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comments-ccwg-accountability-draft-proposal-04may15@icann.org

June 3, 2015

Ms. Grace Abuhamad
CCWG Accountability Staff
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Dear Ms. Abuhamad:

INTA is pleased to submit the attached comments to the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) Proposed Accountability Enhancements (Work Stream 1).

INTA appreciates the CCWG's thoughtful and thorough work to date and thanks the CCWG for the proposed framework. INTA strongly supports enhancing the overall accountability mechanisms within ICANN and believes it is particularly critical to do so before any changes to the IANA stewardship function occur. However, improving ICANN's accountability should be part of an ongoing discussion and not just predicated on the anticipated IANA transition.

Further, INTA reiterates its concern over the timing of the comment period. It is essential that the community has a reasonable amount of time in order to produce a thoughtful and considered response. This work is too important to do otherwise.

Sincerely,

A handwritten signature in black ink, appearing to read "Etienne Sanz de Acedo". The signature is stylized and fluid, with a prominent vertical stroke on the left side.

Etienne Sanz de Acedo

I. Introduction

The International Trademark Association (“INTA”) submits the following comments related to the proposed framework for enhanced accountability that has been developed by the Cross Community Working Group on Enhancing Accountability (“CCWG”). INTA appreciates this opportunity to provide comments and thanks the CCWG for its thoughtful work.

With respect to general feedback on the interim Work Stream 1 proposals, INTA strongly believes that ICANN must be accountable to the Internet community as a whole (“Community”) and that the proposals set forth in Work Stream 1 provide an excellent starting point. However, there is still much work to be done and our comments are presented below for your consideration.

II. Deep Concerns About Timing and Input

As an initial matter, INTA would like to request that ICANN provide additional time to allow for meaningful Community input on complex issues such as the IANA transition and ICANN accountability. Between the CCWG and the CWG reports, the Community had just over one month to review and analyze 233 pages of extremely dense material. This is not sufficient time to critically analyze how the 2 documents work together and whether the pressing concerns of accountability have been fully addressed. The work is too important to rush.

INTA recognizes that ICANN desires to stick to a schedule. However, this schedule is being primarily driven by ICANN’s own calendar of meetings. It has been repeated many times that ICANN must get this right and that the September deadline initially set by the National Telecommunications and Information Administration (NTIA) will be postponed until an acceptable proposal is produced. The process must be fair and deliberative. Creating rushed time tables deprives the Community of full and engaged input and deprives the work of the justice it deserves. Moreover, as with the CWG report, many of the concepts and questions discussed in the CCWG report are dependent upon other policies or require much more specification before any Community member could rationally indicate their support.

INTA is also concerned by the leading nature of the questions set forth herein and the fact that the answering party is forced by the form of the question to indicate agreement or opposition. Any such statements should only be taken as representing a position that INTA may currently possess in light of limited time it has had to analyze this report. We also object to the posting of 3 additional questions after the commencement of the comment period. We have opted not to respond to the additional questions at this time. Therefore, INTA expressly reserves its ability to amend and even to oppose any aspect of the accountability proposals at a later stage. Nonetheless, our responses to the questions are respectfully submitted below.

III. Responses to the Questions Posed by the CCWG-Accountability

Revised Mission, Commitments & Core Values

1. Do you agree that these recommended changes to ICANN's Mission, Commitments and Core Values would enhance ICANN's accountability?

INTA agrees with these recommendations but would like to see the Community have the ability to challenge a decision made by ICANN on the basis that it contravenes one or more of the mission statements, Affirmation of Commitments (“AoC”), or core values. Such a challenge should be arbitrated by a third party and the procedure for any arbitration procedures should be outlined in advance.

2. Do you agree with the list of requirements for this recommendation? If not, please detail how you would amend these requirements.

INTA agrees in principle with enumerated goals and recommendations. However, there must be accountability to the Internet community of governments, NGOs, and individual stakeholders, each of whom should have available a mechanism to challenge a decision by ICANN.

Fundamental Bylaws (p. 27)

3. Do you agree that the introduction of Fundamental Bylaws would enhance ICANN's accountability?

INTA agrees that there should be certain bylaws considered “fundamental,” in that they embody core principles and goals and, hence, are more difficult to amend or abrogate. However, establishing “fundamental” bylaws does not necessarily provide a remedy if the Community perceives that ICANN is not following a fundamental bylaw, or any other bylaw for that matter. We strongly support a mechanism in which an aggrieved party or group can seek redress if it has credible evidence that ICANN is not adhering to a fundamental bylaw. Further, INTA generally supports the idea of requiring some form of assent or involvement of SO/ACs as outlined in §5.4. However, INTA may later object to this requirement depending upon the details of the assent process and we respectfully note that there are flaws in the current proposal since the SO/AC structure is not truly representative of the entire Community and its various constituencies.

4. Do you agree with the list of requirements for this recommendation, including the list of which Bylaws should become Fundamental Bylaws? If not, please detail how you would recommend amending these requirements.

INTA agrees, in general, with the bylaws which have been proposed to be “fundamental.” However, after review, we suggest the addition of AoC ¶ 8b as a mechanism(s) for establishing the IRP (§4.1), and Community powers (§§5.3–5.6) should be included as a “fundamental” bylaw.

Independent Review Panel Enhancement (p.30)

5. Do you agree that the proposed improvements to the IRP would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

INTA agrees with the proposed IRP improvements, especially those regarding the effect of the decisions as being binding and not merely advisory and precedential. The IRP should have authority to review and prevent “mission creep” or actions in derogation of the *Statement of Mission, Commitments & Core Values*, the bylaws (both Fundamental and regular), as proposed, as well as grievances concerning appointment and removal of Board members. INTA recommends a low threshold of the “materially affected” standing requirement. With respect to the selection and appointment of panelists (subsection 14), we recommend that an aggrieved party shall have the right to move to recuse a panelist if there is a credible basis for bias. Regarding enforcement of judgments of the IRP, we recommend that the parties agree in advance to be bound by the decision of the Panel, which agreement shall be enforceable in a California court with jurisdiction over ICANN. We believe that the review of IRP decisions should include a request for reconsideration, as well as an en banc review, at the discretion of the IRP. Finally, the IRP should elect a chief administrator/arbitrator.

Reconsideration Process Enhancement (p.35)

6. Do you agree that the proposed improvements to the reconsideration process would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements. Are the timeframes and deadlines proposed herein sufficient to meet the Community's needs? Is the scope of permissible requests broad / narrow enough to meet the Community's needs?

INTA agrees and we also suggest that ¶ 142(e) should be amended to add, after “relevant information” or “one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on information, and subsequent to the action or inaction, there is a material change in that information.” We recommend changing ¶ 149 to state that Ombudsman “should” (not “could”) make initial recommendation to the BGC.

Mechanism to empower the Community

7. What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed options related to the relative influence of the various groups in the Community mechanism? Please provide the underlying rationale in terms of required accountability features or protection against certain contingencies.

INTA generally supports the Membership model, which the report asserts is consistent with California law. Further, INTA supports keeping ICANN as a public benefit (non-profit) corporation domiciled in California. ICANN’s status as a public benefit corporation in California allows the members to have greater input within ICANN and improve ICANN’s overall

accountability. INTA also believes that re-domiciling ICANN within another jurisdiction would be counter-productive at the present time. The Community as a whole has worked with ICANN in its present form for many years now and is familiar with ICANN's abilities (and inabilities) as governed by California law. Any change to that status at the present time would bring more uncertainty to a system and process that needs stability.

With respect to the CCWG's proposal, INTA does not support the proposed weighting of "community influence". In the current SO/AC structure business interests, except that of the contracted parties, are marginalized. *INTA recommends that given the prevalence of trademark issues in the domain name system, in particular, business interests and advice be provided greater Community weight.*

It is also unclear how each organization will determine how its votes will be exercised and how many representatives, 1 or 5 for example, will participate in full votes of the Community mechanism. *INTA is concerned that depending on how voting is structured, the voice of the trademark Community, and specifically the voice of the Intellectual Property Constituency, may be marginalized or not heard at all.*

Power: Reconsider/Reject Budget or Strategic/operating Plans

8. Do you agree that the power for the Community to reject a budget or strategic plan would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

We agree that giving the Community the power to reject a budget or strategic plan would enhance ICANN's accountability. However, as presented, we have concerns with the potential for this new power to lead to an impasse or budget crisis. In that regard, it is recommended that the feedback and amendment process not be unlimited. To promote Board accountability, rather than the Community having a limited number of opportunities for rejection, the Community and Board could be required to participate in mediation or some other form of consultation to resolve the matter. We believe that this type of dispute resolution should be clearly defined and set forth so that all the Community members understand how dispute resolution related to the budget would be handled.

Power: Reconsider/Reject Changes to ICANN "Standard" Bylaws

9. Do you agree that the power for the Community to reject a proposed Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

INTA supports empowering the Community, through Member SOs and ACs, to reject amendments to the standard Bylaws proposed by the Board. While INTA recognizes that 3/4 support is required to reject a Bylaw amendment, as with the budget rejection power, we are

concerned that the exercise of this power could result in an impasse. It is recommended that mediation, arbitration, or some form of consultation process be imposed at some stage. Further, with respect to any mediation or arbitration, this process should be clearly defined at the present time.

We also suggest that the time period (one month for example) for objecting to a Bylaw amendment be extended in order to allow organizations to consult properly with their members.

Finally, INTA questions whether 3/4 is the appropriate threshold for a first time rejection of a Bylaw amendment, noting that only 2/3 of the Community mechanism is required for a first rejection of a proposed budget or strategic plan.

Power: approve changes to "Fundamental" Bylaws

10. Do you agree that the power for the Community to approve any fundamental Bylaw change would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

INTA supports mechanisms to make it more difficult to change ICANN's purpose and core values and processes and powers critical to its accountability. However, the process for distinguishing between standard and fundamental Bylaws and for objecting to each, will have to be very clear and this standard is not clear enough in its proposed form. For example, at the present time, there is not a list of requirements for this recommendation either in Section 5.4 or Section 3.2.3. We recommend that ICANN develop a list of recommendations and submit them to the Community for public comment.

INTA supports the concept that changes to such Bylaws should require Community consent before changes are implemented, rather than the rejection mechanism available for standard bylaws.

Power: Recalling Individual ICANN Directors

11. Do you agree that the power for the Community to remove individual Board Directors would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

INTA strongly supports the ability for the removal of individual Board of Directors and believes that such a measure would certainly increase ICANN's overall accountability. The current threshold proposed by the CCWG appears to be sufficient as well.

Power: Recalling the Entire ICANN Board

12. Do you agree that the power for the Community to recall the entire Board would enhance ICANN's accountability? Do you agree with the list of requirements for this

recommendation? If not, please detail how you would recommend amending these requirements.

INTA supports granting the Community the power to recall the entire Board of Directors. The proposed processes and threshold appear appropriate.

Incorporating the Affirmation of Commitments into the ICANN Bylaws

13. Do you agree that the incorporation into ICANN's Bylaws of the Affirmation of Commitments principles would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

Since its adoption in 2009, the Affirmation of Commitments (“AoC”) has been the principal means by which ICANN has been held accountable on behalf of global stakeholders. INTA agrees with the Proposal’s observation that, “After the IANA agreement is terminated, the Affirmation of Commitments will become the next target for elimination since it would be the last remaining aspect of a unique United States oversight role for ICANN.” Since the AoC may be terminated by either ICANN or the U.S. government by simply providing 120 days’ notice of such intent, it is important to preserve the critical role of the AoC in reviewing and enforcing accountability principles by incorporating its principles within ICANN’s Bylaws.

INTA generally agrees with the list of requirements for this recommendation as they appear to incorporate and enhance all of the commitments made by ICANN when it signed the AoC. With regard to the proposed incorporation of AoC paragraph 7, we note that the introductory provision of a new Section 8 in Article II of the Bylaws presently reads, “ICANN **shall** adhere to transparent and accountable budgeting processes, **providing [reasonable] [adequate] advance notice to facilitate stakeholder engagement in policy decision-making...**” We believe that the use of the term “advance” is insufficient, as ICANN often provides inadequate time for comment periods, and the resulting limitation on adequate review is especially difficult for large membership organizations such as INTA, which represents trademark professionals from around the world. Therefore, we recommend that this phrase read, “providing reasonable and adequate advance notice.”

14. Do you agree that the incorporation into ICANN's Bylaws of the Affirmation of Commitments reviews would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

INTA agrees that it is very important to give force to the incorporation of the AoC within the Bylaws by amending them as proposed. This will ensure periodic reviews relevant to assuring accountability and transparency; preserving security, stability, and resiliency; promoting competition, consumer trust, and consumer choice; and reviewing effectiveness of the WHOIS/Directory Services policy and the extent to which its implementation meets the legitimate needs of law enforcement and promotes consumer trust.

INTA further agrees that all reviews should be conducted by volunteer community review teams comprised of representatives of the relevant Advisory Committees, Supporting Organizations, Stakeholder Groups, and the chair of the ICANN Board; and that the review group should be as diverse as possible. INTA concurs that review teams should be empowered to solicit and select independent experts to render advice, and should have access to ICANN internal documents.

We have some significant concerns regarding the recommendation that the separate periodic reviews should be carried out at least every five years, whereas the current AoC requires them to be performed every three years (or two years after the receipt of the initial one-year review required for new gTLD rounds). Given the uncertainty of the post-transition situation, we believe that the requirements for reviews to be held every three years should be maintained for at least two full cycles after the transition takes place, with a review mandated after the first six years to decide if less frequent reviews (but no less frequent than every five years) would be adequate to ensure continued adherence to AoC principles. Also, in regard to any possible future rounds of the new gTLD program, we believe that reviews of its promotion of competition and consumer trust and choice should take place at least every three years -- even if the Board should adopt an open-ended version of the program that does not have discrete rounds with set application deadlines.

Bylaws Changes Suggested by Stress Tests

15. Do you agree that the incorporation into ICANN's Bylaws of the above changes, as suggested by stress tests, would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

INTA agrees that the incorporation of changes as suggested by stress tests should help to enhance ICANN's accountability. The twenty-six separate stress tests outlined in the Proposal appear broad enough to cover all major contingencies.

INTA agrees that a mechanism should be established by which the Community can compel the Board to make a decision in response to advisory committee ("AC") advice, but it must be carefully crafted to facilitate the focused goal of triggering the ability for the Community to challenge the decision via Reconsideration or IRP processes. Advisory committees give advice, not direction, and this mechanism must recognize that the Board should respond to but is not obligated to accept AC advice.

In regard to the Governmental Advisory Committee ("GAC") advice, we generally support amendment of the Bylaws to require the Board to try to find a mutually agreeable solution only where GAC advice was supported by GAC consensus. This would be an important safeguard against a potential future decision by the GAC to change its manner of providing advice from broad consensus with no objections to simple majority vote; requiring the Board to attempt to find a solution in that instance could undermine the critical principle of maintaining ICANN as a private-sector led multistakeholder organization free of government control.

Items for Consideration in Work Stream 2

Question: The CCWG-Accountability seeks input from the Community regarding its proposed work plan for the CCWG-Accountability Accountability Work Stream 2? If need be, please clarify what amendments would be needed.

We are in general agreement with deferring the items listed for consideration within the post-transition Work Stream 2, so long as there is adequate assurance that ICANN will, indeed, address these items through the adoption of a transitional article in its Bylaws committing ICANN to implement the CCWG-Accountability recommendations, and task the group with creating further enhancements to ICANN's accountability including, but not limited to, the listed items. We agree that this transitional article must be incorporated in the Bylaws as part of Work Stream 1 prior to the IANA stewardship transition taking place.

We do question the fact that one of the items listed for Work Stream 2 is “Enhancements to the Ombudsman's role and function.” There is general dissatisfaction within the Community regarding the effectiveness of the Ombudsman in its current iteration, even though it is one of the few accountability measures currently available to ICANN stakeholders. Therefore, we believe that review and enhancement of the Ombudsman function should be addressed to at least some extent in Work Stream 1.