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Report of Public Comments

Title:	Enhancing ICANN Accountability																													
Publication Date:	10 October 2014																													
Prepared By:	Strategic Initiatives Department																													
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th colspan="2" style="background-color: #f2f2f2;">Comment Period:</th> </tr> <tr> <td>Comment Open Date:</td> <td>6 September 2014</td> </tr> <tr> <td>Comment Close Date:</td> <td>27 September 2014</td> </tr> <tr> <td>Reply Close Date:</td> <td>NA</td> </tr> <tr> <td>Time (UTC):</td> <td>23:59 UTC</td> </tr> </table>					Comment Period:		Comment Open Date:	6 September 2014	Comment Close Date:	27 September 2014	Reply Close Date:	NA	Time (UTC):	23:59 UTC	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th colspan="2" style="background-color: #f2f2f2; color: red;">Important Information Links</th> </tr> <tr> <td colspan="2" style="text-align: center;">Announcement</td> </tr> <tr> <td colspan="2" style="text-align: center;">Public Comment Box</td> </tr> <tr> <td colspan="2" style="text-align: center;">View Comments Submitted</td> </tr> <tr> <td colspan="2" style="text-align: center;">Report of Public Comments</td> </tr> </table>						Important Information Links		Announcement		Public Comment Box		View Comments Submitted		Report of Public Comments	
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Staff Contact:	Theresa Swinehart				Email:	theresa.swinehart@icann.org																								
Section I: General Overview and Next Steps																														
<p>In response to community request, ICANN opened an additional 21-day comment period on the Enhancing ICANN Accountability Process that was posted on 14 August 2014. Community input after the 14 August posting highlighted that, given the importance of this issue, the community needed more time to ensure that as many stakeholders as possible can review the process and post questions and comments.</p> <p>Along with this Summary and Analysis, ICANN is posting the revised process documentation for this Accountability and Governance review so that the work can proceed. This Summary and Analysis does not lay out the full process; it identifies how the comments received were taken into account in the revision of the process.</p> <p>The next step is for the ICANN Accountability & Governance Process to proceed, including establishing a Cross Community Working Group (CCWG), developing a charter, and appointing liaisons. The Public Experts Group (PEG) will proceed to select up to seven Advisors from the nominations received, as outlined in their Call for Candidates.</p>																														
Section II: Contributors																														
<p><i>At the time this report was prepared, a total of 17 community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.</i></p>																														

Organizations and Groups:

Name	Submitted by	Initials
International Trademark Association – Internet Committee	Kathryne Badura	INTA
Country Code Names Supporting Organisation	Byron Holland	ccNSO
U.S. Chamber of Commerce	Adam Schlosser	Chamber
Coalition for Online Accountability	Steven Metalitz	COA
U.S. Council for International Business	Barbara Wanner	USCIB
Brazilian Government	Jandyr Ferreira dos Santos	Brazil
Internet Service Providers and Connectivity Providers Constituency	Wolf-Ulrich Knoblen	ISPCP
Joint SO-AC-SG-C Statement*	Keith Drazek	Joint Statement
Governmental Advisory Committee	Heather Dryden	GAC
Business Constituency	Steve Del Bianco	BC
Information Technology Industry Council	Ken Salaets	ITI
Center for Democracy and Technology	Matthew Shears	CDT
At-Large Advisory Committee	Olivier Crepin-Leblond	ALAC
Non-Commercial Stakeholder Group	Rafik Dammak	NCSG

Individuals:

Name	Affiliation (if provided)	Initials
Richard Hill	/	/
Avri Doria	/	/
Robin Gross	IP Justice	/

Note: In addition to the entities identified in the Joint Statement, the Joint Statement was subsequently supported by Robin Group, the NCSG, and the ALAC.

Section III: Summary of Comments

General Disclaimer: This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

The comments received in response to this posting focused on identifying issues with the design of the process and proposing solutions to those issues. This public comment summary and analysis addresses these issues and their proposed solutions so as to inform the revisions to the Enhancing ICANN Accountability & Governance Process.

Structure of the Process

The 14 August 2014 Proposal incorporated two groups – a Cross Community Group to help identify issues for consideration and prioritization, and a Coordination Group that would develop recommendations and prioritize the issues identified by the Cross Community Group. The Coordination Group was proposed to be smaller in size, and included up to seven external Advisors to help inform and share best practice recommendations to the Enhancing ICANN Accountability work.

Comments received on the 14 August 2014 Proposal in large part suggested that the two group design be streamlined into a single Cross Community Working Group (CCWG). Some commenters identified ways that the two-group design could be modified or enhanced.

The ccNSO, Joint Statement, ISPCP, BC, ITI, and CDT endorsed the creation of a CCWG, though differing rationale were provided:

- ISPCP considered the creation of a CCWG a simplification of the process by merging two groups into one; the multitude of groups decreases the transparency of the process and makes it difficult to engage.
- The ITI recommended a CCWG be formed for the duration of the IANA stewardship transition and the implementation of enhanced accountability mechanisms. The ITI envisions the CCWG to replace the Coordination Group portion of the 14 August 2014 Proposal, then making the CCWG responsible for the appointment of membership to the Cross Community Group. The Cross Community Group would then be responsible for evaluation of accountability recommendations arising from the CCWG, and the CCWG and the Board would oversee the implementation of recommendations. The ITI further stated that the CCWG would be responsible for defining the oversight mechanisms for ensuring the implementation of accountability reforms. The use of a CCWG would allow for stakeholder appointment of representatives and for the recommendations to be developed through a bottom-up, multistakeholder fashion.
- CDT agreed to CCWG model as long as “others” maintain participation ability.
- The Joint Statement advocated for a traditional CCWG to serve as the primary vehicle for the accountability process. In the event ICANN chose not to use the CCWG model, the Joint Statement identified a number of changes that should be made to the two group design.
- The ccNSO indicated its preference for a CCWG, that an independent secretariat be provided for the CCWG, and that the CCWG select its own non-voting chair.

If the dual group structure is retained, some modifications and clarifications are suggested:

- The Cross Community Group be empowered to develop recommendations and should serve as a tool for soliciting wider community feedback on discussion topics and recommendations. (Joint Statement; CDT; Brazil; USCIB)
- SOs, ACs and SGs be permitted to appoint an alternative representative to the Coordination Group in the event the designated member is not available. (Joint Statement)
- Process to ensure that “others” can contribute to the Coordination Group work. (CDT)
- Both groups will have the final decisions on their charters, with advice from the Board. (CDT)

- The Coordination Group should include one person per constituency rather than one per SG because of the inability of a single person to represent divergent interests. (ISPCP; BC; INTA)
- ICANN staff should only have a supporting role in the process. (Joint Statement; Robin Gross; Brazil)
- The Coordination Group members should be the conduits for the community recommended solutions. (USCIB)
- The Cross Community Group should have no role in confirming stakeholder representatives to the Coordination Group. (COA)

The Role of Advisors / Public Experts Group

The BC, USCIB, and CDT requested that ICANN clarify that the Advisors have no decisional role. The BC and USCIB also requested information on the qualifications of the experts and how their expertise would improve upon the expertise already within the ICANN community.

The Joint Statement welcomed the role of the expert Advisors, and noted that reliance on the community recommendations to the Call for Candidates would result in experts that will contribute positively to the process. The PEG could also be encouraged to consult with the community, possibly through the SO/AC/SG leadership, on their selections. The Joint Statement further stated that the Advisors should not be included in a consensus call within the deliberations of the group.

The ITI suggested that the members of the PEG would be appointed by the Supporting Organizations, in consultation with the CCWG and the ICANN CEO, and the PEG would then advise on the development of recommendations. The ITI suggests that having the CEO indirectly involved in the selection of the PEG would create “unreasonable influence” by ICANN in the process.

The COA requested again that specific expertise in intellectual property rights and the rule of the law on the Internet be included as independent areas of expertise for Advisors.

The ccNSO notes that the preferred method of selection would be through an open nomination process, though the interest of time necessitates the utility of starting that selection process earlier. The need for experts with proven track records necessitates the need to reconsider compensation for the experts. The ccNSO also recognizes that the experts could, through subgroups with stakeholder members, interface more intensely on this work to deliver recommendations.

INTA suggested that the placement of Advisors with a voting role onto the Coordination Group represents a violation of ICANN’s neutral facilitator role called for by the NTIA. The community should have a role in the selection of Advisors.

Participation of those Outside of the SO/AC Structure

The Joint Statement recommended outreach to those identifying as “other” so as to bring them into community: *“To the extent that there are other stakeholders that are not yet affiliated with an ICANN SO AC SG or C, we encourage ICANN to work to educate such participants about the existing*

participation structures within the multi-stakeholder model. If, following these efforts, certain stakeholders could still not appropriately be integrated into one of the existing SOs, ACs, SGs or Cs then the creation of an “other” category could be considered by the CCWG in developing its Charter and working methods. Notwithstanding, we believe that active participation in the CCWG should be open to all interested parties.” Robin Gross noted her concern for capture when allowing those who are outside the normal SO/AC engagement processes to have their own category for engagement, which could incentivize separation from the established processes and give “disproportionately high representation rights in the overall process.”

The CDT noted that it is essential that these discussions involve interested parties from the global multistakeholder community, both inside and outside ICANN; this is a global concern. Any move to a CCWG “might be appropriate if it can accommodate the important category of ‘other’ in a suitably weighted manner.”

Brazil requested that the process be extended beyond the ICANN community, as was done with the IANA Stewardship Transition process, in line with the process applied in the development of the NETmundial Statement. This would include welcoming participation of all stakeholders, including governments, to participate on equal footing, with a goal of diverse representation. The process must also be transparent so that participants do not feel rushed nor able to challenge the outcomes on the basis the process was not inclusive or transparent enough. Self reviews and nonbinding reports do not demonstrate real accountability.

Board Role in the Process

With regard to charter development, BC, CDT, ITI, and USCIB requested that the Cross Community Group and Coordination Group each develop their own charters in consultation with the community and the Board. Importantly, the community groups would retain final approval of their charters. USCIB suggested including the following quote from the September 18 letter in all documentation: *“If a matter is deemed to be outside of scope by the Board, the Board and the chartering group should – with community input – reach agreement on whether, where, and how that matter will be addressed in ICANN.”*

The Joint Statement declared, *“the ICANN Board must accept the outcome of the Accountability Process unless a legal conflict is identified by experts who are independent of ICANN and an agreed process for handling Board rejections or referrals of community recommendations must be in place.”* The Joint Statement further described what the contributors saw as potential tensions between the recommendations and the fiduciary duties held by the Board. The Joint Statement lays out a process for dialogue, including a requirement for full consensus of the Board, in the event of a rejection or referral of a recommendation. The Joint Statement, along with many others, suggest that all meetings, discussions and email on the accountability process should be open. Robin Gross and USCIB specifically endorsed the Joint Statement proposal for a process. The BC also called for a predefined process as well as transparency in the Board discussions on the accountability work, including publication of any legal advice regarding concerns of proposals within the process.

USCIB called for the Board to immediately consider the development of process and heightened voting thresholds, though the mechanism should not be determined unilaterally by the Board. The community should have input into the development of any rejection process. The ccNSO also called for the same community input, and recommended that the process for the consideration of policy recommendations from the GNSO and ccNSO could serve as a guide.

In terms of the Board role in approval of the final proposal, INTA, ccNSO, the Joint Statement, BC, and Robin Gross all asked for some form of standard or methodology that the Board would use in making determinations about community-developed plan. The ccNSO called for a presumption that recommendations would be implemented absent a compelling reason for rejection.

With regard to voting thresholds, both the U.S. Chamber and USCIB requested higher voting standards ($\frac{2}{3}$ majority) from the Board if the Board were to reject recommendations from the Coordination Group, and the Chamber recommended that any such decision by the Board would be preceded by a dialogue prior to finalization, so that all stakeholders could provide input. In the event of impasse, the Chamber recommends that a third-party panel of mediators be appointed to facilitate resolution.

The BC, INTA, and USCIB requested that there be a mechanism by which to appeal Board decisions on the recommendations of the group.

Brazil suggested that stakeholder-determined outcomes should be implemented without filter or modification.

In terms of transparency for the Board and Staff: BC, the Joint Statement, and USCIB urged that all related exchanges between General Council, Board, and Staff be open.

Sufficiency of Scope

There were requests to broaden the scope of the process, as follows:

- Brazil commented that the goal of this work should be for ICANN to be fully accountable to the global community and abide by the highest levels of accountability and transparency. The ccNSO also embraced reference to the NETmundial Principles in support of a broad remit.
- ISPCP requested that issues related to the legal status of ICANN be addressed, and there has to be explicit acknowledgment that there are broader issues that will not be addressed through a resolution of accountability issues directly related to the transition. The ISPCP requested commitment that these issues will be worked through.
- Joint Statement suggested that the scope of the process allow the consideration of “any mechanisms for improving ICANN accountability” and that the community is opposed to the proposed narrowing of this discussion to accountability issues related to the IANA Stewardship Transition. The CCWG would identify which portions of this work must be implemented in advance of the transition, and the community and ICANN would then work together to identify a full timeline for implementation of all recommendations.

- CDT affirmed that the Affirmation of Commitments should be part of the process.
- USCIB was supportive of the scope limitation set forth by ICANN.
- Robin Gross suggested a rejection of ICANN’s claims that this process needs to be limited to the those issues that relate to the IANA Stewardship Transition, suggesting that this limitation is an example of ICANN’s conflict of interest limiting the overall process. CDT and BC also suggested that scope concerns should not be used as a tool for impeding discussion.
- The ITI suggested that a CCWG perform collective drafting of the charter to determine scope and mission, “not as newly defined and restricted by ICANN staff.”
- Avri Doria noted that the accountability effort must include the broader issues of ICANN’s review mechanisms as called for in ATRT2, recommendation 9.2.

Timeline of Process

The Chamber suggested that a timeline for the work include where drafts will be made available for community input, as well as a requirement that the comment periods be longer than the 21-day comment/21-day reply currently in practice, suggesting the international norm of 60 days.

While some comments related to the timeline of the process would be best left up to the group’s working methods –such as those made by the Chamber—the ccNSO, the Joint Statement, INTA and CDT called for a timeline for full implementation of accountability recommendations before the transition takes place. They acknowledged that implementing accountability recommendations could extend beyond the IANA Stewardship Transition. Related to this, Avri Doria suggested establishing sequential milestones of those minimum items needed to allow the transition to proceed and then meeting the fuller accountability issues as raised in the ATRT2 report. The CDT noted the need for close coordination between the two processes. The BC suggested that the IANA Stewardship Transition “should follow approval of recommendations on Enhancing ICANN Accountability” and there should be specific acknowledgment of this timing by ICANN. Brazil called for the Accountability process to be delivered on the same timeline as the IANA Stewardship Transition process, in September 2015. Richard Hill suggested that the entire accountability process be closed and merged into the IANA Stewardship Transition discussions.

Section IV: Analysis of Comments

General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.

Taking these identified issues and proposed solutions into consideration, ICANN has revised the process for the Enhancing ICANN Accountability review. Accompanying this summary and analysis posting is a [revised process document](#). This analysis section details how ICANN took stakeholder comment into consideration when revising the process.

Structure of the Process

As a result of the comments and the option to either modify the 14 August process or integrate the principles into the establishment of a Cross Community Working Group (CCWG) by the community, ICANN staff proposes the process be further modified and there be the establishment of a CCWG model in place of the dual group structure. This most significant change to the process will address many of the comments received regarding structure. Within the process document that is being produced, ICANN is laying out some principles that have also been reflected in the community discussion and should be recognized as part of the CCWG in performance of their work.

Some of the key areas of moving to the CCWG that address comments are:

- The CCWG will have responsibility for the establishment of a charter drafting team, with the charter approved by the chartering organizations and taking into account the inputs of the Board. This addresses the many commenters seeking clarity on the community role in development of the charter.
- Membership in the CCWG is to be established by the CCWG Drafting Team. ICANN is not prescribing the membership numbers. This addresses the many comments regarding the need for sufficient representation among the different SOs, ACs, stakeholder groups and constituencies.
- The expert Advisors, ICANN Board liaison and Staff participant on the CCWG are not expected to be part of any vote or call for consensus in the deliberation of the CCWG, though they are expected to be allowed meaningful and full participation otherwise.
- The CCWG is expected to allow for full and meaningful participation and engagement of those who are new to the ICANN structure and not associated with the SO/AC model. This includes the inclusion of those who have already expressed an interest in the process by applying to be in the Cross Community Group. Though some commenters challenged this inclusion as creating a risk of capture or undue influence, there were other commenters, such as Brazil and the CDT, that explained that the value of this process is not simply for the ICANN of today, but to make sure that ICANN is seen as accountable to the global community. The risk of undue influence is present from any group, though the movement to a CCWG itself is expected to mitigate this risk. The Joint Statement noted that rather than solely identifying these individuals as “Other,” efforts should be made to bring them into the community. ICANN committed (in its 18 September [letter](#)) to “*work with those who are new to the ICANN community to see how these newcomers can continue to engage in ICANN and/or join an existing stakeholder group as appropriate.*”
- Though requested by one commenter, the CCWG will not have an independent secretariat; it is not part of the general practice to date across CCWGs and ICANN has demonstrated competency in delivering secretariat services. Even if ICANN’s role were limited to a facilitation role (which it is not), the provision of secretariat services is a facilitation duty.
- Though a few commenters suggest that ICANN has a conflict of interest in this work and is not a stakeholder to this process, ICANN respectfully disagrees with this conclusion. As discussed in the 18 September [response](#) to the SO/AC/SG/Cs, ICANN brings an identified interest to the table, and all participants should be open and transparent in the provision of a statement of interest. Having this review go forward without meaningful participation from ICANN at the

staff and Board level would not be appropriate. Particularly with a commitment that ICANN staff nor Board would count towards consensus, the CCWG should have the tools needed to prevent undue ICANN influence over the process.

In moving to the CCWG model, where ICANN understands there are not yet established and documented working methods (as those are under discussion), ICANN's understanding of the past and current practices of other CCWGs support the fundamental nature of items such as charter development and approval through chartering organizations, membership selection, and endorsement of outcomes.

Role of Advisors / Public Experts Group

As many commenters identified, there is recognized value in having Advisors inform this accountability work. As Brazil noted, a review that is fully a self-review is not a measure of accountability. As the ccNSO noted, identifying thought leaders with proven track records will be of benefit.

Some commenters requested that the community have a role in the selection of the Advisors, however that is not feasible in light of concerns of self-review. ICANN recognizes that there is still some discomfort with the PEG role, particularly in that the PEG members were appointed by the ICANN CEO. Some commenters are concerned that there is a conflict of interest in having ICANN be in the indirect appointment chain of the Advisors, particularly if those Advisors would have a voting role in the recommendations of the group. The confirmation that the Advisors are not expected to be part of consensus calls for the CCWG, along with the move to a CCWG (as opposed to the more limited numbers on the previously proposed Coordination Group) help address the concerns of the potential for undue influence of the Advisors. In light of this, the PEG's role in the selection of Advisors will continue. The PEG work, with the exception of deliberation over candidates, is publicly available through a mailing list [archive](#) and [Wiki](#). While ICANN does not agree that having the CEO involved in the PEG appointments results in a conflict of interest, the mitigation efforts taken through the clarification of the Advisors' roles are intended to address the concern raised.

The community requests for reconsideration of compensation of Advisors will be provided to the PEG for consideration. The renewed request from COA on the development of two new specific, standalone areas of expertise (intellectual property rights and the rule of law on the Internet) has already been accommodated to the extent possible, through the clarification of the Internet Consumer Protection category. To note, regardless of the selection of the Advisors by the PEG, the COA or other parts of the ICANN community remain able to identify stakeholder experts with desired expertise to work within the CCWG.

Board Role in the Process

As clarified in the [FAQs](#) and above, to ensure stakeholder ownership of the process, the CCWG will be responsible for development of the charter, with input from the Board.

The Board will appoint a liaison to the CCWG. For clarity in response to comments, the Board liaison will not be part of any vote or consensus call within the deliberations of the group.

The issue of how the Board would consider a final report, and particularly what process the Board would need to follow if it determined not to follow a recommendation, is an issue that ICANN takes seriously. The commenters are nearly universal in their statement that a defined process must be put forward, and there are suggestions of a heightened voting threshold for any decisions to not follow a recommendation, as well as dialogue and rationale around that decision. The Board is considering these comments and is anticipated to commit to a process in short order, well before any final recommendations are entered.

Requests to Broaden Scope/Linkage of Timeline to IANA Stewardship Transition Discussions

Many commenters identified that they are not comfortable with the scope limitation presented in the 14 August 2014 Proposal, and noted that the broader discussion on Enhancing ICANN Accountability must move forward. To take on these comments, ICANN will be introducing a phased review process, one that focuses first on those accountability issues that are linked to the IANA stewardship transition, and then on the broader accountability issues. The CCWG model will be in place across both of these phases. What this will do is allow for the transition-related accountability discussion to proceed in a timely fashion and meet the timeline for the consideration of an IANA Stewardship Transition proposal (which is also in line with community comments on a timeline for the process), while allowing the time needed for a robust discussion on the broader accountability issues. Providing a place for discussion of the broader issues also addresses the concerns raised by some commenters that ICANN is inappropriately foreclosing discussion.

The Enhancing ICANN Accountability & Governance process is linked to the IANA Stewardship Transition process and is intended to deal with focused systemic issues caused by the changing historical relationship with the United States, including for example, by stress testing against internal or external captures or takeovers, and safeguards against capture at all levels, which is a pre-condition of the transition. Statements made by the NTIA since posting clarify that this process is limited to ensuring that ICANN remains accountable in the absence of its contractual relationship with the U.S. Government.

Given the close linkage to the transition discussions, a mechanism to liaise with the work of the IANA Stewardship Transition Coordination Group (ICG) should be established for Work Stream 1 of the accountability process, as the output of this is interconnected and part of the deliverable for the IANA Stewardship Transition to NTIA.