

Draft Transition Proposal by the Cross-Community Working Group on Naming Related Functions – Comment from the Centre for Communication Governance, National Law University Delhi.

About the Draft Report

The Cross-Community Working Group on Names (CWG) has placed its draft transition proposal for public comment. Briefly, it prescribes four new entities that would replace the NTIA’s oversight of IANA naming functions once the contract between the United States government and ICANN – the current IANA functions operator -- expires on September 30, 2015. A not-for-profit corporation (“Contract Co”) would handle contractual functions: defining contract specifications, renewal of the contract, and issuances of RFPs, among others (the draft proposal suggests there is “no reason to transition naming functions outside of ICANN” for now but that the “new arrangements post-transition should provide the possibility of replacing it” in the future). The proposal also suggests a new IANA functions operator should not replicate the “ICANN-like structure”.

Multistakeholder Review Team (MRT): The administrative and management functions performed by the NTIA currently will be distributed between a Multistakeholder Review Team (MRT) and a Customer Standing Committee. The CWG sees Contract Co, described above, as a “vehicle to enforce” the contract with the IANA functions operator when advised by the MRT. The MRT will identify the “terms of agreement” with the IANA functions operator as well as manage and select a new operator through a rebidding process. The MRT, which would meet annually to review the performance of the IANA functions operator, will also work with ICANN through its budget preparation “to discuss funding for improvements to the IANA naming functions.” The exact composition of the Multistakeholder Review Team is yet to be decided by the CWG, although it is expected its members will be formally elected by “their communities”.

Customer Standing Committee (CSC): The Customer Standing Committee, comprised “primarily of representatives of registry operators” and possibly liaisons from other SOs/ACs, would provide the input for MRT’s work. The CSC will “receive and review” IANA function operator reports, especially on delegation and re-delegation of ccTLDs and gTLDs, as well as root zone management audit data.

Independent Appeals Panel: In addition to these three entities, the CWG has mooted the creation of an Independent Appeals Panel (IAP) for binding adjudication on all decisions and actions of the IANA Functions Operator that relates to the root zone or the WHOIS database. The CWG suggests the IAP mechanism could be used in disputes over the “consistency of ccTLD delegation or redelegation” decisions with accepted policy. This body adjudicating

“IANA-related policies” will comprise three persons, two chosen by the parties to the dispute and the third, by the two appointed panelists.

In the post-transition contract, the CWG has included a draft provision requiring ICANN to maintain IANA as a “functionally separate division”. On issues concerning the delegation and re-delegation of ccTLDs, the IANA functions operator shall “take into account, the relevant national frameworks and applicable laws of the jurisdiction that the TLD registry serves.” The CWG has also added provisions to the original contract with the purported aim of increasing transparency – all recommendations by the IANA operator (i.e., ICANN) on naming-related decisions must be made public. ICANN is also asked to provide sufficient funds to IANA operators so it can engage “independent legal counsel” on interpretation of existing policy. The CWG has also sought to retain the original text on root zone file responsibilities of Verisign Inc. (“This contract does not alter the root zone file responsibilities as set forth in Amendment 11 of the [Cooperative Agreement NCR-9218742 between the U.S. Department of Commerce and VeriSign, Inc. or any successor entity]”). That Cooperative Agreement states:

NSI (Network Solutions Inc., acquired subsequently by Verisign Inc.) agrees to continue to function as the administrator for the primary root server for the root server system and as a root zone administrator *until such time as the USG instructs NSI* in writing to transfer either or both of these functions to NewCo or a specified alternate entity. (emphasis added)

The CWG is yet to offer its recommendations on NTIA’s role as the Root Zone Management Administrator and its possible replacement after the transition. However, in the post-transition draft contract, the working group has chosen to retain a provision from the original NTIA-ICANN agreement that stipulates “IANA functions must be performed in the United States.” There is also no change to the provision requiring the IANA functions contractor to be “owned and operated, incorporated and organised under US law”.

Comments and Questions

The Centre for Communication Governance at the National Law University, Delhi reserves its comments on the draft transition proposal pending the CWG’s final recommendation on the exact composition of the Multistakeholder Review Team and the Customer Standing Committee. Transparency in the election of MRT and CSC members will render both entities accountable to the larger community. Although the draft proposal asserts “Contract Co” will likely be a not-for-profit corporation, there is no discussion on the legal character of the Multistakeholder Review Team. The CWG, it is expected, will answer these concerns in the final report.

1. Will the MRT be incorporated under US law?
2. Will MRT members be immune from personal liability in lawsuits?
3. If IANA is to be maintained as a “separate division” within ICANN, what would be the nature of the relationship between the Multistakeholder Review Team and the

ICANN Board of Directors?

4. Given the functional separation so prescribed, why is the MRT expected to meet in conjunction with ICANN meetings?
5. Would ccTLDs who are not members of the ccNSO be represented in the MRT?
6. Which organisation or entity will fund the operational expenses of the MRT and CSC?
7. In drafting the terms of agreement between Contract Co and the IANA functions operator, is the MRT expected to obtain independent legal counsel?
8. Will the MRT have a significant role in Root Zone Management?
9. In addition to a transparent and representative selection process, will ongoing transparency and accountability be embedded in the functioning of the Multistakeholder Review Team?
10. Would the MRT play a role, if any, in the development of ICANN bylaws relating to IANA-related policies?
11. What would be the nature of the relationship between the MRT and registry operators?

Given that the Independent Appeals Panel provides for a “binding arbitration process”, it is expected the CWG would provide a broad framework for dispute resolution among interested parties. In particular:

1. Would the IAP follow *ad hoc* arbitration (where arbitral rules are selected by parties) or be housed under an institutional set up (such as the International Chamber of Commerce, JAMS arbitration rules etc)?
2. How would awards rendered by the IAP be made enforceable?
3. What is the role of local courts in enforcing an IAP award made outside their jurisdiction?
4. What policies may be defined as “IANA-related” under the IAP’s ambit?
5. Who would frame the list of panelists qualified to adjudicate IAP disputes? What would be the role of the MRT in this process?
6. How would the IAP secretariat be funded for operational expenses?
7. Would an arbitral award by the IAP be subservient or superior to an ICANN Board resolution on the subject?
8. Given that the CWG has sought no changes to the “principle of subsidiarity” for ccTLDs, how would the IAP adjudicate a matter involving a ccTLD registrar and an individual/entity from another jurisdiction? Would the IAP defer to local policy concerns?

While the CWG’s efforts to create functional separation between ICANN and the IANA functions operation is appreciated, the Multistakeholder Review Team and the Customer Standing Committee should not become unaccountable structures. In particular, it is hoped the CWG will address concerns around overlapping memberships in the MRT and CSC. The terms of reference as well as the tenure lengths of MRT members are equally important (it is expected that membership would be equitable and rotated frequently). Greater clarity on the relationship between the ICANN Government Advisory Council and the MRT would also

be appreciated.

In formulating its final recommendations, the CWG should not end up creating a parallel “super-structure” without addressing its accountability to the community. Questions regarding funding of all four entities proposed are critical and must be addressed by the CWG in its final report. The CWG should also liaise with the Cross-Community Working Group on Accountability to prevent overlap of accountability-related issues on naming functions.

About Us

The Centre for Communication Governance at National Law University, Delhi (CCG at NLUD) is a research centre within the National Law University, Delhi established in accordance with the National Law University, Delhi Act, 2007.

The Centre aims to promote research in communications law and policy with a focus on India, and to promote the Indian legal education establishment’s engagement with communication policy making. Its work spans constitutional and human rights law concerning privacy and free expression, media regulation, cyber laws and Internet governance. As part of its Internet governance efforts, the Centre tracks internet governance processes both at the domestic and global level, and holds regular briefings – through online publications and interactive events – for Indian stakeholders on the subject.