CCWG-Accountability: bringing AoC reviews into the ICANN bylaws

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Key Changes:
- Propose 2 options for defining composition of review teams
- Restrict review team from disclosing sensitive information
- OECD privacy guidelines are a consideration for WHOIS/Directory Services review, instead of a "legal constraint" on policy

6.2 Affirmation of Commitments Reviews

The Affirmation of Commitments is a 2009 bilateral agreement between the US government and ICANN. After the IANA agreement is terminated, the Affirmation of Commitments will become the next target for elimination since it would be the last remaining aspect of a unique United States oversight role for ICANN.

Elimination of the Affirmation of Commitments as a separate agreement would be simple matter for a post-transition ICANN, since the Affirmation of Commitments can be terminated by either party with just 120 days notice. The CCWG-Accountability Stress Test Work Party addressed this contingency since it was cited in prior public comments (see Stress Test 14 in Section 8). The CCWG-Accountability evaluated the contingency of ICANN unilaterally withdrawing from the Affirmation of Commitments and proposed these two accountability measures:

> Preserve in ICANN Bylaws any relevant ICANN commitments from the Affirmation of Commitments, including Sections 3, 4, 7, and 8 as well as commitments cited in the Section 9 reviews.

> Bringing the four Affirmation of Commitments review processes into ICANN's Bylaws.

Other sections in the Affirmation of Commitments are either preamble text or commitments of the US Government. As such they don't contain commitments by ICANN, and so they cannot usefully be incorporated in the Bylaws.

After these aspects of the Affirmation of Commitments are adopted in ICANN bylaws, ICANN and the NTIA should mutually agree to terminate the Affirmation of Commitments. Care should be taken when terminating the AOC to not disrupt any AOC reviews that may be in process at that time.

Suggestions gathered during 2014 comment periods on ICANN accountability and the IANA Stewardship Transition suggested several ways the Affirmation of Commitments Reviews should be adjusted as part of incorporating them into ICANN's Bylaws:

- ☐ Ability to sunset reviews and create new reviews;

- ☐ Community stakeholder groups should appoint their own ~~Members~~ representatives to review teams

- ☐ Give review teams access to all ICANN internal documents;

- ☐ Require the ICANN Board to consider approval and begin implementation of review team recommendations, including from previous reviews. The CCWG concluded that some review team recommendations could be rejected or modified by ICANN, for reasons such as implementability or cost. If the community disagreed with the Board's decision on implementation, it could invoke a Reconsideration or IRP process to challenge that decision, with a binding result in the case of an IRP. Moreover, CCWG Legal Counsel say that ICANN Bylaws could not require the board to implement review team recommendations.

In Bylaws Article IV, add a new section for Periodic Review of ICANN Execution of Key Commitments, with an overarching chapeau for the way these reviews are conducted and then one subsection for each of the four current Affirmation Reviews.

~~POSSIBLE~~ BYLAW THAT PROVIDES A CHAPEAU FOR ALL PERIODIC REVIEWS

All of the reviews listed in this Section 6.2 would be governed by the following:

PROPOSED BYLAW TEXT	COMMENT
ICANN will produce an annual report on the state of improvements to Accountability and Transparency. ICANN will be responsible for creating an annual report that details the status of implementation on all reviews defined in this section. This annual review implementation report will be opened for a public review and comment period that will be considered by the ICANN Board and serve as input to the continuing process of implementing the recommendations from the review teams defined in this section.	This is new. It is a recommendation based on one in ATRT2 and becomes more important as reviews are spread further apart.

As for review team composition, our 3-May draft said simply this:

All reviews will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, Stakeholder Groups, and the chair of the ICANN Board. The group must be as diverse as possible.

2 New options for consideration, provoked by discussions on CCWG list:

> Option 1: Multiple volunteers are welcomed from each AC/SO, to accommodate representatives of individual stakeholder groups. If a review team conducts a consensus call on its report and recommendations, voting will be equalized among the participating AC/SOs.

> Option 2: Review teams are establish to include both a fixed number of members and an open number of participants. Each AC/SO participating in the review can suggest up to 7 prospective members for the review team. The group of chairs of the participating AC/SO will be responsible for selecting a group of up to 21 members balanced for diversity and skill set that includes 3 members from each participating AC/SO. If consensus cannot be reached among the participants, consensus will be sought among the members. In the event a consensus cannot be found among the members, a majority vote of the members may be taken. In this case both a majority recommendation and a minority response will be provided in the final report of the review team.

Review teams may also solicit and select independent experts to render advice as requested by the review team, and the review team may choose to accept or reject all or part of this advice.

To facilitate transparency and openness in ICANN's deliberations and operations, the review teams shall have access to ICANN internal documents. Review team members shall agree not to disclose sensitive or confidential information obtained from ICANN, although the designation of sensitive / confidential should not be in ICANN's sole discretion.

The draft output of the review will be published for public comment, including a description of the degree of consensus reached by the review team. The review team will consider such public comment and amend the review as it deems appropriate before issuing its final report and forwarding the recommendations to the Board.

The final output of all reviews will be published for public comment. The Board shall consider approval and begin implementation within six months of receipt of the recommendations.

The Affirmation lets Board and GAC Chairs designate review team members, and has no diversity requirement.

The Affirmation has no specific requirements for number of members from each AC/SO.

While showing a preference for consensus, a resolution procedure should be defined. It is important to avoid both tyranny of the majority and capture by a minority.

New ability to access internal documents, with non-disclosure provisions.

Public commenter requested transparency as to degree of consensus reached.

The Affirmation of Commitments requires Board to 'take action' within 6 months.

PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES
1. **Accountability & Transparency Review**. The Board shall cause a periodic review of ICANN's execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders.	This commitment is reflected in Bylaws Core Values.
~~In~~ Issues that may merit attention in this review include~~this review, particular attention should be paid to~~:	Public commenter suggested making this a suggestion instead of a mandated list of topics.
(a) assessing and improving ICANN Board governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions;	
(b) assessing the role and effectiveness of GAC interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;	Rephrased to avoid implying a review of GAC's effectiveness.
(c) assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);	
(d) assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and	
(e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.——————————— ~~The review team shall assess the extent to which the Board and staff have implemented the recommendations arising from the reviews required by this section.~~	
The review team shall assess the extent to which prior Accountability and Transparency review recommendations have been implemented.	AoC required ATRT to assess all AoC reviews.
The review team may recommend termination of other periodic reviews required by this section, and may recommend additional periodic reviews.	New. A recommendation to terminate an existing review would be subject to public comment. And the subsequent bylaws change would be subject to IRP challenge.
This review team should complete its review within one year of convening its first meeting.	New.

This periodic review shall be convened no less frequently than every five years, measured from the date the ~~Board received the final report of the prior review team.~~previous ~~Accountability and Transparency~~ review was ~~initiated~~convened.	Affirmation of Commitments Reviews were required every 3 years.

PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES

2. **Preserving security, stability, and resiliency.**
 	
The Board shall cause a periodic review of ICANN's execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS.
 	
In this review, particular attention will be paid to:
 	
    (a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS;
 	
    (b) ensuring appropriate contingency planning; and
 	
    (c) maintaining clear processes.
 	
Each of the reviews conducted under this section will assess the extent to which ICANN has successfully implemented the security plan, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS, consistent with ICANN's limited technical Mission.
	This commitment is reflected in Bylaws Core Values.

The review team shall assess the extent to which prior review recommendations have been implemented.	Make this explicit.
This periodic review shall be ~~conducted~~ convened no less frequently than every five years, measured from the date the previous ~~Board received the final report of the prior~~ review ~~team~~was convened.	Affirmation of Commitments Reviews are required every 3 years.

PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES
3. **Promoting competition, consumer trust, and consumer choice.** ICANN will ensure that as it expands the top-level domain space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.	This commitment ~~will~~ should be added to Bylaws under Core Values. Para 107 of first draft omitted the commitment to address "malicious abuse issues, sovereignty concerns, and rights protection."
The Board shall cause a review of ICANN's execution of this commitment after any batched round of new gTLDs have been in operation for one year.

This review will examine the extent to which the expansion of gTLDs has promoted competition, consumer trust, and consumer choice, as well as effectiveness of:

     (a) the gTLD application and evaluation process; and

     (b) safeguards put in place to mitigate issues involved in the expansion. | Re-phrased to cover future new gTLD rounds. "Batched" is used to designate a batch of applications, as opposed to continuous applications. |
The review team shall assess the extent to which prior review recommendations have been implemented.	Make this explicit.
Subsequent rounds of new gTLDs should not be opened until the recommendations of the previous review required by this section have been implemented.	New.
These periodic reviews shall be ~~conducted~~ convened no less frequently than every five years, measured from the date the ~~Board received the final report of the relevant~~ previous review ~~team~~was convened.	The Affirmation of Commitments also required a review 2 years after the 1 year review.

PROPOSED BYLAWS TEXT FOR THIS AFFIRMATION OF COMMITMENTS REVIEW	NOTES
4. **Reviewing effectiveness of WHOIS/Directory Services policy and the extent to which its implementation meets the legitimate needs of law enforcement and promotes consumer trust.**	Changed title to reflect probability that WHOIS will be replaced by new Directory Services
ICANN commits to enforcing its existing policy relating to WHOIS/Directory Services, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information.	
~~Such existing policy also includes the requirements that legal constraints regarding privacy, as defined by OECD in 1980 as amended in 2013.~~ This review will consider OECD guidelines regarding privacy, as defined by OECD in 1980 and amended in 2013.	New. Public commenter noted that OECD guidelines do not have the force of law.
The Board shall cause a periodic review to assess the extent to which WHOIS/Directory Services policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust.	
The review team shall assess the extent to which prior review recommendations have been implemented.	Make this explicit.
This periodic review shall be ~~conducted~~ convened no less frequently than every five years, measured from the date the ~~Board received the final report of the prior~~previous review ~~team~~was convened.	The Affirmation of Commitments is required every 3 years.

The CWG-Stewardship has also proposed an IANA Function Review that should be added to the ICANN Bylaws, as a Fundamental Bylaw.

IANA FUNCTION REVIEW

The CWG-Stewardship recommends that the Statement of Work (SOW) review be done as part of the IANA Function Review (IFR). The IFR would not only take into account performance against the SOW, but would be obliged to take into account multiple input sources into account including community comments, IANA Customer Standing Committee (CSC) evaluations, reports submitted by the Post-Transition IANA entity (PTI), and recommendations for technical or process improvements. The outcomes of reports submitted to the CSC, reviews and comments received on these reports during the relevant time period will be included as input to the IFR.

The first IFR is recommended to take place no more than 2 years after the transition is completed. After the initial review, the IFR should occur every 5 years.

The IFR should be outlined in the ICANN Bylaws and included as a Fundamental Bylaw as part of the work of the CCWG-Accountability and would operate in a manner analogous to an Affirmation of Commitments review. The Members of the IANA Function Review Team (IFRT) would be selected by the Supporting Organizations and Advisory Committees and would include several liaisons from other communities. While the IFRT is intended to be a smaller group, it will be open to participants in much the same way as the CWG-Stewardship.

While the IFR will normally be ~~scheduled~~ convened based on a regular 5-year cycle with other ICANN reviews, measured from the date the previous review team was convened. ~~a~~ A Special Review may also be initiated following the CSC raising concerns with the GNSO and/or the ccNSO or by concerns raised by TLDs directly with the ccNSO or the GNSO. In the event of a Special Review being proposed, the ccNSO and GNSO should consult with both Members and non-member TLDs, in the light of the consultations, the Councils can decide by a supermajority to call for a special review.

QUESTIONS AND OPEN ISSUES: