive issues, and to implement many of the recommendations from the ATRT1 and ATRT2 Reviews.

GNSO

- All processes and procedures related to the GNSO Council and GNSO Working Groups are, in addition to the relevant sections of the ICANN Bylaws, detailed in the GNSO Operating Procedures (see https://gnso.icann.org/en/council/op-procedures-01sep16-en.pdf).

GNSO-BC

- The published policies and procedures to which the BC are accountable to are the ICANN Bylaws and Expected Standards of Behaviors, GNSO bylaws and procedures, the CSG Charter, and the BC Charter.

- The Commercial and Business Users Constituency (BC) is a member of ICANN's Generic Names Supporting Organization (GNSO), and is located within the Commercial Stakeholders Group (CSG) in the Non-Contracted Parties House (NCPH). As such, it is accountable to the procedures outlined by the groups' respective governing documents. The CSG has its own charter, at http://www.bizconst.org/assets/docs/ICANNCSGCharter2010.pdf.

- GNSO Procedures, in Section 6.1.2 j state "No legal or natural person should be a voting member of more than one Group," so members cannot vote in more than one Constituency within the GNSO.

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- Further, under the BC Charter, any organization/company/association that participates in more than one constituency/SG should maintain a divisional separation between their work in the BC and other constituencies. As such, they need to identify which other constituencies they and their organization participate in, and identify in which specific constituency the organization chooses to vote. Their representative to the BC must not represent their organization in another constituency within the GNSO.

- Appeals – BC Charter (new) §2.6 In the new BC Charter, the Executive Committee (EC) is entrusted with responsibilities in §2.6: BC response to questions from Work Stream 2 group on SO/AC Accountability 12 Dec 2016, Page 3 of 1 BC_SOAC Accountability Report source documents_20161128.

- Unwritten: The BC endeavors to put its policies in writing, as part of its charter. While there are unwritten prior practices cited for some activities, we are not aware of any that are responsive to these questions.

GNSO-IPC (Intellectual Property Constituency)

- The IPC is a member of ICANN's Generic Names Supporting Organization (GNSO) and is located within the Commercial Stakeholders Group (CSG) in the Non-Contracted Parties House (NCPH). As such, IPC accountability is governed by the GNSO and CSG governing documents, as well as the IPC Bylaws. These include the ICANN Bylaws and Expected Standards of Behavior, GNSO Bylaws and Procedures, the CSG Charter, and the IPC Bylaws.

- Appeal mechanisms for the refusal of a membership application or the expulsion of a member are as follows:

  - Any decision of the IPC officers can be appealed to the IPCC, with the possibility of further review by the ICANN Ombudsman in accordance with the ICANN Bylaws.

  - [The IPCC may] refuse or expel any member where on reasonable grounds it feels it is in the best interest of the IPC to do so, provided that any such action is subject to review by the ICANN Ombudsman in accordance with the ICANN Bylaws.

- Unwritten: At the commencement of each election, the candidates participate in a "Candidate Call," a conference call (by phone and Adobe Connect) in which the candidates respond to questions. Questions are posted to the IPC mailing list prior to the Call, and new questions are asked on the Call as well. This is not a written policy.

- Unwritten: The IPC has an unwritten policy that all draft public comments should be posted to the IPC mailing list one week before the end of the comment period, so that the membership can review, discuss, and revise the draft public comment before it is submitted.

- Unwritten: Informally, IPC leadership can be held accountable on the IPC mailing list at any time, or on a membership call. Members can also raise any issue, at any time, on the IPC mailing list for the IPC's consideration or awareness.

- Unwritten: Current IPC practice varies from the Bylaws in certain ways. IPC is undertaking a Bylaws review and amendment process in order to bring the Bylaws in line with current practice.

- Unwritten: Accountability of the IPC's Councilors is informally maintained through the taking of detailed notes on deliberations, decisions, and rationales of the GNSO Council in matters raised in Council meetings. These are circulated promptly to IPC members, who are invited to raise comments, concerns, and questions on the IPC's participation in these decisions.

GNSO-ISPCP (Internet Service Providers and Connectivity Providers)

- The published policies and procedures to which the ISPCP are accountable to are the ICANN Bylaws and Expected Standards of Behaviors, GNSO procedures, the CSG Charter, and the ISPCP's two governing documents are: 1) Articles and 2) Procedures. The ISPCP is a member of ICANN's Generic Names Supporting Organization (GNSO), and is located within the Commercial Stakeholders Group (CSG) in the Non-Contracted Parties House (NCPH). As such, it is accountable to the procedures outlined by the groups' respective governing documents.

GNSO-NCUC (Non-Commercial Users Constituency)

- NCUC is a member of ICANN's Generic Names Supporting Organization (GNSO), and is located within the Non-Commercial Stakeholders Group (NCSG) in the Non-Contracted Parties House (NCPH). As such, it is accountable to the procedures outlined by the groups' respective governing documents.

- NCUC also functions in accordance to NCUC Bylaws. NCUC holds annual elections for Chair and Executive Committee members. We find elections to be one of the most important aspect of NCUC accountability. All appointed offices are also renewed annually and term-limited. This means that there is a very regular process for renewing or replacing elected officers. Elected representatives have to report and show progress on a regular basis to be considered for reelection. NCUC has the highest degree of geographic and gender diversity by design (regional representation in the EC) in its elected officials and its membership (list of members is public and automatically updated at http://www.ncuc.org/about/members/) of all the GNSO constituencies, and there is a high degree of change in its leadership.

- Regarding challenges to elections and decisions, see section IV (G) of the new NCUC Bylaws. http://www.ncuc.org/governance/bylaws/bylaws-revision-2016/differential-document

- Unwritten: Before elections, candidates are expected to express in their SOI the ways they will be keeping the members (regional groups and full membership) up to date with their activities –through bulletins, use of social media, or other communication strategies. The interval of time which these updates are done (fortnightly, whenever there is an event, other options) is also discussed with membership or potential voters. Members appointed by NCUC for different working groups or committees or members receiving funding for particular activities may also submit reports.

GNSO-NPOC (Not-for-Profit Operational Concerns Constituency)

- NPOC functions in accordance to NPOC Charter. NPOC holds annual elections for Executive Committee every year. We have an number of members who are NGOs and not-for-profit organizations. Our list of active members is at https://community.icann.org/display/NPOCC/Active+Members. Membership database is updated prior to elections to ensure contact information is correct and participation is active.

- All members are invited to open policy and membership calls. Remote participation is encouraged for all constituency meetings

- NPOC has some appeal mechanisms in its charter (https://community.icann.org/display/NPOCC/Charter):

  - 2.5.3.7 states the procedure for appealing the removal of a Committee Officer by the Executive Committee.

  - 3.1.5 states the capability of the Executive Committee to resolve disputes among members and from a decision made by the Membership Committee Chair.

  - 4.1.3.7.3 states that regarding an interested party might appeal the Executive Committee decision when as stated in the charter, the Executive Committee determines the top four candidates to be put on the ballots for the same position, in the cases where they are more than four candidates for said position.

- Good practices in the election process and how candidates present themselves are usually agreed each time, depending on the number of candidates and context of the election. There is not a consistent practice, but in general, it is safe to say that candidates are expected to explain why they are fit for the position and how they will work, what are they proposing, etc. This behavior is clearer when there are several candidates for each position. For instance, it is normal for the community to discuss about elections even before the elections are open, since is part of coordination the ongoing work regardless of who is going to be an officer in the next election.

- Unwritten: NPOC discusses issues on policy based on a consensus agreement as per our EXCOM online meetings.

GNSO-RrSG (Registrars Stakeholder Group)

- RrSG home page is at http://www.icannregistrars.org.

- The community definition for the RrSG is well defined: the SG comprises members in good standing. Furthermore, eligibility for membership is established by Sec. 2.1 of the RrSG Charter (http://icannregistrars.org/charter/), as open only to ICANN-accredited registrars, and for whom their primary relationship with ICANN is as a registrar, rather than as another contracted party (e.g., registry operator).

- Members can challenge the eligibility of a candidate for office. If a member believes that an elected officer has become ineligible since being elected, or is engaged in a conflict of interest or other disqualifying activity, they may submit a motion for removal, which would be subject to the rules in Sec. 7 of the Charter.

- Unwritten policies? No. We have often discussed the continued definition and usefulness of disqualifying elected officers who have access to "Registry Proprietary or Sensitive Information," but always defer to the Charter in those situations.

GNSO-RySG (Registries Stakeholder Group)

- The gTLD Registries Stakeholder Group (RySG) is a recognized entity within the Generic Names Supporting Organization (GNSO) formed according to Article X, Section 5 (September 2009) of the ICANN Bylaws.

- RySG home page is at https://gnso.icann.org/en/about/stakeholders-constituencies/rysg.

- RySG Charter is at https://gnso.icann.org/en/meetings/rysg-charter-22oct15-en.pdf.

- Section X in our Charter is devoted to our voting procedures. See http://media.wix.com/ugd/ec8e4c_f27e896d19a94e169af3e73347513ac6.pdf.

RSSAC (Root Server System Advisory Committee)

- For the purposes of its work as an advisory committee to the ICANN Board and community, the RSSAC is aligned with its designated community as outlined in the ICANN Bylaws. The RSSAC Operational Procedures more specifically define the composition of the RSSAC to include voting primary representatives and alternate representatives from the root server operator organizations, nonvoting representatives of the root zone management partner organizations, and nonvoting liaisons from reciprocating bodies. (RSSAC 000v2, Section 1.2.1)

- The RSSAC operates on consensus. Occasionally, RSSAC members abstain from votes. These abstentions are noted in the minutes of RSSAC meetings. However, all votes are recorded with total vote counts except in the case of a vote by acclamation or a vote with no objections.

- For RSSAC publications, objections or withdrawals from a document are indicated in the final draft. (RSSAC 000v2, Section 3.1.1.6)

- There are two appeals procedures in the RSSAC Caucus. Neither has been exercised since the establishment of the RSSAC Caucus.

- The RSSAC may reject an applicant for the RSSAC Caucus. In that case, the RSSAC Caucus Membership Committee will contact the candidates and thank them for their interest in the RSSAC but indicate that the RSSAC is not recommending their addition to the RSSAC Caucus at this time. On request of the person concerned, the RSSAC explains its decision to refuse to add a person to the RSSAC Caucus. If a candidate appeals the membership decision, the Co-Chairs shall determine how to address the appeal on a case-

by-case basis. (RSSAC 000v2, Section 2.5)

- The RSSAC Caucus Membership Committee periodically reviews the composition of the RSSAC Caucus and may remove members in consultation with RSSAC. On the request of the person concerned, the RSSAC Caucus Membership Committee explains its decision to remove that person from the RSSAC Caucus. (RSSAC 000v2, Section 2.5)

- Unwritten: The RSSAC does not have any unwritten policies related to accountability that would be relevant to this exercise.

SSAC (Security and Stability Advisory Committee)

- ⊙ See SSAC Operational Procedures (OP).

- ⊙ Existing SSAC members can challenge the appointment of new members proposed by the Membership Committee in accordance with OP Section 2.3 New Member Selection. Where an objection is raised, the matter is resolved by consensus of the whole SSAC. SSAC members agree to the content of all SSAC Publications by consensus. SSAC members who have contributed to an SSAC Publication are listed in the document. If an SSAC member wishes to object to the work product or asks to withdraw from consideration of the work product for any reason, the member is offered an opportunity to provide a statement explaining their dissent or withdrawal (OP Section 2.1.2), and/or to be listed in the final document under the section for dissents or withdrawals. Election of SSAC Office Bearers is undertaken in accordance with OP Section 2.8.1.1 Chair Election. Other SSAC Officer Bearers defined in OP Section 1.5 are elected by the same procedure as the Chair. The election of SSAC members to other roles also follows this process. Provisions for challenges to election results are contained within the detailed process.

Recommendations Regarding Accountability (Written and Unwritten)

Our review leads us to recommend that each SO/AC/Group consider adopting the following Good Practices, as applicable to their structure and purpose:

1. SO/AC/Groups should document their decision-making methods, indicating any presiding officers, decision-making bodies, and whether decisions are binding or nonbinding.

2. SO/AC/Groups should document their procedures for members to challenge the process used for an election or formal decision.

3. SO/AC/Groups should document their procedures for non-members to challenge decisions regarding their eligibility to become a member.

4. SO/AC/Groups should document unwritten procedures and customs that have been developed in the course of practice, and make them part of their procedural operation documents, charters, and/or bylaws.

5. Each year, SO/AC/Groups should publish a brief report on what they have done during the prior year to improve accountability, transparency, and participation, describe where they might have fallen short, and any plans for future improvements.

6. Each Empowered Community (EC) Decisional Participant should publicly disclose any decision it submits to the EC. Publication should include description of processes followed to reach the decision.

7. Links to SO/AC transparency and accountability (policies, procedures, and documented practices) should be available from ICANN's main website, under "Accountability." ICANN staff would have the responsibility to maintain those links on the ICANN website.

Review and Recommendations Regarding SO/AC Transparency

The new Bylaws tasked us to:

> "*review and develop … recommendations on SO/AC accountability, including but not limited to improved processes for accountability, transparency, and participation that are helpful to prevent capture.*"

We asked each SO/AC/Group:

> "*What are the published policies and procedures by which your SO/AC is accountable to the designated community that you serve? Specifically, transparency mechanisms for your SO/AC deliberations, decisions, and elections.*"

Review: A summary of responses and resources provided on transparency, supplemented by independent research by the SO/AC Accountability Working Group:

ALAC

- ⊙ ALAC Rules of Procedure are posted at https://community.icann.org/display/atlarge/Rules+of+Procedure.

- ⊙ ALAC's member At-Large Structures (ALS) are listed at https://atlarge.icann.org/alses. Individual members may choose to keep their names private.

- ⊙ 21-day public notice is given before voting is conducted.

- ⊙ All ALAC, RALO, and working group meetings are open to the public.

- ⊙ Meeting minutes, recording, and transcripts are published.

- ⊙ Most ALAC, RALO, and working group mailing lists are published.

- ⊙ Results of elections are published. Individuals may use secret ballots.

- ⊙ ALAC response spoke specifically about risk of "capture":

The ALAC itself is effectively immune from capture, since its members are selected by very geographically and culturally diverse populations. To be admitted as an At-Large Structure (ALS), the organization must be largely controlled by its members, again spreading the responsibility over large areas. In the one RALO where there was a fear that a few countries, because of their relative size compared to the majority, might dominate, weighted voting was instituted giving each country an equivalent vote and if there are multiple ALSes within that country, the vote is divided among them.

There is a potential for multiple ALSes to be linked and "controlled" centrally, despite

the local membership. There are a few potential examples, but these tend to be more a case of perceived possible control rather than real control. Overall, in all such cases, the real risk is not of some entity capturing a large percentage of votes, but is apathy of the rest of the organization. And that is true in much of ICANN.

ASO/NRO

- Members of the regional numbers community are listed at https://www.nro.net/about-the-nro/regional-internet-registries.

- NRO officers are listed on ASO website.

- ASO sessions at ICANN meetings are open to anyone.

- ASO provides glossary for acronyms and an FAQ page.

- ASO publishes minutes of NRO meetings.

- ASO email archives are published for anyone to see.

ccNSO

- ccNSO Guidelines are published at https://ccnso.icann.org/about/guidelines.htm.

- Allows non-member ccTLDs to be present at ccNSO meetings.

- All ccNSO Council decisions are immediately published on ccNSO website and wiki.

- All documents and materials are published on the wiki at least a week before ccNSO Council meetings.

- ccNSO Guidelines Review Committee is reviewing current practices and documentation and may recommend updates and/or new guidelines.

GAC

- GAC Operating Principles are published at https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles.

- Materials on GAC membership, meetings, key topics, correspondence, and meeting notes are published on the GAC website.

- Correspondence between the GAC and the ICANN Board is published on the GAC website.

- All GAC face-to-face meetings (including communiqué drafting sessions) are open and can be monitored in real-time or via recordings and transcripts.

- The GAC communiqué and meeting minutes are published in the six UN languages.

GNSO

- ⊙ Operating procedures are published at https://gnso.icann.org/en/council/op-procedures-01sep16-en.pdf.

- ⊙ Anyone can monitor Council meetings via audio. Meeting recordings, transcript, and minutes are published.

- ⊙ The GNSO Council email list is archived and published for public view.

- ⊙ GNSO Working Group meeting recording and transcripts are published on the Working Group wiki.

- ⊙ GNSO Working Group meeting recording and transcripts are published on the Working Group wiki.

- ⊙ Draft reports of GNSO Working Groups are published on the Working Group wiki.

GNSO-BC (Business Constituency)

- ⊙ The BC Charter is published at http://www.bizconst.org/charter.

- ⊙ BC members are listed at http://www.bizconst.org/bc-membership-list.

- ⊙ All BC filed comments and ICANN correspondence are published on the BC website.

- ⊙ At ICANN meetings, the BC holds some closed sessions and at least one open session.

- ⊙ BC members can monitor BC meetings via adobe and/or audio. Meeting recordings, transcript, and minutes are published to the member email list.

- ⊙ BC members all have access to a private email archive.

- ⊙ Open email communications are published at https://forum.icann.org/lists/bc-gnso/https://forum.icann.org/lists/bc-gnso/.

GNSO-IPC (Intellectual Property Constituency)

- ⊙ Bylaws are published at http://www.ipconstituency.org/bylaws.

- ⊙ Members are listed at http://www.ipconstituency.org/current-membership.

- ⊙ Officers are listed at http://www.ipconstituency.org/officers.

- ⊙ Filed comments are published at http://www.ipconstituency.org/public-comments.

- ⊙ Archived emails are available at http://mm.icann.org/pipermail/ipc-gnso/.

- ⊙ Meeting minutes are published at http://www.ipconstituency.org/meeting-minutes.

GNSO-ISPCP (Internet Service Providers and Connectivity Providers)

- ⊙ ISPCP Charter is published at
https://community.icann.org/pages/viewpage.action?pageId=27854098.

- ⊙ ISPCP Operating Procedures are published.

- ⊙ Officers are listed at https://gnso.icann.org/en/about/stakeholders-constituencies/csg/isp.

- ⊙ Comments filed prior to 2014 are published at
https://community.icann.org/pages/viewpage.action?pageId=27853808.

GNSO-NCSG (Non-Commercial Stakeholders Group)

- ⊙ NCSG Bylaws are published at
https://community.icann.org/display/gnsononcomstake/Charter.

- ⊙ NCSG members are listed at
https://docs.google.com/spreadsheets/d/1o0n2H5xkTPmon8K8wbFg0dAZTouHWgkWjcyNs
Ss_YXw/edit# gid=0.

- ⊙ Executive Committee listed at
https://community.icann.org/display/gnsononcomstake/Leadership+Team.

- ⊙ Meeting minutes are published at
https://community.icann.org/display/gnsononcomstake/Meeting+Records.

- ⊙ Email archives are published for both NCSG and Executive Committee

- ⊙ Statements and letters are published and archived

GNSO-NCUC (Non-Commercial Users Constituency)

- ⊙ Bylaws published at http://www.ncuc.org/governance/bylaws/bylaws-revision-
2016/differential-document/.

- ⊙ Organizational members are listed at http://www.ncuc.org/about/members/.

- ⊙ Executive Committee is listed at https://www.ncuc.org/bylaws/leadership/.

- ⊙ Executive Committee meeting minutes are published at
https://www.ncuc.org/bylaws/leadership/.

- ⊙ Email archives are published at http://lists.ncuc.org/cgi-bin/mailman/listinfo.

- Statements and letters are published at https://www.ncuc.org/policy/policy-statements/.

GNSO NPOC (Not-for-Profit Operational Concerns Constituency)

- NPOC Bylaws (Charter) are published at https://www.npoc.org/governance/charter/

- NPOC has started a Bylaws review at https://community.icann.org/display/NPOCC/NPOC+Charter+Review.

- NPOC members are listed at https://www.npoc.org/about/members/

- Executive Committee listed at http://gnso.icann.org/en/about/stakeholders-constituencies/ncsg/npoc.

- Email archives are published at and Executive Committee at https://mm.icann.org/mailman/listinfo/npoc-discuss.

GNSO RrSG (Registrars Stakeholder Group)

- The RrSG commitment to transparency is first mentioned in Sec. 2.6. Additionally, rules and procedures for group decisions (Motions, elections, "Fast Track" issues, budget approval, etc.) are also defined in the Charter. (http://icannregistrars.org/charter/)

GNSO RySG (Registries Stakeholder Group)

- Minutes of all meetings shall be kept in electronic form or audio form, or both, if feasible, and copies of the minutes (if available) shall be sent to the membership as soon as conveniently possible after each meeting. Private deliberations and conversations need not be recorded.

RSSAC (Root Server System Advisory Committee)

- The RSSAC produces publications in part for the benefit of and consumption by the broader Internet community. In support of this mission, the RSSAC holds public meetings for two principal purposes: 1) to report to the community on its activities and other significant issues and 2) to receive from the community questions, comments, and suggestions. The RSSAC may elect to hold multiple public meetings when the RSSAC is studying a topic of interest over a long period. (RSSAC 000v2, Section 1.5.3)

- The results of RSSAC votes (publication approvals, policy/position decisions, appointments, elections, etc.) are captured in minutes of each meeting, which are posted to the RSSAC website after the RSSAC approves the draft version for publication. (RSSAC 000v2, Section 1.5.3) The RSSAC shares its minutes with the RSSAC Caucus every month. The RSSAC notifies appropriate groups via its liaisons and/or support staff about any decisions or votes.

- The RSSAC provides public briefings on its publications (and updates on its ongoing work) at every ICANN meeting. The RSSAC also briefs the ICANN Board during its joint meetings.

Moreover, the RSSAC participates in a tutorial series organized by the Office of the ICANN CTO, presenting on root server operations. The RSSAC welcomes invitations to explain its publications or to conduct joint meetings with other groups.

SSAC (Security and Stability Advisory Committee)

⊙ Charter is published at https://www.icann.org/groups/ssac/charter.

⊙ Operational Procedures are published at https://www.icann.org/en/system/files/files/operational-procedures-20jun16-en.pdf.

⊙ Member bios and SOIs are listed at https://www.icann.org/resources/pages/ssac-biographies-2016-12-15-en.

⊙ Officer (chair) is named at https://www.icann.org/groups/ssac.

⊙ Reports and advice are published at https://www.icann.org/groups/ssac/documents.

⊙ Correspondence is published at https://www.icann.org/groups/ssac/documents-correspondence.

Note that transparency is part of the structural review of the ALAC, ASO, ccNSO, GNSO, RSSAC, and SSAC, to be conducted at direction of the ICANN board every five years. ICANN Bylaws Section 4.4 requires the Board to cause an independent, periodic review (every five years) of each SO/AC, except that the GAC "shall provide its own review mechanisms." Note that these are required to be independent reviews and are usually conducted by outside consultants hired by ICANN.

Recommendations Regarding SO/AC/Group Transparency

Our review leads us to recommend that each SO/AC/Group consider adopting the following Good Practices, as applicable to their structure and purpose:

1. Charter and operating guidelines should be published on a public webpage and updated whenever changes are made.

2. Members of the SO/AC or Group should be listed on a public webpage.

3. Officers of the SO/AC or Group should be listed on a public webpage.

4. Meetings and calls of SOs/ACs and Groups should normally be open to public observation. When a meeting is determined to be members-only, that should be explained publicly, giving specific reasons for holding a closed meeting. Examples of appropriate reasons include discussion of confidential topics such as:

    a. Trade secrets or sensitive commercial information whose disclosure would cause harm to a person or organization's legitimate commercial or financial interests or

competitive position.

b. Internal strategic planning whose disclosure would likely compromise the efficacy of the chosen course.

c. Information whose disclosure would constitute an invasion of personal privacy, such as medical records.

d. Information whose disclosure has the potential to harm the security and stability of the Internet.

e. information that, if disclosed, would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.

5. Records of open meetings should be made publicly available. Records include notes, minutes, recordings, transcripts, and chat, as applicable.

6. Records of closed meetings should be made available to members and may be made publicly available at the discretion of the SO/AC/Group. Records include notes, minutes, recordings, transcripts, and chat, as applicable.

7. Filed comments and correspondence with ICANN should be published and publicly available.

Review and Recommendations Regarding SO/AC Participation

The new Bylaws tasked us to:

> "review and develop … recommendations on SO/AC accountability, including but not limited to improved processes for accountability, transparency, and participation that are helpful to prevent capture."

We asked each SO/AC/Group to describe:

> "2b. Your policies and procedures to determine whether individuals or organizations are eligible to participate in your meetings, discussions, working groups, elections, and approval of policies and positions."

Review: A summary of responses and resources provided on participation, supplemented by independent research by the SO/AC Accountability working group:

ALAC

- Policies related to the certification or decertification of ALSes are documented within the ALAC RoP and (related to decertification) in the RALO rules coupled with the ALAC RoP.

- Acceptance of individual RALO members is governed by the RALO rules.

- Work Teams (WT – under a number of different names, such as Working groups, Drafting Teams, Subcommittees, etc.) are generally open to all except as limited in the WT Charter, mission, or motion that creates it.

- Locating such documents, like all records in ICANN, can at times be problematic, but there are few if any instances where that has caused a problem. As noted, virtually all meetings are open, and subject to time and the Chair's discretion, who can speak is not generally limited.

- Who can vote in elections is defined in the appropriate ALAC or RALO rules. Each RALO is free to set its own position on issues and the ALAC speaks for itself and all of At-Large as appropriate.

ASO/NRO

- Process is open and inclusive of any entity or individual that wishes to participate in the Numbers community and the Global Policy Development Process (GPDP). As the GPDP by its nature includes engagement of the Numbers community at the five RIR regions respectively, see: https://www.nro.net/about-the-nro/rir-accountability#141.

- Further, to assist members of the community, particularly newcomers, in understanding the NRO NC, its processes, and how a community member can be involved in the GPDP, an FAQ is available at https://aso.icann.org/about-the-aso/aso-frequently-asked-questions/

- The ASO also maintains mailing lists for dissemination of information and engagement with the community. See https://aso.icann.org/contact/aso-mailinglists/.

- To assist members of the community, particular newcomers, in understanding terms that may be used in disclosed material, a glossary is made available at https://aso.icann.org/about-the-aso/glossary/.

ccNSO

- The general rule is that any ccTLD, regardless of its membership of the ccNSO, is always welcome to participate in the meetings of the ccNSO, contribute to discussions, and participate in the work of the working groups. However, only ccNSO members elect ccNSO Councilors and ICANN Board members (seats 11 and 12), as well as vote on the ccNSO policies

GAC

- Procedures for becoming a member of the GAC are available on the GAC website. All members may participate in GAC face-to-face meetings, discussion via the GAC e-mail list, inter-sessional teleconferences, and GAC Working Groups, and are actively encouraged to do so.

- All GAC face-to-face meeting sessions are open (recognizing community feedback on this point) and anyone interested can follow them in real-time as well as through recordings and transcripts.

- The GAC communiqué and minutes of the meeting are published in the six UN languages.

- The schedule for GAC face-to-face meetings is subject to extensive consultation with GAC members, including teleconferences arranged for different time zones.

- Real-time interpretation in the six official UN languages is provided (by ICANN) for GAC face-to-face meetings and inter-sessional teleconferences.

- Travel support is provided (by ICANN) to assist a limited number of GAC members and observers from developing economies to attend face-to-face meetings according to published criteria.

GNSO

- Only Council members can participate in GNSO Council meetings. Subject matter experts outside the Council are sometimes invited to attend a Council meeting to provide information on a dedicated topic. However, all decisional meetings are recorded, transcribed, and available via audiocast.

- Anyone interested can participate in a GNSO Working Group. The only requirement is that a statement of interest is provided (it is not a problem to have a specific interest as long as it is declared). Those not willing or able to participate in working groups as a member have the option to following deliberations as an observer (read only access to the mailing list). All GNSO Working Groups have their mailing list publicly archived as well as recordings and transcripts posted online.

GNSO-BC

- Policies for determining whether individuals or organizations are eligible to participate in BC meetings, discussions, etc., are outlined in §3 of the current BC Charter (http://www.bizconst.org/charter). In the new Charter, eligibility is outlined in §5.

- In order to be eligible to participate within the BC, organizations and their representatives (primary representative and others), the organization must first become a member. Eligibility criteria is outlined in §3 within the current Charter and §5 in the new Charter.

- The process for becoming a member of the BC begins with submitting an application to the BC Secretariat (info-bc@icann.org) or via the website bizconst.org, which is then reviewed by the BC's Credentials Committee (CC) for consideration per the membership eligibility criteria. If an application is approved, the applicant (i.e., the organization/association/company) is notified within 14 business days and sent an invoice to be paid. Once the invoice is paid, the applicant is approved as a BC Member. The BC maintains a public list of all members, at http://www.bizconst.org/bc-membership-list.

- Appeal mechanisms for membership applications and membership credentials are outlined in Section 5.6.2 of the new BC Charter, which gives empowers the Credentials Committee to conduct a review upon request.

- The specific steps are outlined in the Charter, including when the termination of a membership is deemed appropriate. If a BC member is not satisfied with an EC decision, that member may pursue the complaint with ICANN's Ombudsman.

- The BC's teleconference meetings are held bi-weekly, and are open to all BC Members. The BC holds a meeting open to guests during each ICANN Public Meeting. The procedures outlining BC Meetings are in the new BC Charter, in §8.

GNSO-IPC

- In order to be eligible to participate within the IPC, organizations, corporations, law firms, and individuals must first become members of the IPC. Eligibility criteria are outlined in Section II(A)-(C) of the IPC Bylaws:

  Information on joining the IPC, including an online application, is on the IPC website, in the "Join the IPC" section: http://www.ipconstituency.org/join-the-ipc. The membership application process is described in the IPC Bylaw, Section II(D) (Application for Membership).

- Potential applicants shall complete an IPC application form that shall be publicly available on the IPC website or through contacting any IPC officer.

- All applications for membership are forwarded to the IPC officers for consideration and will be voted on by the IPC Council on a regular basis. All applicants may request the status of their application and admission decision and, in the event of any objection to said application, shall be given the opportunity to ask clarifying questions about the objection and shall be given the opportunity to reply with clarification or to reply in general.

- Membership applications are first reviewed by the IPC Membership Committee. If approved by the Membership Committee, the application is then referred to IPC Leadership. If approved by IPC Leadership, the application is lastly referred to the IPCC (Intellectual Property Constituency Council), which consists of the IPC Category 2 (local, state, or purely national intellectual property organizations) and three (international intellectual property organizations) members.

- Members' eligibility to participate in IPC activities is set out in the IPC Bylaws, Section II(F) (Participation).

- There is an appeal mechanisms for the refusal of a membership application or the expulsion of a member. Any decision of the IPC officers can be appealed to the IPCC, with the possibility of further review by the ICANN Ombudsman in accordance with the ICANN Bylaws. [The IPCC may refuse or expel any member where on reasonable grounds it feels it is in the best interest of the IPC to do so, provided that any such action is subject to review by the ICANN Ombudsman in accordance with the ICANN Bylaws.]

GNSO-ISPCP

The ISPCP's policies for determining whether individuals or organizations are eligible to participate in ISPCP meetings, discussions, etc., are outlined in Chapter II., Membership, of the Articles (https://community.icann.org/x/EgWpAQ).

- In order to be eligible to participate within the ISPCP, organizations and their representatives (primary representative and others), first must become a member.

- The process for becoming a member of the ISPCP begins with submitting an application to the ISPCP Secretariat (secretariat@ispcp.info) or via the website (http://www.ispcp.info/), which is then reviewed by the ISPCP's Credentials Committee (CC) for consideration per the membership eligibility criteria. If an application is approved, the applicant (i.e., the organization/association) is notified within 14 business days and the new member is added to the mailing list.

- Appeals: Process not yet included.

- The ISPCP's teleconference meetings is held once a month, and is open to all ISPCP members. The ISPCP holds a public meeting open to guests during each ICANN Public Meeting. Agenda, meeting notes and mp3 recordings from the public meetings held during ICANN meetings are posted on the Constituency website.

GNSO-NCUC (Non-Commercial Users Constituency)

- NCUC's policies and procedures for membership eligibility are stated in section III of the NCUC bylaws. Any organization or individual that becomes an NCUC member will be able to get involved with all policy matters discussed at NCUC, working groups etc. (http://www.ncuc.org/governance/bylaws/)

- Each membership application is individually vetted by the NCSG executive committee. There are also new procedures in the recently amended bylaws to ensure that organizations or individuals whose eligibility status changes can be removed if appropriate.

- NCUC is also aligned with GNSO operating procedures.

- Members are encouraged to join the different PDP working groups and information about policies are shared in regular basis in the main mailing list.

GNSO NPOC (Not-for-Profit Operational Concerns Constituency)

- Policies and procedures to determine whether organizations are eligible to participate in your meetings, discussions, working groups, elections, and approval of policies and positions can be found in Provision 5 (Membership) and 4 (Membership Committee) from the NPOC Charter: https://community.icann.org/display/NPOCC/Charter

- NPOC members are organizations with missions such as: philanthropic, humanitarian, educational, academic and professional development, religious, community associations, promotion of the arts, public interest policy advocacy, health-related services, and social inclusion.

- The Membership Committee, among other things, receive and review member applications and, if the information in the application is not sufficient to warrant acceptance, notify the applicant and request additional information. They then establish, execute and assure compliance with the new member application process. Eventually, they accept new members who qualify in accordance with the Charter. The Membership Committee will keep contact information updated and determine the geographical region representation of the membership base. It will also devise and conduct recruitment and outreach programs.

GNSO RrSG (Registrars Stakeholder Group)

- The community definition for the RrSG is well defined: the SG comprises members in good standing. Furthermore, eligibility for membership is established by Sec. 2.1 of the RrSG Charter (http://icannregistrars.org/charter/), as open only to ICANN-accredited registrars, and for whom their primary relationship with ICANN is as a registrar, rather than as another contracted party (e.g. registry operator).

- Overall RrSG membership is defined by Sec 2.1 in the Charter, but eligibility to be a Voting Member ("Registered Representative") is dependent upon affiliations (if any) with other members or with entities voting in other SGs. Registered and Non-Registered Representatives are described in Sec 2.2 and 2.3.

GNSO RySG (Registries Stakeholder Group)

- All Registries are eligible for membership in the RySG upon the "effective date" set forth in the Registry's agreement with ICANN. For all purposes (including voting), each operator or sponsor shall be considered a single Registry Member of the RySG. Further, in cases where an operator or sponsor has a controlling interest in another registry operator or sponsor, either directly or indirectly, the controlled registry operator or sponsor shall not be considered a separate Member of the RySG. Membership shall be terminated if a member's agreement with ICANN is terminated or a member voluntarily terminates its membership. A Registry that is owned or controlled by, or under common ownership with, or affiliated with any entity that votes in another stakeholder group or constituency in either house of the GNSO is not eligible for voting membership in the RySG. Any question regarding eligibility or exceptions shall be determined by a vote of the RySG.

- In order to join the RySG as a full member with voting rights, the potential Association member must meet the following criteria: the Association must be created primarily to represent registry operators; the Association's voting membership must be composed only of gTLD registry operators; the Association may also allow applicants or potential applicants to be gTLD registry operators to become members of the Association, but these applicants/potential applicants may not have a vote within the Association; and at least one Association member must be a gTLD registry operator that is NOT a RySG member. The RySG would evaluate eligibility via the Executive Committee to vet applications. The Executive Committee has final decision-making authority on any association membership application and may use discretion if unique circumstances make it appropriate to do so.

RSSAC (Root Server System Advisory Committee)

- The membership of the RSSAC is defined in the ICANN Bylaws. RSSAC Operational Procedures further specify which RSSAC members can vote. Voting rights are limited to the appointed primary representatives of each root server operator organization. Each root server operator organization may also appoint an alternate representative to allow for continuity of representation and to fulfill voting obligations when the primary representative is unable to do so. (RSSAC 000v2, Sections 1.2.3 and 1.2.4)

- The RSSAC holds regular, emergency, and public meetings. Regular meetings are closed to the public and are held to conduct the work of the RSSAC. The Co-Chairs may schedule a public regular meeting at their discretion. Emergency meetings are closed to the public and enable RSSAC to respond to extraordinary circumstances. Regular and emergency meetings are open only to members of the RSSAC and invited guests. Public meetings are used both to present the work of the RSSAC and to engage the broader Internet community. (RSSAC 000v2, Section 1.5)

- RSSAC Operational Procedures govern RSSAC activity and work. RSSAC deliberations/discussions take place in person, via teleconference or on a closed mailing list. The RSSAC occasionally forms work parties to carry out organizational work. These work parties are open only to RSSAC members.

- The RSSAC Caucus adopts the RSSAC Operational Procedures as its own. RSSAC Caucus deliberations/discussions take place in person, via teleconference or on an open mailing list. The RSSAC Caucus forms work parties to advance advice development. These work parties are open to all RSSAC Caucus members.

SSAC (Security and Stability Advisory Committee)

- SSAC meetings, discussions, and work groups are normally closed to other than SSAC members, SSAC Support Staff and selected members of ICANN Security and Technical Staff. Occasionally, the SSAC will invite individuals with specific expertise to participate in discussions or on Work Parties if that expertise is lacking in SSAC members.

Recommendations Regarding SO/AC/Group Participation

Our review leads us to recommend that each SO/AC/Group consider adopting the following "Good Practices," as applicable to their structure and purpose:

1. Rules of eligibility and criteria for membership should be clearly outlined in the bylaws or in operational procedures.

2. Where membership must be applied for, the process of application and eligibility criteria should be publicly available.

3. Where membership must be applied for, there should be a process of appeal when application for membership is rejected.

4. An SO/AC/Group that elects its officers should consider term limits.

5. A publicly visible mailing list should be in place.

6. if ICANN were to expand the list of languages that it supports, this support should also be made available to SOs/ACs/Groups.

7. A glossary for explaining acronyms used by SOs/ACs/Groups is recommended

Review and Recommendations Regarding SO/AC/Group Outreach

We asked each SO/AC/Group to describe:

> *"2a. Your policies and efforts in outreach to individuals and organizations in your designated community who do not yet participate in your SO/AC."*

Review: A summary of responses and resources provided on outreach, supplemented by independent research by the SO/AC Accountability working group:

ALAC

⊙ Outreach events while at ICANN meetings.

⊙ Interaction with ICANN Fellows and NextGen.

⊙ Use of CROPP funding to attend meetings and other events, or targeted visits (such as to a country with no current At-Large participation).

⊙ Attendance at various regional and international events. Examples include: Regional IGFs, Global IGF, RIR meetings, regional Internet-related meeting (such as APRICOT).

⊙ Organizing, teach at or otherwise participating in Schools of Internet Governance.

⊙ Using social media to increase awareness.

⊙ Each RALO has an Outreach Strategic Plan.

⊙ Outreach to attract new organizational members (ALSes) is a constant focus. More recently, we are working to increase the number of individual members in the regions the allow them (NA, EU, AP) and results show we are successful.

⊙ We also are about to launch a new program to increase penetration within our ALSes.

⊙ Often, in many cases, it is just one or a few people in the organization who are active within At-Large, and we are determined to increase our breadth of coverage within the ALSes.

ASO/NRO

⊙ Anybody who would like to be involved with the Internet number resource community in their respective region is welcome to suggest or comment on global policy proposals, be elected to serve on the ASO Address Council (ASO AC), or vote in elections. Anyone is welcome to attend ICANN meetings and come to the ASO session(s). Anyone is welcome to attend RIR events in person or remotely, and participate in policy discussions.

- The NRO Number Council (NRO NC) performs the function of the ASO AC. For information on how the NRO NC is constituted, see https://www.nro.net/about-the-nro/the-nro-number-council.

- Further, for information on how members of the NRO NC are elected/appointed from their respective RIR regions, see:

  - AFRINIC: https://www.afrinic.net/en/community/ig/nro

  - APNIC: https://www.apnic.net/community/participate/elections/nro-elections

  - ARIN: https://www.arin.net/participate/elections/nronumbercouncil.html

  - LACNIC: http://www.lacnic.net/en/web/lacnic/aso-nro

  - RIPE NCC: https://www.ripe.net/participate/internet-governance/internet-technical-community/nro [RACI program for the academics]

- In addition, for information on the individual RIRs, see the RIR Governance Matrix at https://www.nro.net/about-the-nro/rir-governance-matrix, specifically Section 1, RIR Bylaws and Operational Documents, and Section 2, Regional Policy.

ccNSO (extracted from CCNSO wiki page)

- CCNSO has regional outreach https://community.icann.org/display/ccNSOCWS/Outreach.

GAC

- GAC face-to-face meetings regularly include capacity-building and outreach sessions to encourage the widest range of participation by members.

- GAC has membership of 170 national and territory governments and 35 observers. The GAC Chair and Vice Chairs, GAC member representatives and ICANN staff, in particular those from the Government Engagement Team, regularly explain the work of the GAC on a bilateral basis and at relevant meetings and conferences. Non-members who are eligible to join the GAC are encouraged to do so. Recent bilateral initiatives include the UK reaching out to Bangladesh.

- GAC also does outreach through the biennial ICANN High Level Governmental Meeting, where Ministers from GAC and Non-GAC member governments are invited.

- GAC face-to-face meetings regularly include capacity-building and outreach sessions to encourage the widest range of participation by members and others.

GNSO

- ICANN newsletters, and outreach to other SOs/ACs.

- Specific newcomer webinars and training tools are available for those that want to learn more about what it takes to participate in GNSO working groups.

GNSO-BC (Business Constituency)

- The BC's commitment to outreach is described in the current BC Charter at §12 and in the new Charter at Section 9:2009 CHARTER, §12:

  "Business users' participation in ICANN is critical. The BC will, in tandem with other members of the CSG, make best efforts to broaden the participation of business users wherever possible according to available resources."

- 2016 CHARTER (undergoing review by ICANN Staff), §9.2:

  The new BC Charter in §9.2 presents the Chair and Vice-Chair for Finance and Operations as being "primarily responsible for allocating funds, proposing plans/programs, and encouraging Member participation in activities designed to achieve the Business Constituency's outreach and recruitment goals."

- Outreach Strategy. Annually, a BC Outreach Strategy is created and approved within the BC, outlining its implementation strategy for the upcoming year, and expected outcomes. BC Outreach strategy is administered by the BC Outreach Committee with the support of its Executive Committee and ICANN staff. In FY16, the BC's Outreach spending totaled 12,750.00 €, which includes activities such as support of events and travel requests.

- The Outreach committee meets via teleconference before each ICANN Public meeting for planning purposes. The Outreach team also drafts an Outreach and Strategic Plan annually, which can be found on the ICANN Wiki space (https://community.icann.org/x/XQKbAw) and actively participates in the Community Regional Outreach Pilot Program (CROPP).

- Newsletters are published by the BC in advance of every ICANN Public Meeting (http://www.bizconst.org/newsletter). Articles are written by BC members and designed by the BC for outreach purposes at each ICANN public meeting, and various outreach events that the BC participates in (such as AfICTA Summits, trade events, and IGF forums).

- BC's CROPP travel forms for past and upcoming travel and outreach events in FY17 will be tracked here: https://community.icann.org/x/zw2OAw.

GNSO-IPC (Intellectual Property Constituency)

- IPC has an Outreach Engagement Committee, which is responsible for planning, oversight, and some execution of the IPC's outreach and engagement strategy.

- Outreach Strategy: The IPC Outreach and Engagement Committee is tasked with developing the Outreach Strategy for the upcoming year. The IPC Outreach and Engagement Strategic Plan for FY17 can be found at https://community.icann.org/x/GgybAw. After the Outreach and Engagement Committee develops a draft plan, it is reviewed and approved first by IPC Leadership (Officers and

Councilors) and then by IPC Membership.

⊙ The IPC participates in ICANN programs, such as the Fellows Program, the Leadership Training Program, CROPP, and various business engagement activities.

⊙ Planning team in advance of each ICANN meeting to coordinate the logistics and events of the IPC, including any outreach and engagement planned for the meeting.

⊙ The IPC holds an open meeting of the constituency at each International Trademark Association (INTA) annual meeting and promotes the IPC at meetings of the INTA Internet Committee. The IPC also conducts informal outreach at other meetings where Intellectual Property Constituency stakeholders will be present (e.g., the annual meeting of MARQUES).

⊙ The IPC has a website and a print brochure for outreach purposes.

⊙ IPC Bylaws: http://www.ipconstituency.org/Bylaws.

⊙ IPC Outreach and Strategic Plan for FY17: https://community.icann.org/x/GgybAw7.

⊙ IPC's CROPP travel forms for past and upcoming travel and outreach events in FY17 will be tracked in the CROPP space, https://community.icann.org/x/2A2OAw.

⊙ ICANN Leadership Program: https://community.icann.org/x/4hK4Aw.

⊙ The IPC brochure can be found at http://www.ipconstituency.org/assets/Fact-Sheets/ipc_onepager_2018 (2).pdf.

GNSO-ISPCP (Internet Service Providers and Connectivity Providers)

⊙ Outreach efforts, per the ISPCP Procedures, are described in Section 7: "The ISPCP will undertake best efforts to broaden participation and awareness of the Constituency and its activities wherever possible and with the resources at its disposal. All ISPCP members should be expected to assist with this goal within their own sphere of activities and flag opportunities for outreach to the Executive Committee."

⊙ Outreach Strategy: Annually, an ISPCP Outreach Strategy is created and approved within the ISPCP, outlining its implementation strategy for the upcoming year, and expected outcomes, which includes activities like, but not limited to, the support of events and travel requests.

⊙ The Outreach committee meets via teleconference before each ICANN Public meeting for planning purposes. The Outreach team also drafts an Outreach and Strategic Plan annually, which can be found on the ICANN wiki space (pending) and actively participates in the Community.

⊙ Regional Outreach Pilot Program (CROPP).

- Bulletins: Bulletins (sometimes referred to as newsletters) are published by the ISPCP in advance of the annual ICANN Public Meeting and archived on the ISPCP website.

- ISPCP Articles (2009 – current): https://community.icann.org/x/EgWpAQ.

- ISPCP's CROPP travel forms for past and upcoming travel and outreach events in FY17 will be tracked here: https://community.icann.org/x/2w2OAw.

- ISPCP Bulletins archive: http://www.ispcp.info/ispcp-bulletin.

GNSO-NCUC (Non-Commercial Users Constituency)

- Outreach events before and during each ICANN meeting.

- Brochures in different languages.

- Free membership.

- Exhibitions and booths in various events outside ICANN meetings, such as IGF.

- Maintain a website.

- Participation in Internet governance-related civil society email lists and events, such as WSIS, the Internet governance caucus list, Bestbits, global and regional IGFs, and civil society-organized events, such as Rightscon and Internet Freedom Festival, among others. NCUC members aim to carry out outreach and inform the broader community about NCUC and ICANN at different IG-related events. A new initiative is underway to facilitate further the outreach requests from NCUC members and the external noncommercial users.

- Close collaboration with ICANN global and regional engagement teams

- Supporting noncommercial and civil society events outside of ICANN and informing them about our work

- Use of CROPP to hold events and send delegates to meetings to encourage the NCUC designated community to join

GNSO NPOC (Not-for-Profit Operational Concerns Constituency)

- NPOC has done several outreach events each year. Some are events with panels and debates, while others are webinars with invited guests. NPOC also has members doing outreach in their region in third parties events regarding the DNS, NGOs, and Internet governance.

- We have brochures in different languages and material from the events and webinars.

- All the outreach in NPOC is being reviewed, especially the webpage, as part of an Outreach Strategy and an onboarding program that will both give startup material for newcomers and create a mentorship dynamic for them to be more easily engaged in the PDPs.

- New outreach events have been started by the current NPOC EXCOM, through CROPP funding, the first been in Senegal, Dakar in January 2017. Other outreach events planned during the intersessional could not take place due to lack of approval. A series of outreach too are taken place during ICANN meetings, the last been at Hyderabad. NPOC plans to have other standalone outreach events either through CROPP funding or other sources from ICANN.

GNSO RrSG (Registrars Stakeholder Group)

- We are provided a list of newly accredited registrars by ICANN GDD Staff, and may reach out to them to inquire about membership. Alternatively, we leverage business networks via other organizations and associations, such as ccTLD policy structures, or groups focused on related business activities, like hosting or domain aftermarkets.

GNSO RySG (Registries Stakeholder Group)

- Outreach letters are sent to all new gTLD registry operators upon signing their registry agreement with ICANN.

- Outreach session held during ICANN 56 in Helsinki, and two sessions planned during ICANN 58 in Copenhagen.

RSSAC (Root Server System Advisory Committee)

- The restructure of 2013 established the RSSAC Caucus of DNS experts to broaden the base of technical expertise and experience available for RSSAC work. The RSSAC Caucus produces RSSAC documents such as reports and advisories.

- The RSSAC Caucus consists of the members of RSSAC as well as individuals who have expressed willingness to work on RSSAC documents. Each member of the RSSAC Caucus maintains a public description of his or her willingness and motivation to help produce the RSSAC documents, relevant expertise, and formal interests in the work area of the RSSAC. (RSSAC 000v2, Section 2.1)

- To this end, the RSSAC Caucus Membership Committee has been tasked with conducting outreach efforts in relevant forums (ICANN, IETF, DNS OARC meetings, etc.) to diversify and grow the membership of the RSSAC Caucus. The purpose of the RSSAC Caucus Membership Committee is to ensure that the RSSAC Caucus has a high-functioning and healthy body of technical experts in DNS root name service. The RSSAC Caucus Membership Committee consists of four individuals – both RSSAC and RSSAC Caucus members – and includes one of the RSSAC Co-Chairs as an ex officio member. (RSSAC 000v2, Section 2.4)

SSAC (Security and Stability Advisory Committee)

- ⊙ Appointment of new SSAC members is undertaken in accordance with OP Section 2.3 New Member Selection. Other SSAC outreach is focused primarily outside the designated community and is focused on publicizing SSAC Reports both to the Board and within the broader ICANN community. Additionally, individual SSAC members participate in many other technical fora such as the Internet Engineering Task Force (IETF), the Anti-Phishing Working Group (APWG), etc. and share relevant SSAC work in those fora.

Recommendations Regarding Outreach

Our review leads us to recommend that each SO/AC/Group consider adopting the following Good Practices, as applicable to their structure and purpose:

1. Each SO/AC/Group should publish newsletters or other communications that can help eligible non-members to understand the benefits and process of becoming a member.

2. Each SO/AC/Group should maintain a publicly accessible website/wiki pages to advertise their outreach events and opportunities

3. Each SO/AC/Group should consider creating a committee (of appropriate size) to manage outreach programs to attract additional eligible members, particularly from parts of their targeted community that may not be adequately participating.

4. Outreach objectives and potential activities should be mentioned in SO/AC/Group bylaws, charter, or procedures.

5. Each SO/AC/Group should have a strategy for outreach to parts of their targeted community that may not be significantly participating at the time, while also seeking diversity within membership.

Review and Recommendations Regarding Updates to SO/AC/Group Policies and Procedures

We asked each SO/AC/Group to describe:

> *"2d. Were these policies and procedures updated over the past decade? If so, could you clarify if they were updated to respond to specific community requests/concerns?"*

Review: A summary of responses and resources provided on updates to SO/AC policies and procedures:

ALAC

- ALAC Bylaws were written in 2003 and updated.

- The Memorandums of Understanding creating the RALOs all date back to 2006-2007. The original ALAC Rules of Procedure and RALO governance documents also date to that same era, as do the regulations governing how ALSes are certified and decertified. The ALAC Rules of Procedure (RoP) were completely rewritten in 2013, and many other of the associated documents and processes formalized at that time. APRALO rewrote their Rules of Procedure in 2014 and the other four RALOs are at various stages of rewriting their operating documents. Rewriting such documents tends to be a monumental effort and time devoted to that must be balanced with volunteer time spent on the real reason we are here.

- All of these have been revised or re-written based on the recognition by those trying to govern themselves by these documents that they were insufficient (and that new/revised ones were worth the effort taken to effect the changes). Either as part of the internal review we are conducting on ALS membership criteria and the expectations we have from ALSes and RALOs, or as a result of the current At-Large Review, we expect an extensive rewrite of the ICANN Bylaws for the ALAC (ensuring that they say what actually is happening and not what people in 2002 thought we should be doing).

ASO/NRO

- Pursuant to the ASO MOU (https://aso.icann.org/documents/memorandums-of-understanding/memorandum-of-understanding/) which references Article IV, Section 4 of the ICANN Bylaws (https://www.icann.org/resources/pages/bylaws-2012-02-25-en#IV), the NRO provides its own review mechanisms for periodic review of the ASO.

- For the current RFP related to the upcoming review, see: https://www.nro.net/news/request-for-proposals-for-consulting-services-independent-review-of-the-icann-address-supporting-organisation.

- In addition, see https://www.icann.org/resources/reviews/org/aso for information on current and past reviews.

- Most recent completed report is available at https://www.nro.net/wp-content/uploads/ASO-Review-Report-2012.pdf.

- RIRs have their own accountability assessment report.

ccNSO

- The ccNSO has developed a range of guidelines, which define and delineate the accountability of the ccNSO Council with respect to the ccNSO membership and broader ccTLD community. These guidelines and rules define, inter alia, internal ccNSO relation between the ccNSO Council and membership, allocation of travel funding, participation in working groups, and newly created bodies. All these rules should be considered internal rules in the sense of the ICANN Bylaws and can be found at:

https://ccnso.icann.org/about/guidelines.htm.

⊙ The general rule is that any ccTLD, regardless of its membership of the ccNSO, is always welcome to participate in the meetings of the ccNSO, contribute to discussions, and participate in the work of the working groups. However, only ccNSO members elect ccNSO Councilors and ICANN Board members (seats 11 and 12), as well as vote on the ccNSO policies. All decisions of the ccNSO Council are immediately published on the ccNSO website and wiki space. After discussions with the community, the ccNSO Council decided to implement additional measures to ensure that community members are better informed about the issues discussed by the ccNSO Council. It means that all documents and materials are published on the wiki space at least a week before the ccNSO Council meeting and the community is invited to provide input prior to the meeting.

⊙ Since December 2014, a ccNSO working group – the Guidelines Review Committee (GRC) – has been reviewing current practices and related documentation of the ccNSO. If considered necessary by the GRC, updates of the documentation and/or new guidelines are suggested and after consultation with the ccNSO membership are adopted by the ccNSO Council. The GRC has also been tasked to develop and propose guidelines, practices and working methods to implement the ccNSO related direct and indirect aspects of the 1 October 2016 ICANN Bylaws.

GAC

⊙ The GAC participates at a community-wide level by appointing members to the ATRT and other review teams. All GAC-related recommendations in both the ATRT1 and ATRT2 Final reports have been implemented by the GAC.

⊙ The GAC reviews its internal processes and Operating Principles in response to external developments and the views of members. The Operating Principles were reviewed and amended in 2010, 2011, and 2015. They are currently undergoing a comprehensive review.

GNSO

⊙ Review of such policies and procedures is covered as part of the structural review of the GNSO which has resulted in previous improvements and updates. The recommendations of the current GNSO Review are in the process of being implemented.

GNSO-BC

⊙ The current Charter displayed on the BC website was revised in 2009. In 2014, the BC established a Charter revision committee to explore another Charter update. A new Charter was approved by BC Members in October 2016 and submitted to ICANN to undergo the five-stage approval process. The new Charter appears in the Appendix and at http://www.bizconst.org/charter.

⊙ The BC updates its Charter based upon cumulative requests from BC members. Requests typically note a need for clarifications, for specific amendments, or the need to update the

Charter to account for changing circumstances.

GNSO-IPC (Intellectual Property Constituency)

- The IPC Bylaws were adopted on 15 November 2010 and replace the Bylaws that were effective 14 November 2005. The Bylaws were updated, at least in part, to respond to specific community requests/concerns. For example, there were concerns that under the old Bylaws, there was no voting role for individual members. Such a role was provided in the revised Bylaws.

GNSO-ISPCP (Internet Service Providers and Connectivity Providers)

- Not updated

GNSO-NCUC (Non-Commercial Users Constituency)

- NCUC just conducted a major review and revision of its Bylaws. The process, which started almost two years ago, has involved a major redrafting and finally approval by a supermajority of the membership. The revised NCUC Bylaws provide more clarity on membership eligibility requirements as well as formal procedures for removal of members and officers. The new Bylaws also contain a clause reaffirming NCUC's commitment to accountability.

GNSO NPOC (Not-for-Profit Operational Concerns Constituency)

- NPOC is less than 10 years old as a Constituency and is now going under a Charter review that is lead both by the new ICANN Bylaws after the transition, but as well as part of the community request and concerns regarding improving NPOCs structure, policies, and procedures to better address its community interests.

GNSO RrSG (Registrars Stakeholder Group)

- Most recently updated in 2014 to reflect changes that would clarify some ambiguities around membership eligibility and elected offices. The charter amendments were developed by an RrSG working group working with ICANN staff, and were approved by members and the ICANN Board. They may also have been put out for public comment.

- The RrSG Charter is also currently undergoing another review, with completion and ratification hopefully completed by June 2017. Primary changes are to ensure smoother operation of the SG procedures, as well as to clarify the eligibility to hold office.

GNSO RySG (Registries Stakeholder Group)

- Community request to translate our Charter into the six UN approved languages. All translated versions now available on our website.

- Community request for Association membership was approved and now part of our Charter. Two Association members now part of the RySG community: Brand Registry Group and the GeoTLD Group.

RSSAC (Root Server System Advisory Committee)

- The RSSAC reviews its operational procedures annually. The most recent review of this document in late 2015 yielded several clarifying changes which were approved in June 2016.

- The first review of the RSSAC from 2008-2009 produced several recommendations for improvement. As a result, the RSSAC implemented significant structural changes in 2013, reflected in its Operational Procedures. The RSSAC looks forward to its next review scheduled to begin in May 2017.

SSAC (Security and Stability Advisory Committee)

- The SSAC OP is reviewed annually. The current Version 5.0 is dated 20 June 2016. These reviews have resulted in several changes, such as to the New Member Selection and Annual Review processes undertaken in late 2015-early 2016, resulting in Version 5.0. The SSAC has previously advised that it wishes to continue providing its input to the ICANN Community in a purely advisory capacity and does not wish to take on any role in exercising community powers. Additionally, in the annual review of the OP the SSAC takes into consideration concerns, if any, raised by the community and ensures that the OP is not in conflict with the ICANN Bylaws with respect to the SSAC and its role.

Recommendations regarding Updates to SO/AC/Group Policies and Procedures

Our review leads us to recommend that each SO/AC/Group consider adopting the following Good Practices, as applicable to their structure and purpose:

1. Each SO/AC/Group should review its policies and procedures at regular intervals and make changes to operational procedures and charter as indicated by the review.

2. Members of SOs/ACs/Groups should be involved in reviews of policies and procedures, and should approve any revisions.

3. Internal reviews of SO/AC/Group policies and procedures should not be prolonged for more than one year, and temporary measures should be considered if the review extends longer.

Track 2. Evaluate the Proposed "Mutual Accountability Roundtable" to Assess its Viability and, if Viable, Undertake the Necessary Actions to Implement It

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

> *"A roundtable of the Board, CEO and all supporting SO/AC 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.[8] 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*

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[8] L. David Brown: `Multiparty social action and mutual accountability' in Global Accountabilities: Participation, Pluralism and Public Ethics Cambridge University Press, 2007.

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

Conclusion and Recommendation

The Mutual Accountability Roundtable as originally described is more of a transparency exercise where experiences and Good Practices may be shared. We note that SO/AC chairs have a standing email list and may convene calls and meetings at any time. That creates an appropriate forum for sharing of experiences and Good Practices.

While a small minority of CCWG-Accountability participants prefers a formal public discussion, the CCWG-Accountability consensus view is not to recommend the Mutual Accountability Roundtable for formal implementation.

Track 3. Assess Whether the Independent Review Process (IRP) Should be Applied to SO/AC Activities

The question addresses by this working group is, "Whether the Independent Review Process (IRP) should be applied to SO & AC activities."

The answer proposed by our group has three parts:

1. The IRP would not be applicable to SO & AC activities, as the IRP is currently described in Bylaws.

2. While the IRP could be made applicable by amending bylaws significantly,

3. The IRP should not be made applicable to SO & AC activities because it is complex and expensive, and there are easier alternative ways to challenge an AC or SO action or inaction.

1. The IRP would not be applicable to SO/AC activities, as is currently described in Bylaws.

In the current ICANN Bylaws, the IRP is extensively explained in section IV.3. The IRP is designed to challenge ICANN Board and staff action and inaction that harms specific individuals by violation of the Articles of Incorporation or the Bylaws. While SO/ACs can be parties to an IRP as claimants, the IRP is not a mechanism that could call SO/ACs into account. Its jurisdiction per the Bylaws does not include disputes brought against or involving SO/ACs; an IRP panel would dismiss the claim if brought against SO/ACs due to lack of jurisdiction. This is made explicit in the Bylaws definition of covered actions to which the IRP is applicable:

> In Section 4.3.b.B (ii) "Covered Actions" are defined as any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute."

SO/ACs are not among the entities in the defined Covered Actions.

2. The IRP could theoretically be made applicable to SO/ACs, by amending bylaws significantly, but it might face other challenges. For example, SO/ACs are not legal entities, and would need to have legal standing to be called into account under an IRP. There would be additional substantive issues to be dealt with, including which actions or inactions of SO/ACs could be challenged in the IRP. Such substantive non-technical matters would increase the complexity of such a Bylaws change, although this complexity alone is not a definitive reason to forgo use of IRP against SO/ACs.

3. The IRP should not be made to apply to SO/AC activities, because it is complex and expensive. IRPs do not render monetary judgment, but when a panel awards costs an SO/AC might not have a budget to cover such costs.

Therefore, our group's conclusion is that the IRP should not be made applicable to activities of SO/AC/Groups. The appropriate mechanism for individuals to challenge an AC or SO action or inaction is though ICANN's Ombuds Office, whose bylaws and charter are adequate to handle such complaints.[9]

We note that duties and powers of the Ombuds Office may be further enhanced and clarified through recommendations of the CCWG-Accountability Work Stream 2 project "Considering enhancements to the Ombudsman's role and function," as provided in ICANN Bylaws.[10]

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[9] Statement of Herb Waye, ICANN Ombudsman, 13-Jul-2017, regarding Section 5 of ICANN Bylaws at
https://www.icann.org/resources/pages/governance/bylaws-en/#article5
[10] Article 27, Transition Article, in ICANN Bylaws as adopted Oct-2016, at
https://www.icann.org/resources/pages/governance/bylaws-en/#article27

Annex 1. Working Group Participants and Activity

The SOAC-Accountability Working Group convened 33 conference call meetings between August 2016 and September 2017. Working Group participants listed at https://community.icann.org/pages/viewpage.action?pageId=59643284.

Cheryl Langdon-Orr, Co-Rapporteur
Farzaneh Badii, Co-Rapporteur
Steve DelBianco, Co-Rapporteur
Alan Greenberg
Athina Fragkouli
Avri Doria
Christian Dawson
Christopher Wilkinson
Denise Michel
Fiona Asonga
Giovanni Seppia
Greg Shatan
Herb Waye
Isaac Maposa
Jean-Jacques Subrenat
John Curran
Jon Nevett
Jordan Carter
Jorge Cancio
Jorge Villa
Juan Alejo Peirano
Julf Helsingius
Kavouss Arasteh
Malcolm Hutty
Mary Uduma
Matthew Shears
Olga Cavalli
Phil Buckingham
Rafik Dammak
Renu Sirothiya
Rinalia Abdul Rahim
Robin Gross
Rosalia Morales
Samantha Eisner
Sebastien Bachollet
Seun Ojedeji
Sivasubramanian Muthusamy
Stefania Milan
Tatiana Tropina
Tom Dale
Vinay Kesari

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Annex 7 – Staff Accountability Sub-Group Final Report and Recommendations – CCWG-Accountability

ICANN

TABLE OF CONTENTS

Introduction

This document is the product of the Work Stream 2 Staff Accountability Sub-Group. The group conducted its work in line with the mandate set out in the Work Stream 1 report (see Supplement, Part VI).

The group adopted the definition of "accountability" used by the Board and organization in its development of the Board resolution on delegated authorities, passed in November 2016. 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 focus of this group was to assess "staff accountability" and performance at the service delivery, departmental, or organizational level, and not at the individual, personnel level.

The group's work was a combination of problem-centered analysis as well as solution-focused exploration, with the goal of identifying any gaps to address as part of an effort to create a comprehensive system of checks and balances, based on the assessment of tools and systems currently or newly in place. The group considered the roles and responsibilities of ICANN's Board, staff, and community members and the links between them; sought input on issues or challenges relating to staff accountability matters; and assessed existing staff accountability processes in ICANN.[1]

In general, these efforts revealed an extensive accountability system both within the ICANN organization as well as in the mechanisms of review and redress afforded the community, including the Board's role, the Empowered Community Powers, Complaints Office, and Office of the Ombuds. The group found that many of the issues or concerns identified by the group will benefit from simply making existing mechanisms more transparent. The group has identified a few important changes that will further enhance these accountability mechanisms. The changes proposed are designed to work with existing systems and processes, and to help establish mechanisms to support continuous improvement within the ICANN system.

Note: A description of the process followed by the sub-group is presented in a separate document, which also includes the worksheets used in the process of developing the recommendations (https://docs.google.com/document/d/1Vqz7RDHgazhZfIVyv5tzAbtQfgLACqV-wGD7xPX9-w8/edit?ts=5a0488e3).

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[1] This report is using the agreed-upon usage for the ICANN organization (which includes all full, part-time, and contracted staff), ICANN Board, and ICANN community. The term ICANN, when used alone, refers to the trinity of ICANN Organization, ICANN Board and ICANN community.

Roles & Responsibilities

1. The primary role of those who work for ICANN – the "ICANN staff" or the "ICANN organization" – is to execute the strategy and plans adopted by the ICANN Board. They do the day-to-day work of the organization, working with the ICANN community in many cases to do that work.

2. This staff role is distinct from the roles of the ICANN Board and ICANN community.

3. The ICANN Board is made up of people from within and beyond the ICANN community. It is the formal governance body. It is responsible for the usual set of governance functions, and is integral to maintaining and developing ICANN as an open and accountable organization.

4. The ICANN community is the stakeholder groups and individuals who participate through its processes in advancing ICANN's mission. They are co-producers in much of ICANN's work. The community are not governors and are not staff; their involvement in ICANN is generally voluntary from ICANN's point of view.

5. Formally speaking, staff accountability is through the Chief Executive to the ICANN Board.

6. Informally speaking, relationships between and among staff, Board, and community are integral to the successful work of the ICANN system. ICANN needs to hold staff accountable for succeeding in those relationships and in dealing with any problems.

7. In thinking about staff accountability, the important point is that collaboration is essential to ICANN's success. The community needs to be sure, when appropriate, that ICANN staff will be congratulated and thanked when things are working well, and also to be sure, when appropriate, that staff are held accountable through the usual set of Human Resources (HR)[2] and performance management approaches where things don't go well. Formal and informal systems need to be working together to achieve this.

8. Clear delegations and open, well-communicated process for resolving issues will help generate certainty and clarity and ensure that issues if they arise are dealt with well. Such an approach also generates important information and feedback for ICANN, allowing it to evolve and improve over time.

9. An ICANN document, "**ICANN's Delegation of Authority Guidelines**[3]," sets out more detail of the respective roles of ICANN's Board, CEO, and staff, and how these interact. It was first published in November 2016. The organization has been improving the clarity of this over time as it has matured, and this document will continue to evolve over time.

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[2] In this document HR is used in its Human Resources, i.e. personnel, meaning
[3] See: https://www.icann.org/en/system/files/files/delegation-of-authority-guidelines-08nov16-en.pdf

Issues

The Staff Accountability Sub-Group reached out to the larger community to identify occasions on which there has been concern about accountability issues related to staff. The sub-group received descriptions of various issues, including copies of messages sent to the Board, individual written statements and verbal comments during meetings. As this Staff Accountability process is about improving the processes and culture associated with staff accountability at the service delivery, departmental, or organizational level, the group did not identify individuals and does not identify specific incidents in this report.

After the elements involved in the group's assessment were collected and discussed, the following themes emerged, which the group determined are of a sufficiently systemic nature and should be addressed by the community.

Underlying issues or concerns, identified through the group's analysis:

⊙ **Lack of broad and consistent understanding of the existence and/or nature of existing staff accountability codes of conduct and other mechanisms.**

The work of the CCWG-Accountability noted a lack of understanding of how the organization sets department and individual goals, how those goals support ICANN's mission and strategic goals and objectives, and how the community might be able to provide constructive input into the performance of ICANN services, departments, or individuals they interact with.

Also identified was an inconsistent understanding of the expectations related to the development of public comment staff reports, or other substantive response to community feedback.

⊙ **Lack of an effective diagnostic mechanism to clearly identify and then address accountability concerns between community and organization.**

One of the overriding themes of the group's work was addressing the challenge that much of the evidence provided was general or anecdotal in nature. There was broad consensus that there were concerns in the community, but it was difficult to single out the key sources of the concern. The group noted in its discussions that there was no established approach for measuring the satisfaction or relationship "health" of the overall community and of its respective components with respect to service delivery at the departmental or organizational level

The work of the group identified a consistent theme of the desire for a safe forum for expressing concerns regarding organizational performance in a less formal or alarmist fashion than the current mechanisms of sending "formal" correspondence directly to the Complaints Office, CEO, or Board. Another consistent theme was the concern about how to best address perceived inconsistencies or concerns regarding implementation of community recommendations.

Recommendations

Based on these underlying issues or concerns, the group is proposing the following recommendations.

1. To address the lack of understanding of the existence and/or nature of existing staff accountability mechanisms the following actions should be taken:

    a. The ICANN organization should improve visibility and transparency of the organization's existing accountability mechanisms, by posting on icann.org in one dedicated area the following:

        I.   Description of the organization's performance management system and process.

        II.   Description of how departmental goals map to ICANN's strategic goals and objectives.

        III. Description of the Complaints Office and how it relates to the Ombudsman Office.

        IV.   Organization policies shared with the CCWG-Accountability during the course of the WS2 work.

        V.   ICANN Organization Delegations document.

        VI.   The roles descriptions included in this overall report.

        VII. Expectations and guidelines regarding the development of staff reports for public comments, or staff response to community correspondence.

    b. The ICANN organization should also evaluate what other communication mechanisms should be utilized to further increase awareness and understanding of these existing and new accountability mechanisms.

2. To address the lack of clearly defined, or broadly understood, mechanisms to address accountability concerns between community members and staff members regarding accountability or behavior:

    a. The ICANN organization should enhance existing accountability mechanisms to include:

        I.   A regular information acquisition mechanism (which might include surveys, focus groups, or reports from the Complaints Office) to allow the ICANN organization to better ascertain its overall performance and accountability to relevant stakeholders.

              The group notes that several new mechanisms are now established, but have not yet been exercised enough to determine effectiveness or potential adjustments. The evaluation mechanism proposed here would be helpful in determining effectiveness of these recent mechanisms before creating yet more mechanisms that may turn out to be duplicative or confusing for the organization and community.

II. Results of these evaluations should be made available to the community.

    b. Consistent with common best practices in services organizations, standardize and publish guidelines for appropriate timeframes for acknowledging requests made by the community, and for responding with a resolution or updated timeframe for when a full response can be delivered. The ICANN organization should include language in the performance management guidelines for managers that recommends people managers of community-facing staff seek input from the appropriate community members during the organization's performance reviews. Identification of appropriate community members, frequency of outreach to solicit input, and how to incorporate positive and constructive feedback into the overall performance review should be at the discretion and judgement of the personnel manager, with appropriate guidance from HR as necessary. Such a feedback mechanism should be supplemental to the existing mechanisms available to the community to provide input on ICANN staff performance, including direct communication to specific staff members, their personnel managers, senior executive staff, Board Directors, and the Complaints Officer.

3. The ICANN organization should work with the community to develop and publish service level targets and guidelines (similar to the Service Level Agreement for the IANA Numbering Services) that clearly define the services provided by ICANN to the community as well as the service level target for each service. In this context:

    a. ICANN should work with the community to identify and prioritize the classes of services for which service level targets and guidelines will be implemented, and to define how service level targets and guidelines will be defined.

    b. Develop clear and reasonable guidelines for expected behavior between the ICANN organization and the community for those newly identified activities.

    c. Develop and publish the resulting service levels, targets, and guidelines in a single area on icann.org. These targets and guidelines should also inform any regular information acquisition mechanism described in Recommendation 2 of this report.

The structure and specific timing of this effort should be determined by the ICANN organization (but be substantially underway before the end of 2018). We suggest that representatives of ICANN's executive team, the ICANN Board, and SO/AC Leadership participate in this effort to ensure a constructive dialogue across all parts of the ICANN community. This work should be, and be seen as, a genuine chance for collaboration and improved relationships between the Board, organization and community.

Thank you to the ICANN organization for their collaboration in preparing this work. Staff accountability is of vital concern to the leaders of any organization; the recommendations here are designed to be enhancements of a system that is generally believed by many to be working well.

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Annex 8.1 – Transparency Sub-Group Final Report and Recommendations – CCWG-Accountability

CCWG-Accountability Work Stream 2 – Recommendations to Improve ICANN's Transparency

1 May 2018

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Executive Summary

As ICANN seeks to improve its governance, transparency is a key ingredient to promoting accountability and effective decision-making. This Report, developed as part of the Work Stream 2 processes of the Cross Community Working Group on Accountability (CCWG-Accountability WS2), explores areas of improvement and proposes targeted recommendations to improve transparency, tailored to ICANN's unique position as the steward over a vital international resource.

The Report begins with an introductory discussion of global transparency standards, to make the case for why this issue is important and to establish the source material underlying our recommendations. There are many well-recognized benefits to a robust transparency system, including providing public oversight over decision-making, generating a strong system of accountability, and facilitating public engagement. Given ICANN's long struggle to battle public misconceptions about its role, functions, and governance, transparency will be a key ingredient in countering misinformation and rumor.

The second section considers improving ICANN's Documentary Information Disclosure Policy (DIDP). The CCWG-Accountability WS2 Final Report reveals strong support for major improvements to this policy. Among the most important proposed changes are bolstering the requesting procedures, including centralizing the response function among a single employee or team, and creating a responsibility for ICANN staff to assist requesters as necessary, particularly where the requester is disabled or unable to adequately identify the information they are seeking. It is also recommended that timeline extensions should be capped at an additional 30 days and that several of the exceptions be narrowed, so that they only apply to material whose disclosure would cause actual harm. The exception for vexatious requests should require consent from an oversight body before it is invoked. Ongoing monitoring and regular evaluation of the system is also recommended.

The third section discusses documenting and reporting on ICANN's interactions with governments. While ICANN is currently obligated under U.S. federal law to report any and all federal "lobbying" activity, such reports are limited in their utility. First, reports filed under the federal Lobbying Disclosure Act (LDA) apply only to federal "lobbying" activities, thus not capturing any U.S. state or international interactions. Second, the reports do not encompass engagement with government officials that falls outside the statutory definition of "lobbying" [1] or fails to meet certain statutory thresholds. In light of these deficiencies, it is recommended that certain additional disclosures be made to complement ICANN's U.S. federal lobbying disclosure and provide a clearer picture of how, when, and to what extent ICANN engages with governments. This information may also better inform the Empowered Community if and when it challenges any ICANN Board action. Indeed, the CCWG-Accountability in its final Work Stream 1 report asked for such transparency.

The fourth section discusses transparency of board deliberations. Virtually every access to information policy has some form of exception to protect the integrity of the decision-making process. However, since this can be an extremely broad category, it is important to take a

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[1] The LDA defines "lobbying" as lobbying contacts and any efforts in support of such contacts, including preparation or planning activities, research, and other background work that is intended, at the time of its preparation, for use in contacts, and coordination with the lobbying activities of others. For additional guidance re the LDA, please see http://lobbyingdisclosure.house.gov/amended_lda_guide.html

purposive approach, applying it only to information whose disclosure would cause harm. The recommendations also include clearer rules on how material is removed from the published minutes of Board meetings, including a requirement to ground these decisions in the exceptions in the DIDP, and to establish timelines for disclosure of redacted material.

The fifth section discusses improving ICANN's Anonymous Hotline (whistleblower protection). It is appreciated that ICANN responded to a recommendation from the second Accountability and Transparency Review and retained NAVEX Global to conduct a review of ICANN's Anonymous Hotline Policy and Procedures. Overall, NAVEX produced a very solid analysis of Hotline policies and procedures and proposed appropriate recommendations for improvements. It was recommended that NAVEX's recommendations be implemented by June 2017 as they address several concerns about the need for improvements in policies and procedures. These concerns pertain to: (1) the clarity and availability of the existing policy and employee education around it; (2) the definition of incidents report, which is too narrow; (3) the Hotline policy scope; (4) the operation of the Hotline process; (5) addressing fear of retaliation more effectively; and (6) the need for regular third-party audits.

This Report is the result of a multistakeholder consultation, whose inputs were refined into a set of targeted recommendations by sub-group volunteers. The CCWG-Accountability looks forward to further engagement on these issues, including the opportunity to hear from ICANN's staff on these issues.

Background on Transparency and the Right to Information

Institutional transparency is, in many ways, an emergent and evolving concept. Over the past two decades, the right to information has gone from being viewed solely as a governance reform to being broadly recognized as a fundamental human right,[2] protected under Article 19 of the United Nations' *Universal Declaration of Human Rights*,[3] as well as the freedom of expression guarantees found in other international human rights treaties. These include, for example, the *Charter of Fundamental Rights of the European Union*, where the right to information is enshrined under Article 42.[4] The right to information is also protected under the *American Convention on Human Rights*[5] as a result of the case of *Claude Reyes and Others v. Chile*.[6]

The expanding recognition of the right to information has also been accompanied by the development, through jurisprudence and international standard setting, of established best practices in the implementation of robust transparency systems. At the core of this emergent understanding is the basic idea that the people, from whom all legitimate public institutions ultimately derive their authority, should be able to access any information held by or under the control of these institutions. Although, for the most part, this idea is focused on governments and related public bodies, it is broadly understood that the right should apply equally to non-governmental organizations that serve a fundamentally public purpose, such as where a government privatizes the water or power utilities.[7] Consequently, recent years have seen a significant expansion of the right to information to a range of private, non-governmental, quasi-governmental, or intergovernmental institutions.

Beyond cases where they are legally required to implement right to information systems, such as where a national law has been extended to apply to them, many organizations have embraced the right to information due to the benefits that flow from robust transparency, particularly in terms of improved governance, accountability, and outreach. For example, transparency is a key instrument for fighting corruption and mismanagement, by allowing broad oversight over decision-making and generating a sense of public accountability among staff. This is reflected in the famous saying by Louis Brandeis, an eminent American jurist, that "sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[8]

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[2] The sub-group recognizes that ICANN has adopted a Bylaw/Core Value concerning respect for human rights and that another Work Stream 2 sub-group is developing a Framework of Interpretation in such respect. The work of this sub-group is focused solely on transparency and does not intrude on these other efforts.
[3] UN General Assembly Resolution 217A(III), 10 December 1948. The entrenchment of the right to information as part of freedom of expression was cemented by the UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, available at: http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.
[4] Adopted 7 December 2000, Official Journal of the European Communities, 18 December 2000, C 364/01. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1526337810405&uri=CELEX:32000X1218(01).
[5] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, entered into force 18 July 1978.
[6] 19 September 2006, Series C No. 151, para. 77 (Inter-American Court of Human Rights). Available at: www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.
[7] See, for example, right to information laws in force in Mexico, Nicaragua, Moldova, South Africa, Ukraine, Bangladesh, Kosovo, Colombia, Bosnia and Herzegovina, Georgia, Armenia, Estonia, Ireland, Guatemala, Argentina, Nigeria, Rwanda, Serbia, Ecuador, etc.
[8] Louis Brandeis, *Other People's Money* (Louisville: University of Louisville Louis D. Brandeis School of Law, 2010). Available at: www.law.louisville.edu/library/collections/brandeis/node/196.

Similarly, the right to information is an important ingredient in generating trust in institutions and facilitating dialogue with the public. For international organizations, which often need to engage with an even wider and more diverse network of stakeholders than governments do, transparency is a key mechanism for fostering open discussion about their strategies and goals, and to enabling interested parties to get a closer and more accurate understanding of what they do and how they do it.

As a consequence of these benefits, right to information policies have been put into force in many international financial institutions, including the European Investment Bank,[9] the Asian Development Bank,[10] the Inter-American Development Bank,[11] and the African Development Bank,[12] as well as UN institutions such as UN Environment Programme,[13] the UN Children's Fund,[14] the World Food Programme,[15] UN Population Fund[16] and the UN Development Programme.[17]

Although ICANN is, of course, neither a government nor an intergovernmental institution, the benefits of a robust transparency system apply equally to its unique status and context. No institution is immune from mismanagement, and many eyes make it easier to spot problems before they become entrenched. Considering the long-running battles that ICANN has fought to counter public misconceptions about its role, functions, and governance, it is worth noting that conspiracy theories thrive in an environment of secrecy. Transparency, and an organizational stance that demonstrates that ICANN has nothing to hide, is the best answer to such misinformation and rumor. In a governmental context, it is widely recognized that a successful democracy requires an informed electorate, which fully understands the challenges a government faces, and the thinking which underlies particular policies. Similarly, ICANN's multistakeholder approach can only work if its constituents are able to obtain clear, timely, and accurate information about the institution, to ensure that their opinions and positions are grounded in fact. As stewards of a global public resource, transparency is fundamental to guaranteeing public trust in the role that ICANN plays, as well as to improving governance and management within the institution itself.

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[9] *European Investment Bank Group Transparency Policy*, March 2015. Available at: www.eib.org/attachments/strategies/eib_group_transparency_policy_en.pdf.
[10] *Public Communications Policy,* 2005. Available at: www.adb.org/site/disclosure/public-communications-policy.
[11] *Access to Information Policy*, April 2010. Available at: www.iadb.org/document.cfm?id=35167427.
[12] *Group Policy on Disclosure of Information,* October 2005. Available at: www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/10000004-EN-THE-AFRICAN-DEVELOPMENT-BANK-GROUP-POLICY-ON-DISCLOSURE-OF-INFORMATION.PDF.
[13] UNEP Access-to-Information Policy (Revised), 6 June 2014. Available at: www.unep.org/environmentalgovernance/UNEPsWork/AccesstoInformationPolicy/Revised2015/tabid/1060867/Default.aspx.
[14] UNICEF, Information disclosure policy, 16 May 20111. Available at: www.unicef.org/about/legal_58506.html.
[15] WFP Directive on Information Disclosure, 7 June 2010. Available at: documents.wfp.org/stellent/groups/public/documents/newsroom/wfp220973.pdf.
[16] Information Disclosure Policy, 2009. Available at: www.unfpa.org/information-disclosure-policy.
[17] Information Disclosure Policy, 1 October 2015. Available at: www.undp.org/content/undp/en/home/operations/transparency/information_disclosurepolicy.html.

Improving ICANN's Documentary Information Disclosure Policy (DIDP)

Probably the most important aspect of a robust transparency policy is providing people with a mechanism by which they can request access to information. Early on in our consultations, it became apparent that there was strong support for major improvements to ICANN's Documentary Information Disclosure Policy (DIDP). Fortunately, in designing a strong transparency policy there is a rich body of international standards to draw from. Although most of these ideas were developed in the context of governmental or intergovernmental right to information systems, they are easily adapted to suit ICANN's unique operational context. Moreover, an increasing number of international organizations, such as UN agencies, international financial institutions (IFIs), and even NGOs, have adopted right to information policies of their own, providing a range of potential models, whose strengths and weaknesses informed our thinking.

A strong right to information policy should begin by recognizing a right of access, which applies to all information held by, generated by or for, or under the control of the organization. It should also note, as an interpretive guide, that the organization's operations should be carried out under a presumption of openness.

The DIDP begins by noting that it guarantees access to "documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control". This is a relatively wide definition, though in order to ensure broad applicability, the caveat that the policy applies only to "operational activities" should be deleted.

Strong right to information policies include clear and simple procedures for making and responding to requests for information. The world's best right to information policies spell these out in detail, and in many cases a substantial proportion of the law or policy is devoted to this explanation.[18] However, ICANN's description of the procedures for access is conspicuously skeletal, stating only that:

> *"Responding to Information Requests*
>
> *If a member of the public requests information not already publicly available, ICANN will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial."*

This provision should be expanded to include clearly defined procedures for lodging requests for information, including requirements that requesters should only have to provide the details necessary to identify and deliver the information. The DIDP should also impose clearer information for how ICANN will process requests received. Although ICANN developed a

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[18] See, for example, articles 121-140 of Mexico's *General Act of Transparency and Access to Public Information*, available at: www.law-democracy.org/live/wp-content/uploads/2012/08/Mexico-General-Act-of-Transparency-and-Access-to-Public-Information-compressed.pdf.

document, in 2013, on their process for responding to DIDP requests,[19] this information could be further clarified, and released in a more user-friendly manner.[20]

Best practice among other access systems is to appoint a dedicated employee or team who will be tasked with processing requests, and to publicize the identity of this person or persons. Although this need not necessarily be the employee or team's only task, if demand is not high enough to warrant dedicated staff, experience suggests that a right to information system is most effective when the response process is centralized, rather than distributed among employees in an ad hoc manner. Note that these dedicated staff may often need to consult with their colleagues in responding to a request, for example where a specialized determination must be made, such as whether information under request would be harmful to the security and stability of the Internet. This employee or team's responsibilities should include a commitment to provide reasonable assistance to requesters who need it, particularly where they are disabled, or to help clarify requests where the requester is unable to identify adequately the information they are seeking. Along with delegating these responsibilities, the DIDP should state that the dedicated employee or team's responsibilities may include processing information to respond to a request, including potentially creating new documents from existing information, where this would not involve an unreasonable expenditure of time.

The DIDP should also commit to complying with requesters' reasonable preferences regarding the form in which they wish to access the information (for example, if it is available as either a pdf or as a doc). While these guidelines may already be spelled out in ICANN's internal procedural guides, it is also important to include this information as part of the DIDP, to ensure that requesters have a clear idea of what to expect.

Another problem with the DIDP is the timetable for response. Thirty calendar days is generally reasonable, though it is worth noting that many countries, including Serbia, Denmark, Lithuania, Bulgaria, and Indonesia, commit to responding to right to information requests within two weeks. However, while it is not uncommon for policies to grant institutions a degree of leeway regarding timeline extensions, the fact that there is no outside time limit for these extensions is a glaring problem with the DIDP. Many countries, such as India, do not allow for extensions at all past the original 30-day limit. However, among those that do, the vast majority cap extensions at an additional 30 days or less. If ICANN requires more than 60 days to process an information request, this is likely an indication that staff are not properly prioritizing DIDP requests, in line with the institutional importance of transparency, or that ICANN's record management processes need to be improved. Strong right to information policies generally also state that information should be provided "as soon as reasonably possible," in order to provide a clear indication that employees should aim for speedy disclosures.

Another major problem with the DIDP provision quoted above is that it only commits to responding "to the extent feasible, to reasonable requests," which implies that staff have discretion to abandon DIDP requests if competing work pressures are too intense, or if they feel that the request is unreasonable. The former is obviously incompatible with a robust approach to transparency, while the latter is unnecessary in light of an existing exception allowing for

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[19] ICANN's process guide is available at: https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf.
[20] See, for example, the following flowchart, developed by the UK Information Commissioner, for how requests should be processed under their system: https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/. Developing a more detailed roadmap for responses would not only clarify the process for requesters, but would also be useful in training ICANN employees in how to process DIDP requests.

dismissal of vexatious or unduly burdensome requests. The phrase "to the extent feasible" should be deleted, as should the word "reasonable."

Similarly, the DIDP provision begins with a caveat that appears to suggest that ICANN will only respond to public requests for information if that information is not already publicly available. This, too, is problematic, since in many cases published information may be difficult to locate. In cases where a request is to be rejected on the grounds that the information is already available, ICANN staff reviewing the request will, presumably, have an understanding of where that information has been published. Rather than dismissing the request outright, staff should direct the requester as to where this information may be located, with as much specificity as possible.

Once information is published, ICANN should, by default, release it under a Creative Commons license for attributed reuse, unless there is a compelling reason not to (for example, if it contains information which is subject to copyright by a third party).

Probably the most controversial aspect of the DIDP, according to our consultations, is the list of exceptions. Every right to information system has exceptions to disclosure to protect information whose release would be likely to cause harm to a legitimate public or private interest. This is perfectly reasonable, and indeed essential to a robust and workable system. However, in line with the broader presumption of openness, these exceptions must be crafted carefully, and should only exclude information whose disclosure would cause real harm, such as by jeopardizing the security of the Internet or breaching a contract to which ICANN has committed.

In order to better understand this idea, it is worth exploring its foundations, which lie in Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR).[21] This recognizes restrictions to expression (including the right to access information) as being legitimate only where they are: i) prescribed by law; ii) for the protection of an interest that is specifically recognised under international law, which is limited to the rights and reputations of others, national security, public order, and public health and morals; and iii) necessary to protect that interest.

In the specific context of the right to information, this idea has been adapted into a similar three-part test, as follows:

- The information must relate to an interest that is clearly defined, and legitimate insofar as there is a core public interest underlying its protection.

- Disclosure of the information may be refused only where this would pose a risk of substantial harm to the protected interest (the harm test).

- The harm to the interest must be greater than the public interest in accessing the information (the public interest override).

The three parts of the test are cumulative, in the sense that an exception must pass all three parts to be legitimate, and together these constraints reflect the idea that restrictions on rights bear a heavy burden of justification, and in line with the broader public interest in transparency and openness.

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[21] Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

The harm test flows directly from the requirement of necessity in the general test for restrictions on freedom of expression. If disclosure of the information poses no risk of harm, it clearly cannot be necessary to withhold the information to protect the interest.

Finally, the idea of weighing the public interest in openness against the potential harm from disclosure also flows from the necessity test. It is widely recognised that this part of the test involves a proportionality element. Thus, the European Court of Human Rights has, in the context of freedom of expression, repeatedly assessed whether "the inference at issue was 'proportionate to the legitimate aim pursued'".[22] If the overall public interest is served by disclosure, withholding the information cannot be said to be proportionate.

Although ICANN is not a State, it is instructive to apply a similar test to the restrictions in the DIDP, in order to assess how they measure up against strong transparency systems in force elsewhere. The most common complaint about the DIDP exceptions is that they are overly broad, an idea that is justified by comparisons against better practice laws and policies in force elsewhere. For example, the DIDP includes an exception for any information "that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone." There is no question that ICANN should withhold information whose disclosure would pose a threat to the security and stability of the Internet. However, the current phrasing of the exception goes far beyond that, and excludes any material "that relates in any way." This could include, for example, descriptions of which departmental teams have been active in examining security issues, security gaps that have been repaired and no longer pose any active threat, etc.

The exception for "trade secrets and commercial and financial information not publicly disclosed by ICANN" is also unduly vague, and somewhat circular. Presumably, whenever financial or commercial information is subject to a request, it is being asked for because it has not been publicly disclosed. It is also unclear how this exception overlaps with the exception for "confidential business information and/or internal policies and procedures." Both of these exceptions should be deleted, and replaced with an exception for "material whose disclosure would materially harm ICANN's financial or business interests or the commercial interests of its stakeholders who have those interests."

Where exceptions are applied to protect third parties, such as in the case of commercial interests or personal information, better practice access policies also include a mechanism to contact these parties to ask if they would consent to the disclosure or, conversely, whether they would take particular exception to the material being disclosed. If the third party consents, there is no need to withhold the information under the exception. The third party's objections to disclosure should also be noted as part of the decision-making process, though they should not be granted an automatic veto over whether the information will be released, a decision which should remain in the hands of ICANN.

The DIDP exception for "drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication" also lacks a requirement for harm. While it is not uncommon for right to information systems to place draft documents off-limits while a deliberative or decision-making process is ongoing, once the process has been concluded there is no harm, and an obvious benefit, to allowing the public to see how the thought process evolved.

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[22] See *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40.

The exception for information requests which are "not reasonable, excessive or overly burdensome, not feasible, abusive or vexatious or made by a vexatious or querulous individual" also requires careful consideration. While exceptions for vexatious requesters are generally legitimate, experience suggests that they are also prone to abuse if their exercise is not closely watched. As a result, and because it is difficult to objectively define when a request should be considered abusive or vexatious, it is recommended that either the Ombudsman or the Complaints Officer should be required to review any decision to invoke this exception.

The DIDP also includes an exception for information subject to attorney-client privilege. While this is a broadly legitimate interest to protect, it is worth considering that attorneys at ICANN play a significantly different role than attorneys who serve typical private-sector clients, due to ICANN's unique role overseeing a global public resource. Since attorney-client privilege is waived at the discretion of the client, in some public-sector contexts, governments have announced policies that confidentiality will only be asserted over documents whose disclosure would harm their litigation or negotiating position in an ongoing or contemplated proceeding, allowing for the release of the more general sorts of legal policy-making advice. ICANN should consider building a similar principle into the DIDP. The working group discussed this exception with ICANN Legal, but were unable to arrive at an avenue for progress in this respect. It is hoped that this matter will be revisited as part of future processes.

Consideration should also be given towards adopting open contracting rules, of the type that are found in most progressive democracies. These include policies that contracts with external parties will generally be open by default, including a rule that all contracts above a particular threshold (generally $5,000 or $10,000) should be published proactively online. Where contracting comes as a result of a tendering process, many governments routinely release details about bids received, including costing breakdowns and an explanation for why a particular bid was chosen over others.[23] While open contracting does not fully preclude the use of non-disclosure clauses in agreements, their application should be limited to cases where legitimate harm would flow from disclosure, as identified by the DIDP's list of exceptions. For example, it may be reasonable to build confidentiality into security contracts that include information about steps to guarantee the security and stability of the Internet whose disclosure would undermine these safeguards.

There are a range of reasons to support open contracting, including to increase the efficiency and integrity of contracting processes. Open contracting helps to combat corruption, by facilitating oversight over where contracts are awarded and why. In addition, mechanisms to allow unsuccessful bidders to access and review why they lost out will allow them to strengthen their bids for the next round, promoting healthy competition, to the overall benefit of ICANN. This, in particular, is worth bearing in mind in the context of objections which have been raised by ICANN with regard to the potential for open contracting to raise the costs of procurement and discourage participation of bidders. The overwhelming preponderance of evidence, from global case studies, is that the reverse is true, and that open contracting substantially reduces costs and increases the competitiveness of procurement processes.[24] However, in exceptional cases

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[23] A good example here is the city of Richmond, Virginia's eProcurement Portal, available at: https://eva.virginia.gov/pages/eva-public-access.htm.
[24] See, for example, experiences in Ukraine and in Paraguay at: https://medium.com/open-contracting-stories/everyone-sees-everything-fa6df0d00335 and https://medium.com/@opencontracting/paraguays-transparency-alchemists-623c8e3c538f. A good overview of open contracting standards can be found at: https://www.open-contracting.org/data-standard/.

where ICANN has substantial evidence that disclosure of a contract or process would actually serve to raise contracting costs, there is also an exception in the DIDP to protect ICANN's commercial and business interests that could potentially be invoked.

However, in response to concerns raised by some of the participants in this consultation, it is noted that non-disclosure clauses that are already in place should be respected, so that, going forward, contractors can decide for themselves whether they wish to engage with this open and transparent way of doing business.[25] It would also be important, going forward, to clearly communicate ICANN's open contracting policy to prospective partners.

Once an information request has been assessed per the listed exceptions in the DIDP, the next step should be to apply the public interest test.[26] Properly drafted, a public interest test operates as an exception to the exceptions, providing for the release of information where an exception is *prima facie* engaged but where disclosure is still warranted due to the overriding public interest this serves. However, ICANN's DIDP public interest test is crafted to allow for general withholding of information based on the public interest even where no exception otherwise applies:

> "Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the public interest in disclosing the information."[27]

A proper public interest override should be limited to the first sentence of this provision, allowing for additional disclosures, but not additional withholding. There are a number of reasons for this. First, a proper regime of exceptions should protect all legitimate secrecy interests, so that there is no need to provide for such discretionary extension of the regime. The overwhelming experience at the national level, where reverse public interest overrides are virtually unknown, amply demonstrates that all confidentially interests can in practice be protected effectively in this way. Second, the reverse public interest override fails to align with international best practice standards, which hold that restrictions on transparency should be the exception and may be legitimate only if drafted narrowly and very clearly. Third, and related to the previous point, affording this sort of discretion almost inevitably leads to abuse.

Where an exception is legitimately applied, and information is being withheld, the DIDP should follow the principle of severability, whereby severing (redacting) out the specific information subject to an exception and disclosing the remainder is considered preferable to refusing the request entirely. This, too, is relatively standard practice across progressive right to information systems.[28]

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[25] This issue is also discussed in the following section, with a specific focus on lobbying and interactions with governments.
[26] For greater clarity, references here to the applying the public interest test should not be confused with the inclusive, bottom-up multistakeholder community processes to determine the global public interest envisioned in ICANN's Articles of Incorporation.
[27] Available at: www.icann.org/resources/pages/didp-2012-02-25-en.
[28] See, for example, s. 25 of Canada's Access to Information Act, available at: http://laws-lois.justice.gc.ca/eng/acts/A-1/FullText.html.

Where an information request is refused, or the information is provided in a redacted or severed form, the DIDP should require that ICANN's response explain the rationale underlying the decision, by reference to the specific exception(s) invoked, as well as information about appeal processes that are available.

Among the most important aspects of a robust right to information system is an effective, user-friendly, and timely process for appealing against refusals, redactions, breaches of timelines, and other administrative failures. Our present understanding is that these appeals will be carried out under the IRP process, currently in its final stages of development. One particularly important aspect of this, which is a critical component of every robust information appeals system, is that reviews will be de novo, meaning that the Panel will consider whether, in their own judgment, ICANN's decision was in accordance with the Bylaws.

A further recommendation is that the Ombudsman's mandate regarding transparency should be boosted to grant the office a stronger promotional role, including specific steps to raise public awareness about the DIDP and how it works and by integrating understanding of transparency and the DIDP into ICANN's broader outreach efforts. Another way to facilitate requests is to make it clear to external stakeholders what sort of information ICANN holds, to better facilitate filing targeted and clear DIDP requests. This can be done, for example, by publishing a list of the categories of information it holds and whether they are disclosed on a proactive basis, may be available via a request or are confidential.

Effective records management is another important element of strong transparency. An access to information policy is only meaningful where institutions properly document their decision-making and other administrative processes, an increasing number of jurisdictions have implemented staff protocols creating a "duty to document," which requires employees to create and maintain full and accurate records of their organization, functions, policies, decisions, decision-making processes, procedures, and essential transactions, including noting the substance of in-person conversations and phone calls where these conversations are a significant component of a decision-making process.

Monitoring and evaluation are also essential to a successful right to information policy, and either the Ombudsman or the Complaints Officer should be tasked with carrying out reasonable measures to track and report basic statistics on the DIDP's use, such as the number of requests received, the proportion which were denied, in whole or in part, the average time taken to respond, and so on.

Because transparency standards evolve over time, it is also important for ICANN to commit to undertaking periodic reviews of the DIDP policy, for example every five years. In its 2010 Policy on Access to Information, for example, the World Bank noted that it had reviewed its information policy in 1993, 2001, and 2005.[29]

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[29] See: www.worldbank.org/en/access-to-information/overview#3.

Documenting and Reporting on ICANN's Interactions with Governments

ICANN currently discloses its federal "lobbying" activities two ways. First, it reports such activity pursuant to the U.S. federal Lobbying Disclosure Act (LDA). Such reports are filed quarterly and are publicly available via www.house.gov and on ICANN's website. These reports reveal the general amount expended by ICANN for "lobbying," including both internal personnel and outside personnel. The LDA also requires reporting of which house of Congress and/or federal agencies were contacted by ICANN and what general issue(s) and specific legislation, if any, were discussed. Additionally, as a 501(c)(3) non-profit entity incorporated in the U.S., ICANN must abide by federal tax law with regard to its lobbying activities (must not exceed a certain threshold) and is legally obligated to disclose such interactions on its annual IRS Form 990 (reporting similarly what it reports via the LDA).

With regard to U.S. state lobbying, ICANN is presumably subject to the same reporting requirements as any other business. However, each state's reporting requirements and threshold triggers differ. A quick search of California's lobbying disclosure database does not reveal any filings made by ICANN, a California public benefit corporation.

In addition to hiring outside entities to engage in "lobbying," ICANN can and does hire outside "vendors" to assist ICANN externally with "education/engagement." Under federal tax law, ICANN is required in its Form 990 to disclose the identity and amounts paid to its five highest paid independent contractors ("Top 5"). Additionally, ICANN has on its own initiative decided to report amounts paid by ICANN to all contractors in excess of $1 million within a fiscal year. During the most recent fiscal year, according to ICANN, none of the vendors in the "education/engagement" category reached the $1 million limit nor did they qualify as a "Top 5" contractor, thus the issue of disclosure of specific amounts of their work has not been triggered.

Further, as noted in a 5 August 2016 email to the CCWG-Accountability list from Xavier Calvez, ICANN's CFO, ICANN enters into vendor contracts that often include confidentiality clauses, including those requested by the vendors. According to Mr. Calvez, ICANN entered into seven contracts supporting "education/engagement"[30] services presumably during its most recently completed fiscal year. He noted that the contractual terms prohibit ICANN from disclosing the specific amount paid to each contractor and the specific activities undertaken by the contractor on behalf of ICANN. He was able to reveal the names of each contractor and that all seven contracts were related to the expiration of the IANA functions contract between ICANN and the U.S. government. None, according to Mr. Calvez, were engaged in "lobbying" on behalf of ICANN, and as such were not reported by ICANN in its LDA filings.

Regarding the $1 million threshold, it was determined by ICANN that such a threshold was sufficient for transparency purposes without being overly burdensome on staff to collect such data.

The recommendations in this report regarding proactive disclosure are not meant to solely encompass "education/engagement" vendors, per se. Certainly, such vendors, whether in regard to policy issues surrounding the IANA functions contract, or for other policy matters,

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[30] "Education/engagement" is a category created by ICANN for purposes of logging expenses related to the IANA functions contract's expiration, and is not a category generally used outside that context, according to Mr. Calvez.

should be disclosed to the public and are to be covered by these recommendations. However, these proactive disclosure recommendations are intended to capture any and all internal and external persons or entities informing or influencing governments on matters of public policy that are not otherwise disclosed under the LDA. Such disclosure does not pertain to government-ICANN interactions directly related to ICANN administrative or policy matters (e.g., GAC-Board dialogue re: a PDP WG).

Transparency of Board Deliberations

Transparency of internal deliberative processes is among the trickiest issues to deal with in any transparency system. Virtually every access to information policy has some form of exception to protect the integrity of the decision-making process. However, since this is potentially an extremely broad category, it is important to take a purposive approach when considering the scope of the exception. That is to say, only information whose disclosure would cause harm should be withheld.

Once again, while acknowledging that ICANN is not a government, the close relationship between this exception and parallel exceptions found in right to information laws around the world makes it instructive to consider how transparency of internal deliberative processes have been approached by different courts and oversight bodies.

The United States Supreme Court, in considering a parallel provision found in that country's Freedom of Information Act, noted that "'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public, and that the 'decisions' and 'policies formulated' would be the poorer as a result."[31]

However, taking this purposive approach to protecting the deliberative process, many countries, including the United States, explicitly limit the application of this exception so that it cannot apply to any factual information, technical reports, or reports on the performance or effectiveness of a particular body or strategy, as well as any guideline or reasons for a decision which has already been taken.[32] This last point, whereby information about deliberative processes should be disclosed once the decision to which they relate has been finalized, is particularly important. As the Indian Central Information Commission pointed out, there is no need to protect the candor of a decision-making process if the decision in question has already been finalized.[33] As a result, authorities seeking to avoid disclosure of material under request on the grounds of protecting a deliberative process are often expected to identify a specific and ongoing decision-making process in order to justify their refusal.[34]

As with other exceptions, the exception for internal documents should not apply where the information is already publicly available. Uniquely, this exception only applies to communications made within or between public authorities. As a result, disclosure of the information to third parties generally waives the admissibility of this exception.[35] This makes sense, since once the confidentiality of the decision-making process has already been violated by disclosure to an outside party, it is difficult to argue that further disclosures would negatively impact the deliberative process.

Presently, although ICANN's Bylaws mandate that minutes be posted for every Board meeting, the rules grant the Board considerable leeway in exempting matters from disclosure, allowing them to remove any material "not appropriate for public distribution" by a ¾ vote. The Bylaws

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[31] NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), p. 150.
[32] See EPA v. Mink, 410 U.S. 73 (1973), p. 89. Also see Government of Ireland, Short Guide to the FOI Acts, Chapter 4. Available at: http://foi.gov.ie/chapter-4-exemptions.
[33] Shri. Arvind Kejriwal sought from the CPIO, Ministry of Commerce & Industry, 132/ICPB/2006. Similar reasoning can be found in: Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979), pp. 360-363.
[34] Senate of the Commonwealth of Puerto Rico v. DOJ, 823 F.2d 574, p. 585 (D.C. Cir. 1987); Safecard Services Inc. v. SEC, 926 F.2d 1197, pp. 1204-120 (D.C. Cir. 1991).
[35] Chilivis v. SEC, 673 F.2d 1205, p. 1212 (11th Cir. 1982).

also mandate the removal of any material related to "personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly."

As expressed above, there are certainly legitimate cases where secrecy is necessary to protect the integrity of communications. However, the Bylaws could be improved by providing more guidance and structure for how material should be excised, particularly with regards to the discretionary removal for matters "not appropriate for public distribution." In line with better practice, the Bylaws should state that material may only be removed from the minutes if its disclosure would cause harm to ICANN's deliberative processes, or would fall under another exception listed in the DIDP. This would also mean that decisions to remove material from the record would potentially be subject to an IRP appeal, in order to ensure that this process is applied appropriately.

In cases where material needs to be withheld from the published record, the Bylaws should contemplate a process where, rather than excising it entirely, it is mandated to be withheld for a particular period of time. For example, when discussions relate to a policy shift that is set to be announced in a year's time, and where premature disclosure would undermine the efficacy of this course of action, the Board could order that the material relating to the announcement be withheld from publication until after the announcement. Presumably, there will only be rare instances where particular subject matters will remain sensitive in perpetuity, so adding a time-limit to restrictions on disclosure should be considered the default option.

Improving ICANN's Anonymous Hotline (Whistleblower Protection)

General Comments

The WS2 Transparency Sub-Group appreciates that ICANN responded to a recommendation from the second Accountability and Transparency Review and retained NAVEX Global to conduct a review of ICANN's Anonymous Hotline Policy and Procedures. Overall, NAVEX produced a very solid analysis of Hotline policies and procedures and proposed appropriate recommendations for improvements.

The Staff Report notes that "ICANN is in the process of updating the Anonymous Hotline Policy and related procedures, as applicable and appropriate, to meet the recommendations and modifications proposed by the review." In general, it is urged that the NAVEX recommendations be implemented by June 2017 as they address several concerns about the need for improvements in policies and procedures. Additional recommendations can be found below.

Clarity and Availability of the Existing Policy and Employee Education Around It

When the Transparency Sub-Group initially began this examination, it was keenly frustrated by not being able to readily access the Hotline policy on ICANN's public website. While it is understood that ICANN employees are briefed on the Hotline policy annually, the inability of a member of the ICANN Community to readily access the policy raised concerns about transparency and best practices with respect to ethics-related mechanisms.

The CCWG-Accountability urges that the policy be clearly posted as "Employee Hotline Policy and Procedures" on the ICANN public website under the "Who we Are" or "Accountability and Transparency" portions as soon as possible. The CCWG-Accountability further recommends inclusion of the term "whistleblower" in introductory text explaining the policy so that an ICANN community member – who may not know that the policy is called a "Hotline Policy" – may easily locate it using "whistleblower" as the search term. For example: "The following outlines elements of ICANN's Hotline Policy and Procedures. Some organizations refer to this as "whistleblower protections." Both terms refer to an internal system for handling reports of suspected wrongdoing, mismanagement, and unethical conduct in an organization."

Related to this, the numerous hotline contact methods[36] should be listed on the public website with hyperlinks provided to the relevant page or annex of the policy. In particular, since ICANN is a global organization, the CCWG-Accountability agrees with the NAVEX recommendation that the international toll-free access list not be buried at the end of the Hotline policy, but referenced up front, with a hyperlink to the actual list.

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[36] a) e-mail with email address; b) facsimile with phone number; c) web with URL; d) intranet with URL; and e) telephone via toll-free numbers both inside and outside North America

The CCWG-Accountability shares NAVEX's concerns that the Hotline Policy and Procedures are two separate documents. Employees need a complete picture of what the policy is and how to avail themselves of it. Reading the policy document alone will not provide a potential reporter with important procedural information. Again, it is urged to use the website, with appropriate hyperlinks to each document, with text explaining that the two documents are complementary and essential elements to the Hotline process.

These basic changes, aimed at providing greater transparency concerning the Hotline policy and procedures, should help to build both employee and community trust in the process. The fact that the Hotline has received only three reports since its inception in 2008 may reflect a lack of understanding about the policy and how it works in practice. While there may be other explanations for its low use, a step in the right direction would be to provide clearer and more accessible information about the Hotline policy to via the public website.

Types of Incidents Reported

The ICANN Hotline policy is defined as a mechanism for employees to report "serious issues that could have a significant impact on ICANN's operations." This definition is too limiting – and potentially intimidating to potential reporters – and may be another reason for low use of the Hotline. For example, if an employee feels he/she is being subjected to verbal abuse or other harassment, that person may be reluctant to avail themselves of the Hotline out of concern that the abuse isn't "serious" enough because it does not involve direct financial losses to ICANN (as would suspected embezzlement or other accounting irregularities).

NAVEX recommends that ICANN drop the "serious" qualifier. Although agreeing with this recommendation, it is proposed to go one step further. The CCWG-Accountability recommends that ICANN not only clarify that employees should feel at liberty to report *all* issues and concerns related to behavior that may violate local laws and conflict with organizational standards of behavior, but also provide specific examples of such violations to guide a potential reporter. Such examples should include at minimum: verbal and sexual harassment, accounting irregularities, disregard or wrongful application of internal policies and standards of behavior, unethical conduct, abuse of authority, and reprisals for use of the Hotline process. The list should be as comprehensive as possible so an employee can feel confident that his/her concerns are legitimate, within scope, and warrant reporting.

Hotline Policy Scope

It is noted that the scope of the Hotline policy is limited to ICANN employees. It is agreed as per the NAVEX report that it is appropriate to limit the scope of the Hotline policy to employees and rely on the Ombudsman to handle complaints from external stakeholders. However, NAVEX recommends that ICANN follow common practice and make the Hotline Policy and Procedures information accessible to Business Partners[37] and other "appropriate third parties as defined by ICANN" to report ethics or compliance matters.

The CCWG-Accountability believes that the definition of "Business Partners" warrants greater clarity given the breadth of the ICANN stakeholder ecosystem. The manner in which "Business

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[37] "Business Partner" is defined by NAVEX as any party that has a contracting relationship with ICANN, including vendors, suppliers, temporary workers, and contractors.

Partners" is defined by NAVEX could conceivably encompass all registries, registrars, governments, and so on, with an actual or future contract of operation with ICANN. The CCWG-Accountability is reluctant to fully endorse this recommendation about expanding the scope of the Hotline Policy absent this definitional clarify.

Operation of Hotline Process

Internal administration of the Hotline process can be improved in several respects. The NAVEX report notes that ICANN does not utilize some type of case management system for tracking, documenting, reporting and anticipating potential problems areas. There should be some means of ensuring that all cases are documented and reported in a consistent way. This also would enable the development of more accurate statistics on Hotline reporting.

The CCWG-Accountability further agrees with NAVEX that such statistics should be provided to employees at least annually with a covering note from the ICANN President/CEO, followed by publication on the public website. This not only would help to inform employees that the system is being used, but also, as a complement to dropping the "serious issues" caveat, provide concrete examples of the types of issues reported. Importantly, publication of Hotline statistics would help to build employee and community trust in the Hotline system and ICANN's commitment to upholding high standards of ethical behavior.

Another measure that would help to build employee trust in the Hotline system is for ICANN to formally acknowledge receipt of the report within 24-48 hours by a secure means specified by the reporter (e.g., email, personal email, phone call). The Hotline Policy document should be revised accordingly to reflect this.

In terms of Hotline procedures, there is a concern that the Hotline Committee's determination of "urgent" and "non-urgent" is too arbitrary. This approach potentially is unfair to a beleaguered reporter who may be dealing with the debilitating effects of daily abuse. It also may delegate to "non-urgent" an underlying problem that was not appropriately addressed in the past and could quickly develop into something serious. The Hotline Committee should appreciate the courage involved in making a Hotline report and treat all reports with the respect for timely action that they deserve.

Addressing Fear of Retaliation

The CCWG-Accountability has proposed several reasons why the Hotline has only received three reports since its inception in 2008: lack of clear and accessible information about Hotline Policy and Procedures; an overly narrow definition if "serious issues;" and insufficient trust in the system due to various operational shortcomings. It is further proposed that an employee's fear of retaliation may be an important reason why so few Hotline reports have been filed. There are several ways in which these fears can be allayed, ranging from Hotline Policy revisions to improved in-house training programs.

The Hotline policy includes language indicating that retaliation will not be tolerated. But the policy could be improved as follows: (1) it should state unequivocally that alleged retaliation will be investigated with the same level of rigor as alleged wrongdoing; (2) it should guarantee

remedy for reporters who suffer from retaliation; and (3) it should clarify that good-faith reporting of suspected wrong-doing will be protected from liability.

The NAVEX report recommends updating the Hotline Policy to define good-faith reporting and clearly state that such reporting is protected. In addition to this, it is recommended that ICANN include language aimed at assuring the reporter that there are avenues for redress from possible retaliation. The language should make clear that investigations of alleged retaliation will be complete, balanced, fair, and comprehensive, considering parties other than the reporter who also may be victims of such actions. Such changes will help to foster more of a "speak-up" culture and likely boost employee morale.

To complement these policy changes, more candid discussion of retaliation in annual employee training programs is encouraged. Employees should be provided examples of what constitutes retaliation for reporting suspected wrongdoing. The training also should underscore the premium placed on confidential reporting and how such confidentiality is maintained. The issue of confidentiality cannot be emphasized enough in the policy itself as well as in posters, hand-outs and other informational documents and training programs.

Finally, in-house training should equip employees with step-by-step information on the Hotline system in practice (e.g., who in the organization specifically answers the call, who will receive the report, and how long it will take for the Hotline Committee to acknowledge receipt of the report [in the manner requested by the reporter], review the report, and determine the course of action.)

From what little information is available to non-employees – including the CCWG-Accountability – it has been difficult to determine the adequacy of in-house training.

Oversight and Audits

It is strongly recommended that NAVEX (or a comparable and equally reputable consultancy on compliance and ethics) be retained to conduct a follow up review of the Hotline Policy and Procedures to determine the extent to which ICANN has implemented improvements recommended by NAVEX and The W2 Transparency Sub-Group. Owing to unusually low reporting, it is very important that the Hotline Policy and Procedures undergo regular third-party audits at least every two years. This would help to identify gaps and enable timely corrections as well as backstop other accountability mechanisms.   The audit should be posted on ICANN's public website following initial review by employees.

Summary of Recommendations

Improving ICANN's Documentary Information Disclosure Policy (DIDP)

1. The caveat that the DIDP applies only to "operational activities" should be deleted.

2. The DIDP should include a documentation rule whereby, if significant elements of a decision-making process take place orally, or otherwise without a lasting paper-trail, the participants in that decision-making process should be required to document the substance of the conversation and include it alongside other documentation related to this decision-making process.

3. The DIDP should be expanded to include clearly defined procedures for lodging requests for information, including requirements that requesters should only have to provide the details necessary to identify and deliver the information.

4. The DIDP should impose clear guidelines on ICANN for how to process requests, including delegating a specific employee or employees with the responsibility of responding to DIDP requests, including a commitment to provide reasonable assistance to requesters who need it, particularly where they are disabled or unable to identify adequately the information they are seeking.

5. The DIDP should commit to complying with requesters' reasonable preferences regarding the form in which they wish to receive information under request (for example, if it is available as either a pdf or as a doc), if ICANN either already has that information available in the requested format, or can convert it to the requested format relatively easily.

6. The DIDP should specify that requests should receive a response "as soon as reasonably possible" and should cap timeline extensions to an additional 30 days.

7. The phrase "to the extent feasible, to reasonable requests" should be deleted from the provision on Responding to Information Requests.

8. In cases where information subject to request is already publicly available, ICANN staff should direct requesters, with as much specificity as possible, to where the information may be found. In other words, if the processing of a DIDP request reveals that the information has already been published, staff should include information about where this information may be found in their response to the requester.

9. The exception for information "that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone" should be amended so that it only applies to information whose disclosure would be harmful to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.

10. The exception for "drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication" should be amended to clarify that this information should be disclosed unless it would be harmful to an ongoing deliberative or decision-making process.

11. The exceptions for "trade secrets and commercial and financial information not publicly disclosed by ICANN" and for "confidential business information and/or internal policies and procedures" should be replaced with an exception for "material whose disclosure would materially harm ICANN's financial or business interests or the commercial interests of its stake-holders who have those interests."

12. Where an exception is applied to protect a third party, the DIDP should include a mechanism for ICANN staff to contact this third party to assess whether they would consent to the disclosure.

13. The exception for information requests which are "not reasonable, excessive or overly burdensome, not feasible, abusive or vexatious or made by a vexatious or querulous individual" should be amended so that either the Ombudsman or the Complaints Officer automatically reviews any decision to use this exception.

14. The following sentence should be deleted: "Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the public interest in disclosing the information."

15. ICANN should consider future processes to expand transparency at ICANN Legal, including through clarification of how attorney-client privilege is invoked.

16. Wherever possible, ICANN's contracts should either be proactively disclosed or available for request under the DIDP. The DIDP should allow ICANN to withhold information subject to a non-disclosure agreement; however, such agreements should only be entered into where the contracting party satisfies ICANN that it has a legitimate commercial reason for requesting the NDA, or where information contained therein would be subject to other exceptions within the DIDP (such as, for example, where the contract contains information whose disclosure would be harmful to the security and stability of the Internet).

17. The DIDP should include a severability clause, whereby in cases where information under request includes material subject to an exception to disclosure, rather than refusing the request outright, the information should still be disclosed with the sensitive aspects severed, or redacted, if this is possible.

18. Where an information request is refused, or the information is provided in a redacted or severed form, the DIDP should require that ICANN's response include the rationale underlying the decision, by reference to the specific exception(s) invoked, as well as information about appeal processes that are available.

19. The Ombudsman's mandate regarding transparency should be boosted to grant the office a stronger promotional role, including by integrating understanding of transparency and the DIDP into ICANN's broader outreach efforts, by publishing a list of the categories of

information ICANN holds.

20. Either the Ombudsman or the Complaints Officer should be tasked with carrying out reasonable monitoring and evaluation procedures, such as publishing the number of requests received, the proportion which were denied, in whole or in part, the average time taken to respond, and so on.

21. ICANN should commit to reviewing the DIDP every five years.

Documenting and Reporting on ICANN's Interactions with Governments

In the interest of providing the community greater clarity with regard to how ICANN engages government stakeholders[38] and to ensure that the ICANN community and, if necessary, the Empowered Community is fully aware of ICANN's interactions with governments, the CCWG-Accountability recommends that ICANN begin disclosing publicly the following (notwithstanding any contractual confidentiality provisions) on at least a yearly (but no more than quarterly) basis with regard to expenditures over $20,000 per year devoted to "political activities",[39] both in the U.S. and abroad:[40]

⊙ All expenditures on an itemized basis by ICANN both for outside contractors and internal personnel.

⊙ All identities of those engaging in such activities, both internal and external, on behalf of ICANN.

⊙ The type(s) of engagement used for such activities.[41]

⊙ To whom the engagement and supporting materials are targeted.

⊙ The topic(s) discussed (with relative specificity).

Transparency of Board Deliberations

1. The DIDP exception for deliberative processes should not apply to any factual information, technical reports, or reports on the performance or effectiveness of a particular body or strategy, as well as any guideline or reasons for a decision which has already been taken or where the material has already been disclosed to a third party.

2. The Bylaws should be revised so that material may only be removed from the minutes of Board meetings where it would be subject to a DIDP exception. Decisions to remove

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[38] Such disclosure is not meant to encompass government-ICANN interactions directly related to ICANN administrative and policy matters (such as a PDP WG) and otherwise disclosed statutory "lobbying" activities.
[39] "Political activities" is to be defined as any activity that is intended to influence or inform a government directly or indirectly on a matter of public policy.
[40] For greater clarity, this is not intended to apply to engagement within ICANN's internal processes, such as conversations between Board Members and the GAC.
[41] E.g., newspaper op-eds, letters, advertisements, speeches, emails, phone calls, in-person meetings, etc.

material from the minutes of Board meetings should be subject to IRP appeal.

3. Where material is removed from the minutes of Board meetings, the default should be to allow for its release after a particular period of time, once the potential for harm has dissipated.

Improving ICANN's Anonymous Hotline (Whistleblower Protection)

1. The policy should be clearly posted as "Employee Hotline Policy and Procedures" on the ICANN public website under the "Who we Are" or "Accountability and Transparency" portions as soon as possible.

2. Related to the above, the term "whistleblower" should be included in introductory text explaining the policy so that an ICANN community member – who may not know that the policy is called a "Hotline Policy" – may easily locate it using "whistleblower" as the search term. For example: "The following outlines elements of ICANN's Hotline Policy and Procedures. Some organizations refer to this as "whistleblower protections."

3. The definition of incidents reported should be broadened from "serious issues" to encourage the report of all issues and concerns related to behavior that may violate local laws and conflict with organizational standards of behavior. Furthermore, the policy should provide specific examples of such violations to guide a potential reporter.

4. ICANN need to improve internal administration of the Hotline process by employing case management software to better enable tracking, documenting, reporting and anticipating potential problem areas.

5. ICANN should regularly provide employees with data about use of the Hotline, that details not only the frequency of use but also the types of incidents reported.

6. ICANN should not prioritize receipt of reports as "urgent" and "non-urgent," but treat every report as a priority warranting formal acknowledgment of receipt of a report within 48 hours at the latest.

7. ICANN needs to more effectively address potential fear of retaliation against the reporter by stating unequivocally that alleged retaliation will be investigated with the same level of rigor as alleged wrongdoing. ICANN should also guarantee remedy for reporters who suffer from retaliation as well as clarify that good-faith reporting of suspected wrong-doing will be protected from liability.

8. ICANN's Hotline Policy and Procedures should undergo a third-party audit least every two years to help identify gaps and enable timely corrections. The audit, in turn, should be posted on the public website.

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Annex 8.2 – Recommendations to Improve ICANN's Transparency – Minority Statement by Robin Gross – CCWG-Accountability WS2 – March 2018

We generally welcome the recommendations contained in the Final Report submitted to the Cross-Community Working Group plenary by the Work Stream 2 Transparency subgroup. We view this as a key priority area for ICANN going forward, and we hope that the organization will work speedily to implement the recommendations in full, and to provide adequate resources to boost ICANN's transparency systems. ICANN's very legitimacy as a steward over critical global Internet functions depends on its accountability to its constituents and to the public at large, which in turn depends on robust transparency.

We submit this minority statement not to disagree with the final recommendations, but to express dismay that the working group was not able to achieve consensus support for any clear principles to guide ICANN's decisions as to when to waive attorney-client privilege, and better align them with the overarching Bylaws obligation to "operate to the maximum extent feasible in an open and transparent manner."[1]

We do support recommendation 15, which states "ICANN should consider future processes to expand transparency at ICANN legal, including through clarification of how attorney- client privilege is invoked.". We would go further: we recommend that ICANN should, as a matter of urgency, take steps to identify and apply principles according to which attorney- client privilege shall be waived in the interests of transparency, and/or the availability of attorney-client privilege disregarded when contemplating making a voluntary disclosure. This process should involve further public consultation.

We also note that the Independent Review Process (IRP) is an ICANN mechanism, which assists ICANN by helping the organisation to recognise and correct its own errors. As such, ICANN does not have an unqualified interest in prevailing in cases before the IRP; it has overarching duties to support the purposes of the IRP, including through disclosure, even where such disclosure may make ICANN less likely to prevail in a particular case.

As a first step, and as a necessary action in order to obtain the best available advice in developing such principles, we further recommend that ICANN immediately adopts, and directs its advisors, agents and attorneys, as follows:

1. Recalling the commitment to transparency in Article 3 Section 3.1 of the Bylaws, the mere fact that attorney-client privilege is available to ICANN in respect of a particular contemplated disclosure shall not be considered, of itself, reason to assert that privilege or otherwise withhold disclosure.

2. The mere fact that disclosure might assist a claimant or potential claimant in a case pursuant to the Independent Review Process shall not, of itself, be considered sufficient reason to assert attorney-client privilege where that privilege is available.

3. When considering whether to make disclosure in connection the IRP, ICANN shall have regard to the "Purposes of the IRP," as set out in Section 4.3 of the Bylaws, and shall consider those purposes as amongst ICANN's objectives.

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[1] Bylaws Article 3 ("Transparency") Section 3.1 ("Open and Transparent") begins "ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent bodies shall operate **to the maximum extent feasible in an open and transparent manner** and consistent with procedures designed to ensure fairness[...]" (emphasis added).

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Annex 9 – Implementation Guidance – CCWG-Accountability WS2 – June 2018

ICANN

Executive Summary

The Implementation Guidance provides further clarification on the recommendations that were noted as problematic by the ICANN Board in its letter to the CCWG-Accountability on 14 May 2018. The recommendations which were noted are:

- The Ombuds Advisory Panel
- Transparency of Board Deliberations
- Transparency of Governmental Engagement
- Transparency of Open Contracting

Ombuds Panel - Implementation Guidance

Original recommendation

> ICANN should establish an Ombuds Advisory Panel made up of 5 members to act as advisers, supporters, wise counsel for the Ombuds and should be made up of a minimum of at least 2 members with ombuds experience and the remainder with extensive ICANN experience.
> The Panel should be responsible for:
>
> - Contribute to the selection process for new Ombuds which would meet the various requirements of the Board and community including diversity.
> - Recommending candidates for the position of Ombuds to the Board.
> - Recommending terms of probation to the Board for new Ombuds.
> - Recommend to the Board firing an Ombuds for cause.
> - Contribute to an external evaluation of the IOO every 5 years.
> - Making recommendations regarding any potential involvement of the IOO in noncompliant work based on the criteria listed in recommendation 11.
>
> The Panel cannot be considered as being part of the Ombuds office and cannot be considered additional Ombuds, but rather external advisors to the office.
>
> Any such advisory panel would require the Ombuds to maintain its confidentiality engagements per the Bylaws.

Implementation Guidance

> This implementation guidance was prepared following the Board raising concerns about the independence of the Ombuds function at the San Juan and Panama meetings. The guidance explains how the CCWG expects the recommendations to be implemented.
>
> The Ombuds panel is not meant to be a decision-making body – it is only there to assist the Board or relevant Board Committee with the specific tasks enumerated in the recommendation. The Panel is specifically prohibited from getting involved in any matter

before the Ombuds; the Ombuds shall not seek, even on anonymized terms, guidance from the Panel on any matter before the Ombuds.

The Panel will only have the six specifically enumerated powers set out in the recommendation.

In implementing the portion of the recommendation "recommend to the Board firing an Ombuds for cause" - because under the Bylaws only the Board has the power to fire the Ombuds, the CCWG advises that the Board should implement this recommendation by preparing and publishing information about the process any ICANN community participants can use to provide the Board with feedback about, or raise concerns regarding, the performance of the Ombuds. The Panel is welcome to offer feedback on the performance of the Ombuds but can only provide any feedback though this process (aside from the regular external evaluation). The CCWG suggests this clarification to preserve the right of the Panel to raise any concerns with the performance of the Ombuds function while not interfering with the Board's responsibilities in managing the engagement of the Ombuds and considering concerns raised in an appropriate way.

In implementing the portion of the recommendation "Make recommendations regarding any potential involvement of the IOO in noncompliant work based on the criteria listed in recommendation 11", this should only occur at the request of the Board.

Finally, a formal process to select the panel members should be created. This should ensure that candidates have extensive ICANN and/or ombuds experience, and also have complete independence from the SO/ACs. The selection process may be designed in any appropriate means to achieve independence, such as by selection by the Board, an independent recruitment firm, or other appropriate process.

Regardless of the process which is selected the ICANN Board should post details regarding the process that will be utilized.

Open Contracting Implementation Guidance

Original recommendation

Original recommendation - 16) Wherever possible, ICANN's contracts should either be proactively dis-closed or available for request under the DIDP. The DIDP should allow ICANN to withhold information subject to a non-disclosure agreement, however such agreements should only be entered into where the contracting party satisfies ICANN that it has a legitimate commercial reason for requesting the NDA, or where information contained therein would be subject to other exceptions within the DIDP (such as, for example, where the contract contains information whose disclosure would be harmful to the security and stability of the Internet).

Implementation Guidance

As the recommendation starts with the language "wherever possible" we would recommend that ICANN publish a document clearly stating its position on the limited use of NDAs and documenting the information that will make available on its contracted relationships, as discussed below.

In the first year of implementation ICANN should publish a register of all suppliers (name of supplier, country or origin and actual annual amount) it pays 500,000$US or more per fiscal year broken down by categories (e.g., computer equipment, software, telecommunication services, contracting etc.). Starting in the second year of implementation ICANN should lower this threshold to 250,000$US. The Board should review this threshold amount on a regular basis to effectively ensure transparency.

In scoping ATRT4 or future ATRT reviews SO/ACs should consider if the information provided in the above Register meets their requirements. Should they feel the need for adjustments they should request the review consider this.

Transparency of Board Deliberations Implementation Guidance

Original recommendation

Original recommendation -The DIDP exception for deliberative processes should not apply to any factual information, technical reports or reports on the performance or effectiveness of a particular body or strategy, as well as any guideline or reasons for a decision which has already been taken or where the material has already been disclosed to a third party.

Implementation Guidance

For the sake of greater clarity, current publications of Board Briefing Materials appear to fulfil this requirement

Note: As ICANN organization points out, documents/information already provided to a third party (without obligation to keep as confidential) should not be withheld simply because of a deliberative process exception.

Original recommendation

Original recommendation - The Bylaws should be revised so that material may only be removed from the minutes of Board meetings where it would be subject to a DIDP exception. Decisions to remove material from the minutes of Board meetings should be subject to IRP appeal.

Implementation Guidance

The basis for redaction of Board minutes and withholding information from a DIDP request should be substantially consistent. For the most part this would seem to be the case including if the CCWG-Accountability recommendations which apply to the DIDP are implemented. As such ICANN should publish a register of all redaction of Board minutes explaining the basis for the redaction. Additionally, the register should explain how the basis for this redaction aligns with the DIDP exceptions and if it does not align with such an exception explain why.

Note: Re IRP appeal – this is currently in the Bylaws.

Original recommendation

Where material is removed from the minutes of Board meetings, the default should be to allow for its release after a particular period of time once the potential for harm has dissipated.

Implementation Guidance

When redacting any information, the Board should identify if the redacted information can eventually be released or not (ICANN should publish the list of the classes of information which can never be disclosed by law, or other reasons, such as staff employment matters etc.). If redacted information is identified as eventually being subject to release it should identify the conditions which would allow the release (this information should be included in the above-mentioned Register). The CEO (or his/her designee) would annually review redacted information which is noted as being conditionally subject to release to see if the conditions for release are met and shall release all appropriate information and update the Register accordingly. For all redactions (other than those that are part of a category that can never be disclosed), the redacted material should be disclosed during the annual Register review process in the 15th year after the redaction was first entered onto the Register.

Government Engagement Implementation Guidance

Original recommendation

In the interest of providing the community greater clarity with regard to how ICANN engages government stakeholders[7] and to ensure that the ICANN community and, if necessary, the Empowered Community is fully aware of ICANN's interactions with governments, the CCWG-Accountability recommends that ICANN begin disclosing publicly the following (notwithstanding any contractual confidentiality provisions) on at least a yearly (but no more than quarterly) basis with regard to expenditures over $20,000 per year devoted to "political activities",[8] both in the U.S. and abroad:[9]

• All expenditures on an itemized basis by ICANN both for outside contractors and internal personnel.

• All identities of those engaging in such activities, both internal and external, on behalf of ICANN.
• The type(s) of engagement used for such activities.10
• To whom the engagement and supporting materials are targeted.
• The topic(s) discussed (with relative specificity).

B.   Implementation Guidance

Note - This recommendation needs to be consistent with DIDP exceptions, specifically the exception which states:

Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party (note - the WS2 Transparency recommendations for DIDP did not mention or modify this exception which is currently included in the DIDP and as such it would be expected to stand).

The above discussion of DIDP policies is by way of explanation, and does not expand the application of this policy

Overall one must recognize that ICANN is a critical actor in the DNS and has significant expertise in the area. ICANN's corporate objectives include a number of activities and programs to share this expertise with all interested parties including governments.

As such any activities where ICANN is presenting information which is publicly available or which is part of formally published ICANN position on a subject through training programs, conferences or individual meetings should not be required to be disclosed beyond the reports which are currently published by ICANN and reports regarding bilateral conversations with governments.

Note: Reporting on bilateral conversations can be found in the ICANN Quarterly Reports. Additional information on specifics of these reports can be requested via the DIDP subject to the stated exceptions. An example of such a report can be found at https://www.icann.org/en/system/files/files/quarterly-report-08may18-en.pdf page 29

To further facilitate the community's understanding of ICANN's objectives in discussions with governments it should publish an annual Government Engagement Strategy which should describe the focus of its interactions with governments for the coming year. This document should be derived from existing documentation including but not limited to annual planning, CEO reports to the Board and correspondence with the GAC.

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