

Comments on Draft Transition Proposal by the CWG-Stewardship

The comments are divided into (i) substantive comments; and (ii) process related comments.

Substantive Comments

General Comments

- I support the current draft proposal of the CWG-Stewardship.
- The proposal incorporates the critical dimensions of separability and external accountability. The proposal reinforces separation between ICANN's IANA functions and ICANN's policy-making functions. The proposal also envisages a strong external accountability mechanism that allows changing the IANA functions operator by way of a limited term contract.
- However, I advice caution against creating new entities that are the subject of political ambition and result in the creation of a parallel ICANN. Adequate care should be taken to restrict the growth dynamics of the new entities.

Contract Co

- *Purpose of Contract Co*: The Contract Co should be extremely light-weight and its purpose should be limited to holding contracts for the names community. The Contract Co should not become a vehicle for policy related *collective action* by the names community. To operationalise this concept (i) the Memorandum of Association (MoA/By-laws) of Contract Co should narrowly limit the activities of Contract Co; and (ii) the MRT should be specifically recognised as an independent entity *outside* the Contract Co.
- *Term of IANA Functions Contract*: The term of the IANA Functions Contract should be 3+2+2 i.e. an initial duration of three years with two options of renewal of two years each. The renewals should be at the discretion of the MRT. There should be a mandatory RFP at the end of the contract term. Only for the purpose of the stewardship transition, ICANN should be allowed to retain IANA for an initial period of two years (Sept 2015 to Sept 2017) after which RFPs should be conducted periodically.
- *Jurisdiction of Contract Co*: There needs to be predictability in the IANA Functions Contract. Therefore, the jurisdiction of the Contract Co and the jurisdiction of the IANA Functions Contract should be a country/state where contract law and corporate law is well developed. It is also recognised that one of the objectives of the NTIA announcement is the globalisation of the stewardship. Therefore, as token recognition of globalisation, the jurisdiction of the Contract Co should not be the United States. Switzerland is a neutral country with well developed contract law and corporate law; and it is suggested as the preferred jurisdiction for Contract Co.
- *Financing of Contract Co*: The Contract Co should be
 - reimbursed/indemnified for all expenses (both legal and administrative expenses) by the IANA Functions Operator as part of the IANA Functions Contract; and
 - financed by a crowd-funded 'Internet Freedom Corpus' where individuals and Governments should be allowed to voluntarily contribute.
- *By-Laws of the Contract Co*: The by-laws (or the articles of association) of the Contract Co should explicitly delegate contract related authority to the MRT. Precaution should be taken to ensure that the by-laws of the Contract Co can not be easily modified resulting in capture of Contract Co by a rouge board. I suggest that a subgroup within the CWG-Stewardship should produce a draft template of the proposed by-laws, as it will be help the global community to better understand the (i) relationship between Contract Co and MRT; (ii) the

scope of activities to be performed by Contract Co.

Multi-stakeholder Review Team

- *Purpose of MRT*: To every extent possible, MRT should only be the convener of a community process and not be the actual decision-making body. The MRT should have a strict mandate to initiate a cross community process open to the global multistakeholder community for managing the RFP in a transparent and bottom-up manner.
- *Charter of MRT*: The MRT should not be a separate legal entity but a group (without a legal personality) that is organised independently of ICANN and Contract Co. The MRT should be governed by a charter. It is suggested that a draft charter be prepared by a subgroup within the CWG. This draft charter should not be binding on the future MRT. This draft charter is only intended to provide guidance to the future MRT. Such a draft charter will allow the community to better understand the purpose and operating principles of the MRT. This will also help identify the finer details of the MRT which may currently be escaping the CWG's attention.
- *Term of MRT*: I suggest that the MRT be treated as a body with continuous existence. The MRT should require 1/3rd members to retire on a rotation basis (3 years) so that the MRT has a continuous existence. This will allow MRT to deal with urgent issues such as premature termination of a contract or a time bound escalation by the CSC. This will also ensure that knowledge transition is continuous in the MRT. In this, no person should be allowed to be re-selected on the MRT for a second time. On the other hand, if the entire MRT is constituted afresh periodically, then the MRT may not be ready or prepared to deal with urgent situations during the transition periods when a new MRT is being constituted; further syncing the time intervals of constituting the MRT with the time intervals of the RFP for the IANA Contractor may not be an easy job.
- *Instruments with MRT*: In the current proposal, it appears that the MRT can only threaten to terminate the IANA Contract in case of non-compliance and performance deviations. It is suggested that other additional instruments should also be built into the IANA Contract to deal with smaller issues. For example, the MRT should be able to impose financial liquidated damages in case certain pre-defined service level flags are set off. These fines should be used to finance the functioning of the Contract Co and MRT.
- *Size of MRT*: It is suggested that the MRT be kept small in size (maximum size of 20) to avoid creation of a parallel ICANN with high potential to grow. However, it is recognised that MRT may become bulky owing to political considerations. To deal with this, the MRT should organise itself into smaller sub-groups in its operating principles/charter to respond to emergency or time bound escalations.
- *Secretariat to the MRT*: The MRT will require a dedicated secretariat that should be independent of ICANN. The secretariat will be required for tasks related to contract formulation and for conducting the RFP process. The secretariat should have (access to) legal resources for performing contract related tasks.
- *Barriers to Participation in MRT*: It has been proposed that MRT members will not be reimbursed/compensated for travel expenses. This proposal should not be applied towards MRT members from emerging countries resulting in the exclusion of their participation.
- *Funding of MRT*: It is suggested that the MRT be indemnified by the Contract Co for all its expenses. The MRT should not be funded by ICANN as it will raise questions about its independence.
- *Composition of MRT*: The composition of MRT should recognise and reflect that
 - not all ccTLDs are a part of ccNSO.

- that there is (numeric) parity between ccTLDs and gTLDs.
- that registries are the primary customers of IANA functions
- that the role of GAC and ALAC is important in bringing diverse cultural perspectives to the table.

Customer Standing Committee

- *Structure*: It is suggested that CSC need not be a separate entity but a sub-group within the MRT. The charter of the MRT should enable the creation of a standing committee (as a sub-group) for day-to-day oversight of IANA. This will be in sync with the principle that the otherwise bulky MRT will be operating through smaller sub-groups.
- *Role and Composition of CSC*: Will the CSC only be escalating issues related to performance deviation or also issues related to policy deviation? It is suggested that the CSC also be tasked with the job role of escalating issues related to policy deviation. In this case, it is suggested that the composition of CSC should be multi-stakeholder and not be dominated by the registry stakeholder group. In the case that CSC is only tasked with performance deviation, the composition of CSC can continue to be dominated by the registries.
- *CSC Composition*: The CSC members should preferably be drawn from the MRT so that there is coordination between CSC and MRT on matters that are escalated.
- *Funding of CSC*: It is suggested that the CSC be indemnified by Contract Co for all its expenses.
- *Term of CSC*: It is suggested that CSC have a continuous existence with 1/3 members retiring on a rotation basis.

Independent Appeals Panel

- *Instruments with IAP*:
 - The IAP should be allowed to issue temporary injunctions withholding (re)delegation pending the disputed matter at hand.
 - In case of contempt of a IAP directive/order by the IANA Operator, the IAP should be able to escalate the matter to the MRT. The MRT should use its position to threaten termination of the IANA contract to ensure compliance.

Authorisation Function

- *Role of Legal Counsel*: It has been proposed that the Authorisation Function will be replaced by publication for gTLDs and counsel review for cTLDs. It is unclear who will appoint this independent legal counsel? Will the legal counsel be providing an assessment based on California Law or the country from where the ccTLD originates? The advice provided by the legal counsel should preferably be in the form of a pre-defined checklist. In case of any contentious issues, the legal counsel should refer the matter to the IAP.

Cooperative Agreement

- *Silence about Cooperative Agreement*: The proposal is silent about the post-transition arrangement for the Cooperative Agreement between NTIA and Verisign. I suggest that post-transition, the Cooperative Agreement should be signed between Contract Co and Verisign. The MRT should be delegated the authority of monitoring the Cooperative Agreement. Elements of the Cooperative Agreement that relate to the registry functions of Verisign (in contrast to the root zone functions) should be removed from the Cooperative Agreement and be transferred to a direct contract between ICANN and Verisign. It should be

left to the future MRT to decide whether the Cooperative Agreement should be merged with the IANA Functions Contract.

Relationship with CWG-Accountability

- *Increase in Scope of New Entities*: The work of CWG-Stewardship is interrelated and interdependent with the work of the CWG-Accountability. It can reasonably be expected that the CWG-Accountability may want to add extra responsibilities to the functions of the Contract Co. For example, the CWG-Accountability could possibly require the Contract Co to sign an Affirmation of Commitments (AoC) with ICANN. Similarly, the responsibilities of the MRT, CSC and IAP may also be increased by CWG-Accountability. For example, CWG-Accountability may require the MRT to monitor compliance with the AoC; or require the IAP to adjudicate policy related disputes. Keeping this possibility in mind, I suggest that the proposal should explicitly recognise that the role and scope of the four entities may be changed by CWG-Accountability even after CWG-Stewardship submits its formal response to the RFP to the ICG in January. Placeholder text at the appropriate places will allow the global community to correctly judge and assess in an informed manner the nature, width and growth dynamics of the new entities proposed to be created.
- *Delineation of CWG's role and ICG's role*: Given the non-overlapping time-lines of CWG-Stewardship and Workstream 1 of CWG-Accountability, it is unclear how the two proposals will be coordinated. The CWG is requested to separately delineate the CWG's role and the ICG's role in coordination between the two proposals.

Alternative Proposal

- I strongly oppose the alternative proposal which envisages transferring all of NTIA's responsibilities to ICANN. This proposal appears to be a guise to gift IANA to ICANN in perpetuity. In the absence of external accountability, there would be no feasible mechanism to change the IANA operator in the future in case of serious dissatisfaction with the incumbent IANA operator.
- It is a risky and speculative gambit to suggest that *if* IANA is transferred to ICANN without a contract *then* in return the ICANN board may accept strong internal accountability mechanisms, especially since the output of CWG-Accountability will be vetted by the ICANN board.

Process Related Comments

There have been many elements of the process that have been found to be exclusionary. The following should be explicitly recognised in the response to the RFP so that level of community participation can be assessed in an informed manner:

- The CWG has had all calls in English without the option of translations. All working documents have also been circulated only in English. The transcripts of sub-groups have not been translated even *after* the meetings concluded. This has been at the exclusion of the non-English speaking participants. It is suggested that the transition proposal should explicitly recognise this limitation to allow proper assessment of community participation in the CWG.
- The CWG proposal should explicitly recognise that the distinction between “members” and “participants” not only includes *consideration of consensus* but also includes *reimbursement of travel expenses*. It is suggested that the transition proposal should explicitly recognise this distinction between stakeholders to allow proper assessment of *barriers* to non-ICANN community participation in the CWG.