CCWG report version 2 – numbers related analysis

Dear colleagues,

The Cross Community Working Group on Enhancing ICANN Accountability

(CCWG) has published CCWG-Accountability 2nd Draft Proposal that can be found here:

https://community.icann.org/pages/viewpage.action?pageId=53783460

The ASO representatives to the CCWG encourage the numbers community to review and give feedback on any specific points in the second Draft Report.

At the same time we would like to highlight the principle amendment introduced in the second Draft Proposal as well as to provide you with a follow up on the numbering related matters highlighted with regards to the first Draft Proposal (see communication from 15 May 2015 <https://www.ripe.net/ripe/mail/archives/cooperation-wg/2015-May/000753.html>).

1. Revised Mission

The CCWG suggests clarifications on the description of ICANN’s mission (more details in section 3.2 of the second Draft Report). With regards to the coordination of policy development for Internet number resources, the description reads as follows:

“In this role, with respect to IP addresses and AS numbers, ICANN’s Mission is described in the ASO MoU between ICANN and RIRs” (p 29, para 181).

The description was provided by the ASO representatives during the drafting process for the first Draft report and the ASO representatives requested the numbers community to confirm its accuracy during the previous public consultation. A support to this definition was expressed.

2. Revised Commitments and Core Values

The CCWG proposes an amendment to one of the core values of the Bylaws.

In the first Draft Report (p 25, para 89) the proposed amendment read as follows:

*“Employ open, transparent and bottom-up,* ***[private sector led multistakeholder]*** *policy development processes that (i) seeks input from the public, for whose benefit ICANN shall in all events act, (ii) promote well- informed decisions based on expert advice, and (iii) ensure that those entities most affected can assist in the policy development process;”*

After the public consultation period ASO representative’s communicated to the CCWG the following comment:

*“With regards to ICANN’s core values in the Bylaws and in particular page 25, paragraph 89, the RIR community notes that the term "private sector led multistakeholder" (and similar terms) have been used by the NTIA in describing ICANN, but the RIRs describe their policy development processes using terms such as "inclusive, open, transparent and bottom". These different descriptions are compatible, provided it is understood that "private sector led" does not exclude government participation.“*

In the second Draft Report the proposed amendment changed and reads as follows:

*“Employ open, transparent and bottom-up,* ***multistakeholder policy development processes, led by the private sector, including business stakeholders, civil society, the technical community, and academia*** *that (i) seek input from the public, for whose benefit ICANN shall in all events act, (ii) promote well-informed decisions based on expert advice, and (iii) ensure that those entities most affected can assist in the policy development process;”*

Do you have any comments with regards to this amended description?

3. US Headquarters as part of the Fundamental Bylaws

Same as in the first Draft Report, the CCWG proposes in the second Draft Report the incorporation of some provisions from the Affirmation of Commitments relevant to ICANN accountability into the Bylaws (in particular regarding ICANN’s Mission and Core Values). The CCWG suggested defining these provisions as "Fundamental Bylaws". The concept of Fundamental Bylaws is described in section 4 (pp 34-37) of the second Draft Report. The main difference with the common Bylaws provisions is that while the Board could propose a change to this Bylaws provision, SO/ACs with voting rights could block the proposed change (by a 66% vote). On the other hand any change to Fundamental Bylaws would require approval by SO/ACs with voting rights (75% vote).

One of these provisions requires that ICANN “remains headquartered in the United States of America”. The CCWG noted that this provision exists already in current ICANN Bylaws, at Article XVIII Section 1:

*“OFFICES.*

*The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.”*

In the first Draft Report the CCWG considered whether this provision should also be listed as a Fundamental Bylaw, since the rest of Affirmation of Commitments provisions are suggested to be incorporated in the Fundamental Bylaws.

After the public consultation period ASO representative’s communicated to the CCWG the following comment:

*“There is general support the introduction of Fundamental Bylaws. Regarding, the list of Bylaws that should become Fundamental Bylaws, most of them indeed contain fundamental principles. However, the RIR community does not believe that the requirement for ICANN to remain in the United States of America is fundamental, but rather is an administrative issue.”*

The second Draft Report does not propose Article XVIII to be designated as Fundamental Bylaw giving the following justification:

*“Three considerations suggest that CCWG not propose Article XVIII be designated as a Fundamental Bylaw:*

*First, public comment on the first draft was evenly split on the question of whether to designate Article XVIII a Fundamental Bylaw. Supporting this designation were several commenters from the Commercial Stakeholders Group of GNSO. Governments were among those expressing strong opposition.*

*Second, the Community Mechanism as Sole Member must approve with 2/3 vote any change to ICANN’s Articles of Incorporation, which now state that ICANN is a California Nonprofit Public Benefit Corporation.*

*Third, the Community Mechanism as Sole Member could block any proposed change to ICANN Bylaws Article XVIII, which states ‘The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California.’ “*

Do you have any comments in relation to this?

4. Appealing Mechanisms

The CCWG has proposed enhancements to the two appealing mechanisms described in ICANN Bylaws, i.e. the Independent Review Panel and the Reconsideration process.

After the public consultation period ASO representative’s communicated to the CCWG the following comment:

*“…the RIR community stresses that there are separate, well-established appeal mechanisms for disputes relating to Internet number resources. In particular there is:*

1. *An arbitration process described in the ASO MoU for disputes relevant to the global policy development process*
2. *An arbitration process described in the draft Service Level Agreement between the five RIRs and IANA Numbering Services Operator for disputes relevant to the IANA numbering services.*
3. *A bottom-up process for any concerns that a third party may have relating to Internet number resources issues.*

*Imposing different appeal procedures than the ones agreed upon and used by the numbers community would be contradictory to the bottom-up principle. Therefore, it is strongly suggested that disputes relating to Internet number resources be excluded from the scope of the proposed appeal mechanisms.*

*Additionally the ASO representatives noted that it was requested by the*

*CWG that decisions regarding ccTLD delegations or revocations would be excluded from standing, until relevant appeal mechanisms have been developed by the ccTLD community, in coordination with other parties.*

*Considering the above, the ASO representatives would propose that any appeal mechanism developed by the CCWG should not cover disputes relating to Internet number resources.”*

Accordingly in the second Draft Proposal there is a clear exclusion of the disputes related to Internet number resources with regards to the Independent Review Process (IRP) (p. 40 para 9):

*“Exclusions; Numbering Resources:*

*The Address Supporting Organization has likewise indicated that disputes related to Internet number resources should be out of scope for the IRP. As requested by the ASO, decisions regarding numbering resources would be excluded from standing.”*

However in the section describing the amendments with regards to the Reconsideration Process the relevant paragraph reads as follows (p. 44 para 275):

*“Disputes related to Internet number resources are out of scope of the IRP.”*

It is our understanding that the intention is to exclude disputes related to Internet number resources from the scope of the Reconsideration Process as this section is about the Reconsideration Process and not about the IRP. However a correction accordingly would be appropriate.

5. Powers

In the second Draft Report there are no changes in the community powers suggested by the CCWG. The powers are the following:

* Reconsider/reject budget or strategy/operating plans (section 7.1 of the second Draft Report, pp 55-57) - We would like to note that this power was listed as one of the expected accountability mechanisms by the CWG.
* Reconsider/reject changes to ICANN Standard Bylaws (section 7.2 of the Second Draft Report pp 57-58)
* Approve changes to Fundamental Bylaws (section 4.5 of the second Draft Report pp 37)
* Remove individual ICANN Directors (section 7.3 of the second Draft Report pp 58-60)
* Recall the entire ICANN Board (section 7.4 of the second Draft Report pp 60- 63)

6. Community Mechanism as Sole Member Model

The first Draft Report suggested that these powers would be exercised by changing ICANN’s structure into a membership-based organisation, of which the SO/ACs would be the members (Membership Model). An alternative model was also investigated, whereby SO/AC would become designators (Designator Model).

However during the public consultation and thereafter objections were expressed relating with regards to both of these models. As a result of further discussions and consultations the CCWG in the second Draft Report introduced a new structure called the Sole Membership Model.

This new model is understood to have the following benefits:

* It provides the required legal enforceability that the Designator Model and Membership Model could not.
* It removes the problematic requirement for some SOs and ACs that they become legal persons, whether to participate as a member in the Membership Model or to enforce rights in both the Membership Model and Designator Model.
* It avoids the problem of differential statutory rights between SOs and ACs that become members and SOs and ACs that were not members, associated with the Membership Model.
* By allowing action only upon support of the community through the Community Mechanism, it limits the issues related to the statutory rights of members associated with the Membership Model, which would allow members to dissolve ICANN and bring derivative suits.

The details of the Sole Membership Model can be found in section 6 (pp 47-53). The following aspects of the model are worthy to be highlighted:

* SO/ACs are not required to have a legal personhood.
* SO/ACs would participate directly in the Sole Member by providing instructions to the Sole Member to exercise the community powers.
* In order to instruct the Sole Member, SO/ACs may chose to have voting rights. Voting rights will be allocated votes in the following way:
  + ASO, GNSO and ccNSO, 5 votes each
  + GAC and At-Large, 5 votes each
  + SSAC and RSSAC, 2 votes each

Early indications are that the ASO, ccNSO, GNSO and ALAC would be the initial set of voting participants in the Sole Member (with remaining and future SOs and ACs able to opt-in to voting participation). There is no requirement or expectation than a participating SO or AC cast all its votes identically for a given issue (meaning all 5 in support or all 5 against).

* For Director removal, those directors appointed by an SO could be removed by that SO or that community only. The Sole Member would merely implement their decisions.

Thank you,