

ALAC response to ICANN Board Community Consultation on Public Interest Commitments (PICs)/Registry Voluntary Commitments (RVCs)

Consultation Topic 1

1. In its [Second Clarifying Statement](#), the GNSO Council said that with respect to Registry Voluntary Commitments (RVCs) both ICANN org and the applicant must agree that a proffered commitment is clear, detailed, mutually understood, and sufficiently objective and measurable as to be enforceable.

Question 1: If ICANN and the applicant cannot agree on final commitment language that both ICANN and the applicant agree is enforceable under the ICANN Bylaws and as a practicable matter, should the application be permitted to move forward without that commitment, particularly in circumstances in which an applicant has proposed a commitment as a means to resolve an objection, Governmental Advisory Committee early warning, etc?

Answer (Yes or No): No

2. Please explain your answer to question 1 above.

The ALAC takes different views depending on the source or cause of a commitment put forth by an applicant.

Objections

We believe that an application should not be permitted to move forward unless the relevant commitment language is agreed to by both ICANN and the applicant as enforceable under the ICANN Bylaws and as a practicable matter, where the relevant commitment was proposed as a means to resolve an objection.

The Objection process is a formal one which requires substantiation, reason(s) or rationale for an objection, and attracts cost/investment in filing fees and for sustaining the objection. Noting that the Objection process' will have been able to weed out frivolous objection filings per SubPro Recommendation 31.15, it is thus logical to conclude that an objection which proceeds to be heard and determined via the Objection process must carry sufficiently significant concern warranting a satisfactory resolution.

In the same way, if a commitment which were to result from negotiations borne out of the cooling-period for a filed objection does not satisfactorily address that objection,

then the objection (if not withdrawn) would need to proceed to be heard and determined; and where, if the objection prevails, then the application will not proceed further. Hence, the recognition given to the weight and consequences of objections.

GAC Early Warning

In contrast, if a commitment proposed as a means to resolve a Governmental Advisory Committee early warning does not result in final commitment language that both ICANN and the applicant agree is enforceable under the ICANN Bylaws and as a practicable matter, the relevant application should still be permitted to move forward.

Unlike GAC Consensus Advice, a GAC early warning serves as a mere warning to an applicant and neither carries the weight of GAC Consensus Advice nor an objection, and therefore is not designed to halt an application. The concern expressed in a GAC early warning could potentially be amicably resolved between the applicant and the GAC Member(s) issuing the early warning; or if not, then it could be escalated to the filing of an objection (or, possibly, GAC Consensus Advice).

Comments to Application

To be clear, the ALAC is of the opinion that a commitment offered, at the option of an applicant, in its attempt to address a comment to its application which does not result in agreement as to its enforceability under the ICANN Bylaws and as a practicable matter, such a commitment should be dropped and would not stop the application from proceeding. It does not matter if the comment received is negative or positive in nature.

3. Should all applicants that propose registry voluntary commitments and community gTLD commitments be required to designate a third party to be charged with monitoring the registry operator's compliance with those commitments, regardless of whether or not the commitments relate to the contents within an applied-for gTLD?

Answer (Yes or No): Yes No

4. Please explain your answer to question 3, above.

We appreciate that this series of questions from the Board has to be taken together rather than in isolation of each other. Our input should be taken in the same manner.

In order for a commitment to be agreed as enforceable under the ICANN Bylaws and as a practicable matter in the first place, due consideration must be given to the process by which ICANN requires an applicant to formulate such a commitment and for both ICANN org and the applicant to develop it to a mutually agreeable form. Yet, the mechanics of this process remain unclear to us at this point.

Notwithstanding, the ALAC sees the monitoring and the enforcement of commitments as two separate functions. While enforcement has to be undertaken by ICANN as the contracting party, via Contractual Compliance, we acknowledge that monitoring may or may not be undertaken by Contractual Compliance.

The ALAC's understanding of the current ICANN Bylaws is that ICANN is prohibited from regulating content. In principle, we do not equate ICANN's enforcement of content-related commitments as ICANN regulating content. Instead, we see such action as enforcement of agreed contractual obligations as they appear in an agreement for which ICANN is a contracting party. The basis for this position is what we continue to accept with certain obligations - such as enforcing UDRP determinations which recognize incidence of trademark infringement by examining content, and such as endorsing registrars' take-down of illegal content or prohibiting child sexual abuse material. Thus, the question of whether a commitment is related to the content within an applied-for gTLD or not is of little relevance.

As for the monitoring of commitments for compliance, the ALAC is of the opinion that because it is likely to be too subjective to rapidly determine if a commitment is content-related or not, it would be more convenient for ICANN org to institute a standard requirement for applicants that propose RVCs and Community gTLD commitments to also identify (and possibly designate) a third party to monitor compliance of those commitments.

As this practice already applies towards applicants who submit a Community-based gTLD application in respect of community-specific commitments around restrictions on use and content, it should not be difficult to extend this practice, operationally, to non-Community-based gTLD applicants.

However, we would like to propose some changes, as detailed in our response to Question 6.

5. Are there any changes that should be made to the proposed implementation framework?

Answer (Yes or No): Yes No

6. If your answer to question 5 is "yes," what changes should be made, and why?

Proposed Change #1

In response to Question #4, the ALAC suggested that, as a practice of convenience, ICANN org institute a standard requirement for applicants that propose RVCs and Community gTLD commitments to also identify (and possibly designate) a third party to monitor compliance of those commitments.

This requirement to identify but not necessarily immediately designate will allow ICANN org to retain flexibility to determine whether a third party monitor is crucial or not. This would allow ICANN Contractual Compliance to examine the proposed commitment and decide whether ICANN Contractual Compliance has the capacity and capability to monitor that proposed commitment themselves. ICANN Contractual Compliance can be asked for their input on this and we are comfortable with the ICANN Board being the final arbiter and decision-maker with recommendations from ICANN Legal.

In this way, consideration could be given to the following factors/steps:

- (a) Removing subjectivity as a factor to asking applicants to identify a third party monitor during the application process;
- (b) Not requiring an applicant to immediately designate a third party monitor would alleviate some unfairness and unnecessary hardship during the application process;
- (c) Not having to establish a community-wide standard by which to determine whether a third party monitor is required or not, which would otherwise require many hours of community work and which may not even lead to consensus; and
- (d) Ultimately, it would be the ICANN Board which has to weigh the associated risks in deciding whether to accept or reject any proposed RVC or Community gTLD commitment, having regard to the ICANN Bylaws and ICANN's Accountability Mechanisms (i.e. non regulation of content and minimizing risk of losing an IRP etc)

Proposed Change #2

The ALAC has major concerns about how third party monitors (where they are required) will be assessed, chosen and approved by ICANN, given that these third party monitors will be engaged and remunerated by applicants (or registry operators).

If ICANN Contractual Compliance were lacking expertise to conduct monitoring of a certain RVC or Community gTLD commitment, what would be the means by which ICANN org would then determine whether a third party monitor identified by an applicant would be considered credible and reliable? Our concern is that in the proposal of a third party monitor, the scope and manner of monitoring by such a third party monitor would originate from the applicant and remuneration of that third party monitor would be borne by the applicant (or registry operator) concerned. This could lead to an actual, or an appearance of, conflict of interest as between the applicant (or registry operator) and its third party monitor, which will need to be addressed.

Could there be a way to involve the ICANN Community in such assessment, or even to draw from the ICANN Community, well regarded, unconflicted community members for the role of monitor?

Proposed Change #3

In terms of an ability to change or amend an RVC or Community gTLD commitment, the ALAC believes that there ought to be a way to disallow or prevent such a commitment intended for a Registry Agreement from being changed or eroded by the relevant applicant in disregard of the concern or issue it sought to address in the first place, and especially if the underlying concern or issue remains a live one. The same would apply to a registry operator's (or its successor) attempt to do so so long as the underlying concern and issue persists.

While we note that procedures exist which subject Application Change Requests and Registry Agreement amendments to public comments, these public comment proceedings are invariably community-resource intensive and therefore, do not offer an effective means for monitoring negative changes.

The ALAC understands that changes to an RVC or a Community gTLD commitment may be warranted in some situations but such changes must make sense in balancing public interest and commercial feasibility. We hope that the ICANN Board can provide some leadership in resolving this dilemma.

7. Are there any specific improvements that should be made to the dispute-resolution processes utilized in the 2012 round (the Public Interest Commitments Dispute-Resolution Procedure and the Registry Restrictions Dispute Resolution Procedure) to ensure that these processes provide an effective mechanism for the resolution of disputes concerning the relevant commitments?

Answer (Yes or No): Yes No

8. If your answer to question 7 is "yes", please explain your answer.

On PICDRP - Public Interest Commitments Dispute-Resolution Procedure

Currently, the PICDRP requires that the person filing a dispute that a registry operator has violated a commitment (PIC or RVC) to show that they have been measurably harmed. It is not inconceivable for harm to not be crystalized, and therefore cannot be shown. This renders a PIC or RVC effectively unenforceable or rather useless.

The ALAC reiterates its belief that the pronouncement imposing 'measurable harm' alone as standing to file a PICDRP complaint unreasonably dispossesses end users. We believe that complainant(s) should be allowed to file a PICDRP in the way a class

action or a representative action can be taken.

Thus, the ALAC believes ICANN should consider a role in preventing harm associated with a PIC or RVC, and therefore we propose that the PICDRP be modified to also allow complaints against any alleged violation of a PIC or RVC on the ground of foreseeable harm to the complainant or to third parties.

On RRDRP - Registry Restrictions Dispute Resolution Procedure

Currently the RRDRP published on the ICANN Website at <https://www.icann.org/rrdrp-en> refers to terms such as “Established institutions”, “Defined community”, and “objector” with little to no context, or hyperlinks for further reference. The ALAC believes this webpage and contents should be improved to provide clarity to specific terms and better understanding by the public at-large of the RRDRP.

As with the PICDRP, the ALAC believes ICANN should also consider a role in preventing harm associated with a Registry Restriction under a Community TLD. Therefore we propose that the RRDRP be modified to also allow complaints against any alleged violation of a Registry Restriction on the ground of foreseeable harm to the Complainant and the community named, and also in the manner that a class action or a representative action may take.

In General

The ALAC notes that there have only been 2 PICDRPs and no RRDRPs filed to-date. While we understand that this may not provide sufficient data for a review of either or both dispute resolution procedures, we cannot help but wonder if the low filing numbers is a result of lack of awareness of the existence of these procedures. In this respect, we would like to encourage more effort in making the public aware of the existence of such procedures.

9. Please provide any further comments you wish to share concerning the proposed implementation framework.

Consultation Topic 2

1. After the launch of the 2012 round of the New gTLD Program, and as part of the 2016 [IANA Stewardship Transition](#), the ICANN Board adopted new community-developed Bylaws that specifically define the scope of ICANN's Mission. The restated Mission could impact ICANN's ability to enter into and enforce content-related registry commitments that are contemplated for inclusion in future Registry Agreements.

The ICANN Board is concerned with proceeding to permit content-related commitments to be negotiated into Registry Agreements if there is significant potential for ICANN's ability to negotiate and enforce those commitments to be challenged as beyond ICANN's Mission.

With this background, the Board seeks your input concerning the scope of content-related Registry Agreement commitments that ICANN should permit registry operators to enter into pursuant to the SubPro PDP Working Group recommendations, taking into account the scope of ICANN's Mission.

Question 1: Are there any types of content restrictions in gTLDs that could be proposed by new gTLD applicants that ICANN must accept for inclusion in future Registry Agreements as a matter of ICANN Consensus Policy?

To facilitate your consideration of this issue, Appendix 2 to the consultation memo includes examples of commitments from 2012 round Registry Agreements so that the community can better understand the types of commitments that could be proposed by new gTLD applicants in the future.

Answer (Yes or No): Yes No

2. Please explain your answer to consultation topic 2, question 1, above.

If your answer to question 1 is "yes", please identify with specificity the types of content-related commitments that you believe must be permitted in future Registry Agreements as a matter of ICANN Consensus Policy.

As stated in our response to Question #4 under Topic 1, the ALAC does not see ICANN's enforcement of content-related commitments as ICANN regulating content.

Instead, we see such action as enforcement of agreed contractual obligations as they appear in any Registry Agreement. Thus, we do not believe that the prohibition in the ICANN Bylaws against regulating content does not impede the ICANN Board's ability to proceed with permitting content-related commitments to be negotiated into Registry Agreements. No one knows if ICANN's ability to negotiate and enforce such commitments will be challenged as beyond ICANN's Mission or not, and that is a risk that the ICANN Board should consider with recommendations from ICANN Legal. That is what we mean when we express support for the ICANN Board to be the final arbiter and decision-maker in whether to accept or reject any content-related commitment.

The types of content-related commitments that we believe must be permitted in future Registry Agreements are:

- (a) Where applicable content restrictions are formulated to implement the Category 1 Safeguards for strings deemed to be applicable to highly sensitive or regulated industries per the New gTLD Program Committee Framework and SubPro Recommendation 9.4;
- (b) Where ICANN org and an applicant comes to an agreement on the language of a commitment as being enforceable and as a practicable matter, provided that ICANN is not required to adjudicate whether the applicant / registry operator is in compliance or not;
- (c) Community gTLD commitments - these will naturally involve possible restrictions on use and content since that is an inherent nature of Community gTLD management, again provided that the practice of having appropriate third party monitors for adjudicating compliance should continue.

At the end of the day, ICANN does not exist in a vacuum - it is still impacted by US laws as well as extra-territorial laws and court orders, all of which outrank ICANN's Bylaws.

Having said that, we believe that as long as content restrictions do not require ICANN to adjudicate whether an applicant / registry operator is in compliance or not with them and ICANN is in a position to enforce the outcome of any ICANN-unrelated third party adjudication, then ICANN should proceed to include them in registry agreements and to enforce the same.

3. Are there any types of content restrictions that ICANN should not enter into in the New gTLD Program: Next Round, considering the scope of ICANN's Mission in relation to Registry Agreements?

Answer (Yes or No): Yes No

4. Please explain your answer to consultation topic 2, question 3, above.

If your answer to question 3 is "yes", please identify with specificity the types of content-related commitments that you believe should not be permitted in future Registry Agreements.

Any type of content-related commitments that the ICANN Board deems as requiring ICANN to adjudicate whether the applicant / registry operator is in compliance or not should not be permitted in future registry agreements.

5. In order for ICANN to have the ability to enter into the content-related commitments recommended by the GNSO for the New gTLD Program: Next Round, a Bylaws amendment appears to be required. For example, an amendment could clarify the scope of future content-related commitments that ICANN may enter into and enforce in future Registry Agreements, including reliance on principles evidenced within the framework (as discussed within Consultation Topic 1).

Question: Do you agree that ICANN must move forward with a Fundamental Bylaws change to clarify ICANN's contracting remit regarding content-related commitments?

Options

Option 1: No. ICANN should not accept any content-related registry voluntary commitments or community gTLD commitments in the New gTLD Program: Next Round, so no Bylaws amendment is required.

Option 2: No. While ICANN must accept, agree to, enter into, and enforce content-related registry voluntary commitments and community gTLD commitments in the New gTLD Program: Next Round, no clarification to the ICANN Bylaws is required for ICANN to perform this function

Option 3: Yes. ICANN must accept, agree to, enter into, and enforce content-related registry voluntary commitments and community gTLD commitments in the New gTLD Program: Next Round, and ICANN must move forward with a Fundamental Bylaws change to clarify ICANN's contracting and enforcement remit regarding content-related commitments.

Answer (option 1, 2, or 3): **Option 3** ▾

6. Please explain your answer to consultation topic 2, question 5, above.

Firstly, we wish to qualify our answer to Question #5 above with a statement that the

way Option 2/b and Option 3/c are worded present difficulties in our selection of either one of these options. And to be clear, Option 1/a was clearly rejected.

It is unsurprising that some members of the At-Large Community opted for Option 2 because they continue to believe that no clarification to the ICANN Bylaws is required for ICANN to accept, agree to, enter into and enforce content-related registry voluntary commitments and community gTLD commitments in the New gTLD Program: Next Round. In support of this, we have in our response to Question #2 above, alluded to several types of content-related commitments which necessitate their acceptance and enforcement by ICANN.

Along the same lines, they hold the opinion that as long as the ICANN Board deems a content-related commitment as not requiring ICANN to adjudicate whether the applicant (or registry operator) is in compliance or not, then logically, ICANN is keeping to its remit and hence no Fundamental Bylaws change is needed to clarify ICANN's ability to perform the function of accepting, agreeing to, entering into, and enforcing such commitments.

However, some members of the At-Large Community opted for Option 3 but with a crucial proviso - and this is the qualification to our having selected Option 3 in response to Question #5 above - being that there is an absolute necessity for ICANN to seek and obtain fresh legal advice on ICANN's contracting and enforcement remit regarding content-related commitments in view of ICANN's Bylaws. The current difference in interpretation between parts of the ICANN Community reinforce the point that the current wording might need clarification.

Thus, even in selecting Option 3, the ALAC is of the opinion a Fundamental Bylaws change to clarify ICANN's contracting and enforcement remit regarding content-related commitments is only required if ICANN obtains and accepts legal advice compelling that such action be taken by the Board.

In other words, if the obtained legal advice counsels for a limited Fundamental Bylaw change to make patently clear how such a change would protect ICANN from challenges (whether legal and/or via ICANN's Accountability Mechanisms) in enforcing content-related commitment where non-compliance of such commitment is established by a third party adjudicator that is not controlled by ICANN, then that is what the ICANN Board should present to the Community for further consideration.

7. Please provide any additional comments or information not addressed above that you believe are critical to inform this community dialogue concerning content-related registry commitments in future Registry Agreements.