



Reply Comment on Enhancing ICANN Accountability

Status: FINAL

Version: 5

25-Jun-2014

Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC). The BC's comments arise from the perspective of Business users and registrants, as defined in our Charter¹:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

On 6-May-2014, ICANN opened a public comment period on Enhancing ICANN Accountability, to examine "how ICANN remains accountable in the absence of its historical contractual relationship to the U.S. Government and the perceived backstop with regard to ICANN's organization-wide accountability provided by that role."²

The BC welcomes this discussion, which signals that ICANN management acknowledges the need for new accountability mechanisms and structures after the U.S Government ends its IANA contract relationship.

BC Initial Comments (filed 27-May-2014)

In initial comments filed on 27-May, the BC raised the following five concerns about the proposed process and structure for this new ICANN Accountability Working Group.

1. Composition of the Working Group (WG). ICANN is inviting community members "to have their names put forward" for participation on the WG.³ We note that ICANN suggests, "sub-working groups on specialized subject areas will be useful and open to all including experts." But our concern is with the potentially restricted composition of the main WG that would be tasked with developing written recommendations for enhancing ICANN Accountability.

Several BC members are interested in participating, so we are concerned that ICANN might be proposing to limit the size of the WG. Moreover, we would object if there were to be an equal allocation of limited slots among Advisory Committees and Stakeholder Organizations.

We have experience with ICANN Affirmation Review teams where members are appointed and apportioned to AC/SO groups. And we have experience with cross-community working groups where participation was not constrained. We are asking which of those models is being proposed for Enhancing ICANN Accountability, and we express our strong preference for the open participation model used in most cross-community working groups. It would benefit all community members if ICANN were to clarify these questions before the end of the public comment period, so that reply comments could be more relevant and responsive.

¹ Business Constituency Charter, at <http://www.bizconst.org/charter.htm>.

² <https://www.icann.org/public-comments/enhancing-accountability-2014-05-06-en>

³ <https://www.icann.org/resources/pages/enhancing-accountability-2014-05-06-en>

2. Scope of Accountability Mechanisms. ICANN listed an inventory of accountability mechanisms that includes existing documents such as the Affirmation of Commitments and ICANN Bylaws. We assume that this inventory is suggestive and not restrictive of the available accountability mechanisms. We also assume that the WG could recommend significant changes to ICANN Bylaws, such as incorporating the Affirmation Reviews into the Bylaws themselves. If our assumptions do not fit with ICANN board and management expectations, then we ask ICANN to clarify any scope limitations before the end of the public comment period.

3. Charter of the Accountability WG. On the web page for *Enhancing ICANN Accountability*, there is no mention of creating a charter for this WG. The BC assumes that the WG could create its own charter after it convenes, drawing upon ICANN's proposed questions and inventory of accountability mechanisms. We ask ICANN to affirm our assumption or clarify its expectations regarding a charter for this WG. We note that the GNSO Council recently submitted a draft charter for IANA Transition, which could be amended for use by the ICANN Accountability WG⁴.

4. Criteria for Board Approval of Recommendations. ICANN proposes that a draft WG report would be posted for public comment, and the final report would go to the ICANN Board to, **"consider whether to adopt all or parts of it, and direct the CEO to implement those parts it has accepted once that decision is made."**

The BC is concerned that widely supported recommendations for accountability enhancements could still be rejected by ICANN's Board. This is a very real risk in a process where the community could well recommend significant enhancements that affect the autonomy, accountability, and transparency of ICANN Board operation.

Before the end of this public comment period, we request that ICANN inform the community of criteria the Board could use to reject WG recommendations. ICANN should also implement a process for explaining the Board's decision to reject WG recommendations, along with a mechanism for the community to appeal the Board's rejection decisions.

Moreover, we also recommend a process to review the subsequent **implementation** of recommendations by ICANN management, perhaps as part of future Accountability & Transparency Reviews required under the present Affirmation of Commitments.

5. Timing. ICANN's proposal to convene the WG before London meeting is ambitious but possible, absent controversy over limits placed on WG composition. However, the BC has a broader concern about timing, regarding the relationship between ICANN Accountability enhancements the transition of IANA functions. As we noted in our comments in IANA Transition, the BC believes that IANA transition should follow approval of recommendations made by the WG on Enhancing ICANN Accountability.

⁴ 8-May-2014 email from Jonathan Robinson, at <http://mm.icann.org/pipermail/ianatransition/2014/001013.html>

BC Reply Comments

In our reply comments, the BC addresses the six questions ICANN posed in the public notice:

1. *What issues does the community identify as being core to strengthening ICANN's overall accountability in the absence of its historical contractual relationship to the U.S. Government?*

As noted in our initial comments, the BC welcomes ICANN management's acknowledgement of the need for new accountability mechanisms and structures after the U.S Government ends its IANA contract relationship. The BC previously stated its belief that ICANN accountability and adherence to the *Affirmation of Commitments* has been assured mainly because the US government could use the IANA contract renewal as a point of leverage on ICANN's board and management.⁵

In fact, the US Government has used IANA contract renewal as leverage on ICANN, actually cancelling the 2011 IANA solicitation because ICANN's bid wasn't responsive to increased technical requirements. Here's how NTIA Administrator Strickling described it in July 2012:

Last year, in anticipation of the expiration of the IANA functions contract, NTIA undertook two consultations of stakeholders, both domestic and international, on how to best enhance the performance of the functions. Based on input received from stakeholders around the world, we added new requirements, such as the need for a robust conflict of interest policy, to exercise heightened respect for local country laws and to increase transparency and accountability.

This spring, we took the unprecedented action of cancelling the initial request for proposals (RFP) because we received no proposals that met the requirements requested by the global community. We then reissued the RFP, and at the end of June we awarded the contract to ICANN, whose submission in response to the reissued RFP did adequately meet the new requirements.⁶

The BC sees a critical need to replace the US Government role of assuring accountability from *outside* the perspective of ICANN's board and management. We do not regard as sufficient those mechanisms internal to ICANN, such as the Reconsideration Process and the Office of the Ombudsman.

Moreover, we believe the ICANN Board has demonstrated that it values a close working relationship with executive management and has been uniformly supportive of management decisions and recommendations. While that may lead to a smoothly functioning ICANN, this close relationship comes at the expense of the board holding management accountable to the greater Internet community. This is not surprising, given how ICANN's Bylaws describe the Duties of ICANN Directors:

Directors shall serve as individuals who have the duty to act in what they reasonably believe are **the best interests of ICANN** and not as representatives of the entity that selected them, their employers, or any other organizations or constituencies.⁷ [emphasis added]

Therefore, the BC believes that a core issue in strengthening ICANN's accountability is to create oversight mechanisms and structures that are not internal to, or obligated to the best interests of the ICANN corporation. In our comments below, we recommend significant strengthening of the

⁵ BC Comment on IANA Transition and ICANN Accountability, 27-Mar-2014, p.2, at <http://mm.icann.org/pipermail/ianatransition/2014/000060.html>

⁶ <http://www.ntia.doc.gov/speechtestimony/2012/remarks-assistant-secretary-strickling-internet-governance-forum-usa>

⁷ ICANN Bylaws, Section 7 DUTIES OF DIRECTORS, <https://www.icann.org/resources/pages/bylaws-2012-02-25-en#/VI>

Independent Review Panel and creating a new cross-community representative structure to act as external check on ICANN's management and board.

2. *What should be the guiding principles to ensure that the notion of accountability is understood and accepted globally? What are the consequences if the ICANN Board is not being accountable to the community? Is there anything that should be added to the Working Group's mandate?*

The BC believes that the most important guiding principle is that the ICANN corporation is accountable to the global community of Internet users and registrants.

However this principle is articulated and advertised, principles alone won't ensure global acceptance. ICANN should demonstrate decisions and action consistent with those principles, over a sustained period and in the face of difficult questions. We can anticipate some of those difficult questions by drafting stress tests that could be faced by ICANN, and asking how the enhanced accountability structures could respond. We suggest several stress tests in our answer to question 6 below.

The BC recommends that the ICANN Accountability Working Group have unrestricted scope, and be permitted to propose new accountability mechanisms and structures, as we have done in these comments.

3. *Do the Affirmation of Commitments and the values expressed therein need to evolve to support global acceptance of ICANN's accountability?*

The BC was supportive when NTIA and ICANN unveiled the *Affirmation of Commitments* in September 2009.⁸ The *Affirmation* established periodic reviews giving all stakeholders – including governments – a defined oversight role in assessing ICANN's performance. The *Affirmation* completed ICANN's transition to independence, within an accountability framework that brought governments alongside private sector stakeholders with a focus on serving global Internet users.

However, ICANN can quit the *Affirmation* with just 120 days notice. And within a year of its signing, ICANN's then-chairman told a group of European parliamentarians that he saw the *Affirmation* as a temporary arrangement ICANN would like to eventually terminate.⁹

And in a 2010 meeting in Brussels, the BC asked ICANN board members if the commitments in the *Affirmation* should be permanently adopted as part of ICANN's bylaws. One board member immediately disagreed, saying the *Affirmation* commitments were already in ICANN's bylaws. But as we pointed out at that time, the *Affirmation* includes important new commitments in paragraphs 3, 4, 7, and 8 – plus the periodic reviews required in paragraph 9.

Regular renewals for the IANA Contract have provided incentive for ICANN to remain in the *Affirmation* and to implement recommendations coming out of the formal reviews. In the absence of IANA

⁸ Affirmation of Commitments, 2009, <http://icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>

⁹ Peter Dengate Thrush, in response to a question from Steve DelBianco, at event hosted by European Internet Foundation in Brussels, June 22, 2010.

contract reviews, the *Affirmation of Commitments* should become a permanent fixture in ICANN's Bylaws.

That said, the *Affirmation* signed in 2009 should be changed as part of becoming a permanent fixture of ICANN's Bylaws. To evolve this accountability mechanism, certain elements of the *Affirmation* should be changed as they become part of the Bylaws:

1. The Accountability & Transparency Review Team (ATRT) should be given authority to sunset obsolete reviews and create new reviews as it sees fit. For example, the *Affirmation* review of the new gTLD program (paragraph 9.3) could be concluded and possibly replaced with similar reviews of future rounds of TLD expansion. By the same token, the *Affirmation* Review of Whois (paragraph 9.3.1) could be ended and possibly replaced with a review of successor mechanisms to the present Whois system.
2. The ICANN community should be empowered to designate its representatives on Review Teams—without being subject to approval of the chairs of GAC or ICANN, as in the present *Affirmation*: “Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the Chair of the Board of ICANN.”
3. Recommendations arising from Review Teams should be given higher priority for implementation. A more formal obligation to implement Review Team recommendations may be needed, to avoid repeating the experience of having many ATRT-1 recommendations not implemented when ATRT-2 performed their review.

By moving the *Affirmation of Commitments* into ICANN's Bylaws, these obligations become continuous, a position that was recently advocated by the ICANN CEO:

There won't be a day when we decide: “OK, we're accountable and transparent now, so we can stop reviewing these things.” Long-term accountability is not a box you check, or a certificate you hang on the wall. It's a continuous, evolving process of careful implementation and review.¹⁰

The BC proposal to bring *Affirmation* Reviews and commitments into the ICANN Bylaws is in contrast with the recommendation of the Strategy Panel on ICANN's Role in the Internet Governance Ecosystem. That panel recommended “a Web of Affirmations of Commitments”:

Among the most important concepts discussed in the panel was the use of voluntary, bilateral, and possibly multilateral, affirmations of mutual commitments to document the relationships and commitments among the players in the Internet governance ecosystem.

The BC believes that multiple, bilateral *Affirmations* would be extremely difficult to negotiate, and could even create conflicting obligations for ICANN. Instead, we recommend incorporating the four reviews and paragraphs 3, 4, 7, and 8 of the *Affirmation* into ICANN's Bylaws, with the evolutionary changes noted above.

¹⁰ Fadi Chehade, “How ICANN is Accountable to the Global Community”, 12-Feb-2014, at <http://blog.icann.org/2014/02/how-icann-is-accountable-to-the-global-community/>

4. What are the means by which the Community is assured that ICANN is meeting its accountability commitments?

As noted in our response to the previous question, the BC believes that structured reviews and paragraphs 3, 4, 7, and 8 of the *Affirmation* should be added to ICANN's Bylaws, with the evolutionary changes noted above.

In addition, the BC is concerned that recommendations of structured review teams are not given appropriate urgency and deference by ICANN board and management. This despite the *Affirmation's* focus on evaluating ICANN management's implementation of recommendations from Review teams:

Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.¹¹

As we noted in our ATRT-2 comments, the BC fully supports the recommendation to institutionalize ICANN's obligation to respond to review team recommendations¹²:

9.1 Mandate Board Response to Advisory Committee Formal Advice

ICANN Bylaws Article XI should be amended to include: *The ICANN Board will respond in a timely manner to formal advice from all Advisory Committees explaining what action it took and the rationale for doing so.*

Also as noted in the BC response to ATRT-2 recommendations, we are disappointed that carefully considered and substantiated comments are not accurately reflected in the staff summary created for ICANN's board. We understand the importance of staff synthesis and summary to inform management and board decisions, given the quantity of individual comments received. To that end, we endorse ATRT2's recommendation 7.2:

7.2. The Board should establish a process under the Public Comment Process where those who commented or replied during the Public Comment and/or Reply Comment period(s) can request changes to the synthesis reports in cases where they believe the staff incorrectly summarized their comment(s).

As noted in the BC's comments on ATRT-2, the Reconsideration process needs to be more *responsive* to community concerns, and less *protective* of decisions made by ICANN management and board. Reconsideration requests regarding string similarity/confusion decisions have been consistently rejected in a perfunctory manner that fails to consider underlying policies and broader implications. The BC therefore strongly endorses ATRT2's recommendation 9.2:

9.2. Explore Options for Restructuring Current Review Mechanisms

The ICANN Board should convene a Special Community Committee to discuss options for improving Board accountability with regard to restructuring of the Independent Review Panel (IRP) and the Reconsideration Process. The group will use the report of the Experts Group Report (ESEP) on Restructuring as one basis for its discussions.

¹¹ *Affirmation of Commitments*, paragraph 9.1

¹² BC comment on ATRT-2 Recommendations, at <http://forum.icann.org/lists/comments-atrt2-recommendations-09jan14/msg00033.html>

The BC is concerned about process and about decisions by the Independent Review Process (IRP) and through reconsideration requests, well beyond decisions regarding the new gTLD program. To that end, the BC recommends a permanent IRP, with the authority to impose consequences on ICANN management and board for failure to implement IRP rulings

Moreover, the BC suggests that IRP reviews should be invoked by community concerns about actions taken by ICANN management and board. To give voice to the community – as opposed to ICANN management and board – we recommend a new structural element comprised of representatives of each constituency and stakeholder group, as described below.

Today, the BC is one of several voices in the GNSO, and participates in multiple cross-community working groups. But that involvement has been the limit of representation by the BC and by other constituencies in the GNSO. That’s primarily because the BC vote is often offset by other constituencies in the GNSO when the Council votes on policy recommendations. And in cases where the BC view prevails at GNSO Council, we find that the GNSO constituencies are collapsed to a single vote that can be offset by any of the other Advisory Committees or Stakeholder Organizations (AC/SOs). This, despite the fact that GNSO constituencies represent the majority of DNS registrants and users, and an even greater share of ICANN revenue.

All this to say that constituency and stakeholder organizations need to preserve their voice a bit further up the chain of ICANN decision-making. To that end, the BC recommends creating a new permanent cross-community working group with the role to impose external accountability on ICANN’s board and management. It could be called the Cross-Community Committee on Accountability (3CA), and would include representatives of all official ICANN communities, including each GNSO constituency, plus the ccNSO, ALAC, GAC, SSAC, RSSAC, IETF, ASO, and NRO. When assigning powers to this new Cross-Community Committee on Accountability, the Enhanced Accountability WG should consider, at a minimum:

- Naming representatives to Review Teams created under the *Affirmation of Commitments*, noting that we propose moving these reviews into the ICANN Bylaws. Under the *Affirmation*, the GAC and ICANN Board chairs had to approve Review Team membership, but we believe the community should be able to designate its representatives without board or GAC approval.
- Invoking the Independent Review Panel (IRP) to review decisions reached by ICANN management and/or board.
- Defining a process for appointing members of the Independent Review Panel (IRP).
- Reviewing and approving proposed ICANN budgets.
- Approving changes to ICANN Bylaws and Articles of Incorporation.
- As an extraordinary measure, triggering a recall of the ICANN board and immediate selection of new directors.

Again, the purpose of this Constituency Council is to provide external accountability pressure on ICANN’s board and management. As noted above, both the board and management are presently and predictably serving the interests of *ICANN the organization* as opposed to *ICANN the community*.

5. *Are there other mechanisms that would better ensure that ICANN lives up to its commitments?*

As noted in our response to the previous question, the BC supports the structured reviews that were established with the *Affirmation of Commitments*. Those reviews, however, should become a permanent part of ICANN Bylaws since the *Affirmation* could be cancelled by ICANN with a short period of notice.

In addition the BC believes the Independent Review Panel (IRP) needs to be permanently funded by ICANN.

Finally, the BC recommends a new accountability structure composed of representatives of constituencies and stakeholder groups, tentatively known as the Cross-Community Committee on Accountability (3CA). (see answer to question 4)

6. *Additional comments that could be of use to the ICANN Accountability Working Group?*

As noted in our comments on ATRT-2, the BC is determined to have ICANN increase the transparency of all board deliberations and meetings:

This past fall, the CEO of ICANN organized a Statement in Montevideo and then flew to Brasilia to request an unprecedented meeting on Internet Governance pursuant to a secret September Board Resolution. This is questionable behavior for an organization committed to transparency, accountability, and acting in the public interest. Many decision-making bodies, from national legislative committees to city councils, publicize their deliberations with audio and video recording.

The current practice of having only pro-forma board interaction after the public forum suggests that community comments heard in the forum are not adequately considered by the board for pending substantive decisions. The BC recommends that ICANN's board hold at least one open meeting with a substantive agenda during each ICANN meeting, where the community could observe deliberations and decisions. Further, ICANN has made binding pledges of accountability and transparency in the *Affirmation of Commitments*, and that should encompass policy actions taken by the Board.

As noted in the BC comments on ATRT-2, ICANN's management and board should be more strictly confined to ICANN's limited technical mission. We note that the recent top-down strategy panels and crowdsourcing initiatives are likely to tempt ICANN to expand its reach beyond DNS coordination, which would expose the organization to greater criticism and risk of interference from intergovernmental bodies.

As the BC noted in our comments on IANA transition, we will reserve judgment on the IANA transition plan unless and until we can also evaluate the accompanying proposal for a transition of ICANN accountability.

Finally, as noted in our response to question 2 above, the BC recommends use of scenarios, or 'stress tests' to help design and evaluate ICANN accountability structures and mechanisms. Today, ICANN is an effective organization that generally performs its core functions. Although it can be uncomfortable to

imagine a scenario where a future ICANN fails dramatically or is confronted with a serious threat, we should consider challenging scenarios that could arise, such as those described below:

1. Scenario: ICANN unilaterally cancels the [Affirmation of Commitments](#), which it may do with just 120 days notice. And if not outright cancellation, ICANN could refuse to implement recommendations of an *Affirmation* review. Presently, the discipline imposed by needing to win the IANA contract forces ICANN to adhere to the only external accountability it has today: the *Affirmation of Commitments*. If the *Affirmation* is to remain part of the new ICANN accountability framework, it is essential that the leverage formerly conveyed by the IANA contract be replaced with a new mechanism, which may or may not include parties external to ICANN.
2. Scenario: ICANN takes steps to eliminate its legal presence in a nation where Internet users and domain registrants are planning to seek legal remedies for ICANN's failure to enforce contracts. This scenario is not about ICANN opening new offices around the world as part of its global outreach. Rather, it is about ICANN creating a new legal entity distinct from its present status as a California non-profit corporation, and eventually relocating its legal presence. ICANN's current corporate presence in California creates legal certainty for businesses; presence in a new jurisdiction might not.
3. Scenario: ICANN becomes financially insolvent, due to lawsuits or gross mismanagement. However unlikely, this scenario should explore the orderly continuation of IANA functions and ICANN contract enforcement in the event ICANN could not maintain the necessary qualified technical resources.
4. Scenario: ICANN expands scope beyond its limited technical mission by using domain registration fees to fund grants for developing nations or other worthy causes. ICANN has the power to determine fees charged to TLD applicants, registry operators, registrars, and registrants, so it presents a big target for any Internet-related cause seeking funding sources. This scenario should examine how a fully independent ICANN could be held to its limited technical mission, and whether its fees and spending are subject to external accountability.
5. Scenario: ICANN attempts to add a new top-level domain in spite of security and stability concerns expressed by technical community leaders. This scenario actually came close to occurring when ICANN management did not respond to recommendations of its own Security and Stability Advisory Committee (SSAC) regarding risks of new TLDs interacting with security certificates and internal domains already in use. SSAC recommendations from prior years were not acted upon until late 2013, after significant pressure from a root server operator, Internet service providers, and system integrators. In the actual event, ICANN responded with a collision mitigation plan. This scenario should assess how proposed new accountability mechanisms could respond to similar technical risks expressed before a TLD delegation, as well as reactive responses to problems reported after a delegation.
6. Scenario: Governments in ICANN's Government Advisory Committee (GAC) amend their operating procedures to change from consensus decisions to majority voting. Today GAC adopts formal advice according to its Operating Principle 47: "*consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.*"¹³ But the GAC may at any time change its procedures to use majority voting, where each government has equal voting power, such as in the UN and ITU. (Notably, only 61 governments were present at the GAC meeting in

¹³ ICANN Government Advisory Committee (GAC) - Operating Principles, October, 2011, at <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>

Singapore during March 2014, where several GAC members expressed dissatisfaction with the multistakeholder process and consensus threshold for new gTLD program advice.) While ICANN's board is not strictly obligated to follow GAC advice, this scenario should assess how ICANN could respond to GAC advice with strong majority support but less than consensus. This scenario might also indicate need to amend ICANN bylaws regarding deference to GAC advice that is not supported by consensus.

7. Scenario: As described in scenario 6, the GAC might issue majority-supported advice instructing ICANN to suspend a TLD that refuses to remove domains with content critical of governments (e.g., .corrupt). Today, this kind of censorship routinely occurs at the edge of the Internet when governments block domestic access to websites, such as Turkey blocking Twitter. This scenario envisions censorship moving from the edge *to the core of the internet* – the root table of TLDs used by the entire world. The stress test would ask how a proposed accountability mechanism could respond if a future ICANN board bowed to GAC advice for censorship at the root of the DNS.
8. Scenario: ICANN attempts to re-delegate a gTLD because the registry operator is determined to be in breach of its contract. The registry operator challenges the breach determination and obtains an injunction from a national court. What procedures or appeal mechanisms would be used by the entity charged with maintenance and publication of the root zone?
9. Scenario: A court grants an injunction against delegation of a new gTLD that's a plural version of another TLD that has already been delegated. (for example, .hotels following after .hotel, or .coms following after .com) The court may have ruled on infringement of rights or on arbitrary and capricious behavior by ICANN, but that's beside the point. The point of this scenario is to ask how a post-transition ICANN and IANA would be empowered to respond to a court injunction granted by a jurisdiction where ICANN has a legal presence. Would ICANN/IANA be able to defer a delegation until court proceedings were concluded? How would ICANN/IANA be accountable for its decision if it ignored the court injunction?
10. Scenario: A government telecom minister instructs ICANN to re-delegate a country-code top-level domain (ccTLD), despite objections from many current registrants and user communities in the country concerned. Faced with this re-delegation request, what response options and measures could be available to ICANN and the entity charged with maintenance of the root zone?

These comments were drafted by Steve DelBianco with help from John Berard, Susan Kawaguchi, Phil Corwin, Claudia Selli, and several others. It was approved in accordance with the BC charter.