

**Comments of the Intellectual Property Constituency (IPC) on the Initial Draft Proposal from the Cross Community Working Group on Enhancing ICANN‬ Accountability**‬‬‬

This comment responds to ICANN’s request for comments on the proposed framework for enhanced accountability by ICANN, as developed by the Cross Community Working Group on Enhancing Accountability (CCWG) in the run-up to the expiration of the IANA functions contract with the National Telecommunications and Information Administration (NTIA).

In the wake of the IANA functions contract expiration, it is essential to build a framework that holds ICANN board and management accountable to the community. Furthermore, the IPC has a special interest in ICANN’s accountability to the community, including ICANN’s accountability for enforcing the obligations of contracted parties to ICANN, via its Contract Compliance department. ICANN’s ability to hold its contractual partners accountable is an essential element of ICANN accountability. Both forms of accountability need to be addressed by any proposed framework.

**Summary**First the IPC would like to commend the CCWG for the impressive effort and comprehensive initial proposal submitted to the community. Overall the IPC is supportive of the accountability framework proposed by the CCWG. Specifically, we agree that:

1. The current accountability framework inside ICANN and between ICANN and the community is insufficient.
2. A suitable accountability framework needs to be in place prior to the expiration of the IANA Functions contract.
3. Any accountability framework needs mechanisms for enforcement to be effective.
4. A minimum subset of the accountability framework (i.e., Workstream 1) needs to be *implemented* prior to the expiration of the IANA Functions contract.

The proposed “membership model” appears to be the most straightforward means to achieve enforceability of the proposed framework and is therefore supported by the IPC.

The issue of enhancing ICANN accountability is sufficiently complex, and certainly sufficiently important, that there is no justification for a truncated public comment period, even though this truncation was approved by two “ICANN Global Leaders,” and even though a somewhat longer public comment period is contemplated for later in the process. It is indisputable at this point that the IANA naming functions – to which the accountability enhancements in Work Stream 1 must be inextricably tied -- cannot possibly be transitioned as early as September 30, 2015. Furthermore, the statement in paragraph 7 of the Draft Proposal that it is based in part on “requests and suggestions that have been provided by the community during a public comment period conducted last year following the NTIA announcement” is somewhat misleading, since the most recent such public comment period was explicitly limited to “addressing questions about the design of the Enhancing ICANN Accountability Process – not about the potential solutions or outcomes of the review.” See https://www.icann.org/public-comments/enhancing-accountability-2014-09-05-en. This is actually the first opportunity the ICANN community has had to comment on specific proposals to enhance ICANN’s accountability in the context of the IANA transition. Accordingly, the IPC reserves the right to supplement these comments at a later time.

Below the IPC addresses the questions posed by the CCWG about the draft proposal:

***Do you believe the set of Work Stream 1 proposals in this interim report, if implemented or committed to, would provide sufficient enhancements to ICANN's accountability to proceed with the IANA Stewardship transition? If not, please clarify what amendments would be needed to the set of recommendation.***

The CCWG provided the following rationale behind the division of Workstream (WS) 1 and 2:

Work Stream 1 mechanisms were defined as those that, when in place or committed to, would provide the community with confidence that any accountability mechanism that would further enhance ICANN's accountability would be implemented if it had consensus support from the community, even if it were to encounter ICANN management resistance or if it were against the interest of ICANN as a corporate entity. (p. 11)

While the IPC remains concerned that sufficient impetus will remain post-transition to implement the WS2 recommendations, the powers proposed in WS1 appear sufficient to ensure the community can expand ICANN reform efforts if they so choose. In all likelihood, the proposed changes in WS2 will be subject to experimentation, review and update and will result in evolutionary change within ICANN.

However, the IPC notes that the power to enforce decisions by the community to review board decisions, reject budgets, scrutinize bylaw changes and recall the board (or individual members) is critical for these accountability mechanisms to be effective. Absent the membership structure or some equivalent, the ICANN community would find itself back where it began at the start of this exercise.

**Do you have any general feedback or suggestion on the interim Work Stream 1 proposals?**

The IPC supports the notion that ICANN should ultimately be accountable to its community and believes the proposed measures in WS1, if enforceable, provide that ultimate accountability. That said, the IPC is anxious to see the process of reform continue after the IANA contract expiration to enable a more finely tuned framework of accountability that will serve the interests of all parts of the community. Operational accountability will be in the details, not the broad strokes outlined in WS1.

However, the IPC also believes that the focus on Board accountability is too narrow. Many of the issues that arise in ICANN’s activities and cause concerns in the community stem from actions by senior management rather than the Board. We recognize that the Board is ultimately responsible for the actions of management, but this is indirect oversight and accountability at best, since many management actions occur without express Board approval. We urge the CCWG to consider mechanisms whereby the actions and inactions of management are also held accountable to the community.

**Revised Mission, Commitments & Core Values (p. 14)**

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

The IPC generally agrees with the recommended changes to ICANN’s Mission, Commitments, and Core Values. These changes help create a culture of accountability within the organization.

IPC is concerned that the proposal in paragraph 60 to add to the Bylaws a statement that “ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet’s unique identifiers or the content that they carry or provide” could be read too broadly. We assume there is no intent here to constrain ICANN’s ability to enter into or enforce contractual provisions that require those making these identifiers available to take into account how they are used in specified circumstances – for example, to require domain name registration services to adopt and enforce policies against prohibited or abusive uses of domain names.  We urge that this very broad proposed language be reviewed and refined to reduce the risk of any interpretation that would constrain ICANN’s ability to enforce its contractual obligations.

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

The IPC agrees with the requirements for this recommendation. Given recent events it is clear that maintaining a strict definition of ICANN’s mission and scope is essential to organizational performance and operational accountability.

**Fundamental Bylaws (p. 27)**

**3. The CCWG-Accountability welcomes feedback on whether there is a need, as part of Work Stream 1 (pre-Transition), to provide for any other means for other parts of the ICANN system to be able to propose new Fundamental Bylaws or changes to existing ones. In particular, the CCWG-Accountability welcomes feedback on whether the Mission should be subject to even higher thresholds of Board or community assent. (page 29)**

The IPC does not believe that there is a need for additional means to propose or amend Fundamental Bylaws, other than those proposed by the CCWG. The IPC is not necessarily opposed to increasing the supermajority thresholds proposed by the CCWG, but any change must be carefully analyzed to avoid a single stakeholder veto situation. Furthermore, there should be a degree of deference to existing supermajority thresholds of general applicability.

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

“Fundamental Bylaws” should be those bylaws that are *fundamental* to the mission and core values of ICANN. These bylaws should be **harder to change** because of their fundamental nature, not merely because they are designated as such.

Thus, the introduction of bylaws that are harder to change does not, by itself, enhance ICANN’s accountability. Rather, it is the substance of these bylaws that must be reviewed to determine whether they will affect ICANN’s accountability. That said, if these bylaws are fundamental in nature, they should be more protected from changes by the Board.

**5. 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.**

The IPC is generally supportive of the bylaws which have been proposed to be “fundamental.” However, as noted below, the IPC suggests that Affirmation of Commitments paragraph 8b should also become a Fundamental Bylaw:

*ICANN affirms its commitments to: remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community.*

**Independent Review Panel Enhancement (p.30)**

**6. 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.**

The IPC further commends the CCWG’s work on the Independent Review Process (“IRP”) section of the Proposal, and considers it to include a great many useful and practical suggestions for improving an often misunderstood and (up until recently) under-utilized process. In our view, the IRP as a whole should continue to take on an ever-greater role in ensuring ICANN’s accountability to the community, and the Proposal represents a significant first step in helping to achieve this.

While we concur with the vast majority of points raised in the Proposal, certain items seemed worthy of additional comment, either because: (1) we consider them to be especially important and potentially deserving of an even greater level of treatment in the Proposal; or (2) we disagree, in whole or in part, with the suggestions of the CCWG with respect to that particular item, and feel that it should be worth a “second look.”

1. **Impact of IRP declarations:** We strongly agree with other commenters (*see* ¶ 131) as well as the interlocutory “Declaration on the IRP Procedure” issued by the Panel in *DCA Trust v. ICANN* (*see* https://www.icann.org/en/system/files/files/irp-procedure-declaration-14aug14-en.pdf) that the process should be deemed “binding” upon the Board to the fullest extent possible, and should not be merely “advisory” in nature. We also concur with the CCWG’s recommendation (*see* ¶ 133, sub. 18b) that IRP decisions be “precedential,” with a certain degree of “weight” given to prior decisions. We do note, however, that the actual number of *final* IRP declarations is currently quite limited as of the date of this writing (*e.g.* just two, and with one of those being arguably considered moot or inapplicable).
2. **Matters excluded from IRP:** Assuming the “membership” organizational model is adopted according to the CCWG’s Proposal (*see* ¶ 180), it would seem reasonable to the IPC that a great many ― if not all ― matters “specifically reserved” to the “members” (*e.g.,* recall of the Board or individual directors, budgetary approvals, etc.) should be deemed to be outside the scope of IRP review when exercised by the members.  *See* ¶ 133, sub. 3. However, the additional exclusion of items “so material to the Board that it would undermine its statutory obligations and fiduciary roles” is vague and demands additional clarification.*Ibid.*Prior to moving forward, objective standards for determining what matters would undermine the Board’s statutory obligations and fiduciary roles should be developed.  A mechanism for making such a determination, including consideration of a procedure for allowing members to have the final say in making such a determination, should be adopted.
3. **Panel expertise/training:** The IPC considers “training on the workings and management of the domain name system” (*see* ¶ 133, sub. 10) to be a very welcome addition, and one that has been sorely lacking in earlier contexts, most notably many new gTLD objections from Round 1. On the other hand, while we would likely deem a candidate with both significant legal and technical expertise to be highly attractive and worthy of consideration for an IRP appointment, requiring (as some commenters have purportedly suggested, *see* ¶ 133, sub. 10a.) that each skill be represented by at least one individual panelist may cause considerable delay in panel appointments. As noted by various IRP panels*,* the process of nomination has already been extremely slow-going. Allowing for panel expertise to be supplemented, on an as needed basis, by qualified experts with specialized knowledge makes a good deal of practical sense.
4. **Geographic diversity:** We generally agree with the CCWG that IRP panels should strive to have “diversity in geographic and cultural representation.” *See* ¶ 133, sub. 11. However, this desire for diversity must be subsidiary to a meritocratic desire for excellence. In order to support diversity in the long term, ICANN could work on outreach and engagement to diverse populations as well as provide support for interested and qualified members of these populations to enable them to serve on panels.
5. **Standard of Review:** The CCWG’s efforts to expand the applicable standard of review to also include “substantive limitations on the permissible scope of ICANN’s actions” (*see* ¶ 133, sub. 9) are highly commendable and should be fully supported. This would seem especially true in light of certain amendments to Art. IV, Section 2 of the ICANN Bylaws, which directly pertain to IRP, following the decision in *ICM v. ICANN* (https://www.icann.org/resources/pages/icm-v-icann-2012-02-25-en).  *Compare* https://www.icann.org/resources/pages/governance/bylaws-en(amended July 30, 2014) and https://www.icann.org/resources/pages/bylaws-2009-09-30-en (as amended September 30, 2009).
6. **Decision Methodology:** According to the CCWG, IRP panels should be permitted to “undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts.” *See* ¶ 133, sub. 17b. We concur with this approach, and would also direct the CCWG’s attention to the language found in the IRP decision *Booking.com v. ICANN*:

**“***Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, as explained below,* ***the IRP Panel is charged with “objectively” determining whether or not the Board’s actions are in fact consistent with the Articles, Bylaws and Guidebook****, which the Panel understands as* ***requiring that the Board’s conduct be appraised independently****, and* ***without any presumption of correctness****.”*

*See* https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf, at pages 32-33, ¶ 111 (emphasis added).

1. **Panel Independence:** While we agree that the “independence” ― both real and perceived ― of an IRP panel is highly desirable, we think additional consideration is needed on how best to achieve this in actuality if, as recommended by the CCWG, “panelist salaries” or other forms of compensation are borne completely by ICANN. Admittedly, ensuring broad access to the procedure for as many interests as possible (including non-profits and others with limited financial resources) is itself a laudable goal. One possible compromise solution might be to allocate a specified portion of each domain name registration toward IRP panel compensation, similar to an “election fund.” While solutions such as this would, of course, take a great deal of additional planning before implementation ― and certainly do not represent the entire universe of possibilities ― the CCWG is encouraged to consider that concerns over accessibility should be balanced with the need for truly unbiased and impartial decision-making, which can often only be achieved through various types of cost-sharing and allocation.

**Reconsideration Process Enhancement (p.35)**

**7. 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?**

The IPC also strongly supports many of the CCWG’s recommendations for improving the Request for Reconsideration (“RfR”) process, with particular emphasis on the provisions concerning improvements to transparency mechanisms (e.g., recordings, transcripts, etc. see ¶ 154); document disclosure policies (see ¶ 164); and opportunities for rebuttal after the BGC’s final recommendation but prior to Board decision (see ¶ 155). The IPC also ― in principle ― supports the efforts to extend RfR filing deadlines, though considers thirty (30) days to still be a bit on the lean side. See ¶ 161. While the IPC is mindful of the underlying goal of resolving disputes quickly, and does not feel that the timelines need to extend nearly as long as traditional statutes of limitations (or what might otherwise be considered “laches” under common law), further consideration is nonetheless encouraged to try and identify a slightly broader window to allow time for reasonable investigation of the merits of potential claims. See ¶¶ 139, 161; see also Bylaws Art. IV, § 2, Para. 5(a). Initial review by the Ombudsman (or anyone with mediation training that can serve in a facilitative, rather than adversarial, role) is another potentially useful approach that will likely reduce costs and, at minimum, help reduce the number of issues to be decided in the proceedings. See ¶ 149.

We also support the CCWG’s efforts to broaden the RfR standards and applicability (e.g., changing “material” to “relevant” as listed in ¶ 142; as well as removing highly subjective dismissal criteria such as “vexatious” or “querulous” as listed in ¶ 146). However, while we do consider the RfR process to be a useful accountability tool in certain situations (e.g., involving ICANN staff action/inaction), we feel that an expanded role for the IRP is more likely to ensure a greater degree of consensus and more adequately protect the interests of the community. While we do not consider a high standard for reconsideration to be unreasonable per se, we also note that, to date, an extremely low number (i.e., two) of RfR’s have ever actually been granted. We, of course, have no doubt that the Board is fully capable of evaluating its own conduct and implementing orders that correct particular discrepancies. However, it has rarely shown much willingness to do so in actual practice. RfR’s still have a place in the accountability ecosystem (and each of the CCWG’s proposed measures should be adopted) but a more efficient and streamlined IRP mechanism would likely better achieve much of what the community seeks to accomplish.

**Mechanism to empower the Community (p.40)**

**8. Do you agree that the introduction of a community mechanism to empower the community over certain Board decisions would enhance ICANN’s accountability?**

The IPC is generally supportive of using a community mechanism to give the community certain powers regarding certain Board decisions.

**9. What guidance, if any, would you provide to the CCWG-Accountability regarding the proposed options to empower the community over certain Board decisions? Please provide the underlying rationale in terms of required accountability features or protection against certain contingencies.**

The IPC generally supports the use of a “membership model” to ensure accountability to and oversight by the community. The role of members in a non-profit corporation (such as ICANN) is naturally suited for this role.

The IPC also notes that the accountability structure proposed by the CCWG was designed with California law in mind, which underlines the need to keep ICANN domiciled and incorporated in California.

The IPC believes that each SO and AC should be given fairly broad leeway to determine if and how it forms or otherwise provides a “legal person” to act as an ICANN member. The IPC does not find the concept of the “unincorporated association” (“UA”) complex, and notes with approval that it is lightweight and easy to form and manage (indeed, the IPC notes that many of the SO/ACs strongly resemble UAs already). However, it is possible that some SO/ACs may wish to form non-profit corporations rather than UAs, or may even wish to designate a natural person as the member, serving in an official capacity.

The IPC does not believe that the creation of UAs or other legal persons will diminish ICANN’s functioning as a multistakeholder organization focused on building consensus. Similarly, the IPC does not believe that a rash of litigation will ensue merely because the ICANN community now has legal vehicles to use for litigation.

The IPC agrees that the use of “designators,” on the other hand, would not be sufficient to support the accountability measures proposed by the CCWG. Designators’ powers are essentially limited to the appointment (or “designation”) of board members, and do not extend to the other powers proposed by the CCWG and generally endorsed by the IPC.

There are issues in implementation that must be dealt with before the IPC can fully endorse the membership model. Some of these are discussed below.

**Influence in the Community Mechanism (p. 43)**

**10. 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.**

The IPC has several concerns with the proposed composition and weighting of the membership as discussed in this section – 5 “votes” for each SO, At Large and GAC, and 2 “votes” for the RSSAC and SSAC.

First, this bears little resemblance to the way directors are currently appointed to the board, and we assume that the CCWG is not proposing any change to the composition of the board. The GNSO, ccNSO and ASO each appoint 2 board members and each has 5 member votes. In contrast, At Large appoints 1 board member and the GAC appoints only a non-voting liaison, yet each of these organizations has 5 member votes as well. The SSAC and RSSAC, also appoint non-voting-liaisons, yet each only has 2 member votes. We understand that there can be different classes of members, appointing 2, 1 or no board members. Yet and still, it seems that there should be a rational relationship between board appointments and membership.

Second, this tends to diminish the influence of the GNSO, which represents the most significant portion of ICANN’s work and revenues. Consideration should be given to a more flexible weighted voting structure, to avoid the situation in which SO’s and AC’s with no real involvement in the policy development, implementation or utilization of the matter under decision could effectively wield veto power over it.

Third, this composition is yet another ICANN structure where the IPC is essentially made non-existent. If the 5 GNSO votes are translated into 5 representatives, that leaves one representative per stakeholder group, along with one wild card. Again, the IPC is expected to homogenize its concerns with those of the ISPs and the general business community, and hope that a member of one of these groups can somehow represent all 3. However, it is far from clear whether the CCWG envisions a 29-member council of some sort, or whether there will just be 7 members, with weighted votes. Our concern regarding the latter is that it truly flattens and wipes out diverse voices, and practically speaking puts the RSSAC and SSAC on an equal footing with the other organizations, except when votes are taken. This must be clarified.

**Power: reconsider/reject budget or strategy/operating plans (p. 45)**

**11. Do you agree that the power for the community to reject a budget or strategic plan would enhance ICNN’s accountability? Do you agree with the list of requirements for this recommendation?**

The IPC generally supports some form of community oversight and “veto” over budgets and strategic plans, beyond the current public comment exercise. The IPC agrees that this power should be relatively narrowly focused and rely on inconsistency with ICANN’s mission and role. A horse-trading line-item-veto process would be unwieldy and put too much power in the hands of the members. In that vein, there should not be an endless loop of feedback. The IPC is concerned by the reference to “subsequent rejection/s” and does not believe there should be more than two bites at the apple, at most. Rather there should be an appropriate consultation process to work through any issues that caused rejection in the first place.

**Power: reconsider/reject changes to ICANN "standard" Bylaws (p.46)**

**12. 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.**

The IPC commends the CCWG for recognizing that SO/ACs (with input from the larger community) should have the right to reject Board approved Bylaw changes prior to such changes becoming effective. Allowing SOs/ACs the right to reject Board approved Bylaws is in keeping with ICANN’s multi-stakeholder model.

The IPC disagrees with the short time period to object to a proposed Bylaw change. Given that SO/ACs are organizations with members throughout the world having only two weeks to decide whether to reject a Bylaw change is far too short. Instead, SO/ACs should be given a 60 day window to decide whether or not to reject a proposed Bylaw changes.

The IPC is unclear why the CCWG recommended a ¾ threshold for the community to reject a change to a “standard” bylaw or the introduction of a proposed standard bylaw. The IPC notes that the Board is required to approve any such new or changed bylaw by a 2/3 majority. Perhaps it would make sense for the “community veto” to be subject to a 2/3 majority as well. Given the importance of the Bylaws, perhaps the threshold for a community veto should be even lower – even as low as a bare majority to reject a change.

**Power: approve changes to "Fundamental" Bylaws (p.47)**

**13. 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.**

The IPC agrees that empowering the community to approve any change to a Fundamental Bylaw will enhance ICANN’s accountability to the community. However, at this time, there does not appear to be a well-defined list of requirements for this recommendation, either in Section 5.4 or in Section 3.2.3. It is critical that these requirements be expressed with clarity, and the IPC urges the CCWG to revisit these sections for purposes of clarification.

**Power: Recalling individual ICANN Directors (p.48)**

**14. Do you agree that the power for the community to remove individual Board Directors would enhance ICANN's accountability?** Yes

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

When considering the removal of a director appointed by the NomCom, the IPC believes a special committee of the NomCom should be established to deal with removal petitions when they arise. Given that the possibility of removing a director appointed by NomCom would be a rare occurrence, the appointment of a special committee appears appropriate. The IPC recognizes that this would require more volunteers but a removal of a director would be a major event and IPC would assume that there would be a sufficient number of volunteers.

**Power: Recalling the entire ICANN Board (p.50)**

**15. Do you agree that the power for the community to recall the entire Board would enhance ICANN's accountability?** Yes

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

Yes, the requirement threshold is sufficient.

**Incorporating the Affirmation of Commitments into the ICANN Bylaws (p.51)**

**16. 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.**

The IPC supports having key commitments from the Affirmation incorporated in ICANN bylaws according to CCWG proposal (p.55). In addition, the IPC suggests that Affirmation of Commitments paragraph 8b should also become a Fundamental Bylaw:

ICANN affirms its commitments to: remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community.

**17. Do you agree that the incorporation into ICANN's Bylaws of the Affirmation of Commitments reviews would enhance ICANN's accountability? (p.52) Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.**

The IPC supports the notion of enshrining the key reviews in the ICANN bylaws to enhance ICANN accountability. The IPC also supports the CCWG proposal to empower the Accountability and Transparency Review Team (ATRT) to create new reviews and reschedule reviews as community priorities demand. However, empowering the ATRT to completely eliminate any of the reviews now provided for in the AoC raises concerns. Rather than the expedited six-month review Board review process applicable to ATRT recommendations generally, the elimination of any current AOC-mandated review should be undertaken only through amendment of the relevant new Bylaws through the amendment process ordinarily provided.

Paragraph 305 should be modified to provide that Review Teams include representatives of all “constituencies” as well as the other entities listed. See our discussion above about the risk that IPC would effectively be eliminated from ICANN structures that do not recognize the importance of constituency representation.

The reference in paragraph 338 to a Board-initiated review of “any batched round of new gTLDs” is somewhat confusing as to whether it refers to the review required by the AoC (as proposed to be incorporated in the bylaws) or something else. Furthermore, experience with the current new gTLD round (and the pending reviews) suggests that one year after the first new gTLD in the round becomes operational may not be long enough if other new gTLDs are still being rolled out at that time. It’s also possible that there will not be further “batched rounds” of new gTLDs. We support having bylaws requirements for periodic community-wide reviews of whether ICANN’s new gTLD activities are promoting competition, consumer trust and consumer choice, and the proposal in paragraph 347 that such reviews occur at least once every five years.

Paragraph 351 is a sentence fragment referencing the OECD Guidelines as playing some role in future Whois Policy reviews. It is not clear what role is contemplated. The reference to “legal constraints” is also ambiguous since the OECD Guidelines do not have the force of law.

**Bylaws changes suggested by Stress Tests (p.61)**

**18. Do you agree that the incorporation into ICANN's Bylaws of the above changes, as suggested by stress tests, would enhance ICANN's accountability? (p.55) Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.**

The IPC strongly recommends the inclusion of the ATRT2 recommendation 9.1:

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.

The IPC believes that the bylaws should be amended to include this language to empower the community to spur the board to action on advice given by ACs.

The phrasing of Stress Test #23 (page 85) seems one-sided. While there may be a danger that “ICANN uses RAA or other measures to impose requirements on third parties outside scope of ICANN Mission,” the more plausible danger is that ICANN will fail to enforce contractual obligations and consequently will harm third parties.  The stress test exercise is described in paragraph 18 as applying “a set of plausible, but not necessarily probable, hypothetical scenarios” in order to “gauge how certain events will affect a system, product, company or industry.” The contractual enforcement failure just described would certainly affect the companies and industries that depend on trademark and copyright protection. The stress test should be adjusted to reflect this, and overall the risk of ICANN’s failure to consistently and transparently enforce contracts must be effectively addressed in any accountability framework.

**Items for Consideration in Work Stream 2 (p.89)**

**19. 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.**

The IPC supports the candidate measures outline as part of Work Stream 2. As stated above, the IPC remains concerned about the ICANN community maintaining sufficient impetus to address WS2 reforms but is anxious that we all do so. Furthermore, the IPC believes it is critical to implement the “essential powers” recommended in WS1 prior to the IANA Functions contract expiration.

Finally, the IPC is concerned that the proposed accountability reforms focus too much on the ICANN Board and not enough on actions taken by ICANN senior management. The CCWG, in Work Stream 2, should consider how the community can have oversight of senior management decisions without resorting to using the Board as a tool.