



CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW
UNIVERSITY DELHI

BRIEFING NOTE ON ICANN 53

Its 53rd conference in Buenos Aires will be ICANN's last general meeting before the IANA transition target date of September 30, 2015. The timing of this session, coupled with ongoing discussions on the draft transition proposals, make ICANN 53 a crucial event in global internet governance. The Cross-Community Working Group on Naming-Related Proposals has submitted its second draft to the IANA Stewardship Transition Coordination Group, while the CCWG on Enhancing ICANN Accountability offered its first set of proposals for public comment in June 2015.

Names Proposal

The second draft proposal offered by the Cross-Community Working Group on Naming-related Functions (CWG) is a significant departure from the version placed for public comment in December 2014. It raises several questions, which the CWG is expected to address at ICANN 53. The proposal lacks a clear justification as to why an external oversight mechanism – in the form of a Multistakeholder Review Team – has been done away with. As it stands, ICANN (through a corporate affiliate) will continue not only as the current IANA functions operator but will also be vested with the right to award IANA contracts in the future. The CWG will also likely be queried on how it has factored in inputs from the first round of public comments.

During the second comment period, the Centre for Communication Governance had offered its input to the draft proposal. Relevant excerpts follow:

The proposal should explain how the CWG has concluded ICANN to be the ultimate custodian of IANA functions oversight, and how this selection has been made. ICANN's performance as a good IANA functions operator

This note was drafted by Arun Mohan Sukumar, Senior Fellow, CCG and made possible through the generous support of the John D. and Catherine T. MacArthur Foundation

is incidental to the larger question of oversight, since the question of accountability is prospective. The need for accountability is not diluted by past performance, however favourable, of the IANA functions operator. Rather, oversight is intended to check any future misconduct or abuse of power/ responsibility. Further, the need for creating an ICANN “affiliate” to perform IANA functions has not been clearly explained. The goal of “functional separation” is undercut by the fact the PTI will be a wholly owned subsidiary of ICANN, and hence subject to legal and operational management by the parent corporation.

At ICANN 53, the response of the chartering organisations – recognised informally as the “community” that ICANN is accountable to – will be critical to the final configuration of the post-transition IANA entity (PTI). Questions that will be raised during respective community sessions would likely include:

1. What will be the composition of the PTI Board?
2. Will the PTI also be subject to California law, being an affiliate of ICANN?
3. Will PTI Board members be liable in the event US or foreign courts “pierce the corporate veil”?
4. What will be the consequence of an unfavourable IANA Functions Review?
This is not specified currently in the draft proposal.
5. What were the CWG’s reasons to do away altogether with the requirement of authorisation” to root zone changes? What does the CWG mean when it says “the IFO’s comprehensive costs should be transparent for any future state of the IANA Function.” What legal or policy mechanisms have been introduced in this proposal to introduce such transparency?

Accountability proposal

The CCWG on Enhancing ICANN Accountability has proposed several “community empowerment mechanisms”, as well as a series of amendments to ICANN’s Mission, Commitments and Core Values. The CCWG has also recommended that some segments of the Affirmation of Commitments – a contract on operating principles agreed upon between ICANN and the United States government – be absorbed into

the Corporation's bylaws. Just as notable is the proposal to create "fundamental bylaws", the modification of which would be beyond the purview of the ICANN board. Some of the community empowerment mechanisms are listed below.

1. Power to reconsider/reject budget or strategy plans of the corporation
2. Power to reject/ suggest changes to ICANN's standard bylaws
3. Power to modify ICANN's fundamental bylaws
4. Powers to recall ICANN directors as well as the entire Board

The key concern on several of these proposals will be legal feasibility, questions around which will likely be raised at ICANN 53. In particular, how these empowerment mechanisms affect the "legal nature" of the community will also be closely examined. The CCWG's proposal to create SOs/ACs as unincorporated "members" with Articles of Association has met with a lot of discussion, especially in the Governmental Advisory Council. The GAC has posed several critical questions on this set up, some of which are listed here:

1. Can a legal person created and acting on behalf of the GAC become a member of ICANN, even though the GAC does not appoint Board members?
2. If GAC does not wish to become a member, how could it still be associated to the exercise of the 6 (community empowerment mechanisms) powers?
3. It is still unclear what the liability of members of future "community empowered structures" would be.
4. What are the legal implications on rights, obligations and liabilities of an informal group like the GAC creating an unincorporated association (UA) and taking decisions as such UA, from substantial (like exercising the community powers) to clerical (appointing its board, deciding on its financing) and whether there are implications when the members of such an UA are Governments?

In addition to the names and accountability proposals, the ICANN Board's reaction to developments within the numbers community will also be closely watched. The CRISP proposal – which moots the creation of a Service Level Agreement between

the RIRs and the IANA operator – has run into some opposition at the Board level. This was noted in April by the numbers community leadership:

[...] the IETF leadership have been negotiating with ICANN [...regarding] our annual Service Level Agreement. After some iterations, we arrived at text that we think captures the IETF consensus, but ICANN has informed us that they are unable to agree to that text right now. ICANN told us that, in their opinion, agreeing to that text now would possibly put them in breach of their existing agreement with the NTIA.

The Centre for Communication Governance at National Law University will be blogging/ writing about crucial updates as they happen over the course of the next two weeks at ICANN 53. For update please follow us on twitter **@CCGDelhi** and **@arunmsukumar**