

Bringing AoC into ICANN Bylaws -- Analysis of public comments on 2nd draft (version 5 - FINAL)

From CCWG 2nd Draft Proposal

The CCWG 2nd draft proposal describes bringing ICANN's commitments from the Affirmation of Commitments (AoC) into ICANN bylaws, beginning on p.72:

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

If the AoC were to be terminated without any equivalent replacement, ICANN would no longer be held to these important affirmative commitments including the related requirement to conduct community reviews. If this were allowed to occur it would significantly diminish ICANN's accountability to the global multistakeholder community.

Elimination of the AoC as a separate agreement would be a simple matter for a post-transition ICANN, since the AoC can be terminated, by either party, with just 120-days' notice. The CCWG- Accountability evaluated the contingency of ICANN unilaterally withdrawing from the AoC (see Stress Test 14 in Section 10.3) and proposed these two accountability measures:

Preserve in ICANN Bylaws any relevant ICANN commitments from the AoC, incl Sections 3, 4, 8.

Bring the four AoC review processes into ICANN's Bylaws. Two of the reviews include ICANN commitments that will be preserved in the Reviews section of the Bylaws.

Other sections in the AoC are either preamble text or commitments of the U.S. Government. As such they do not contain commitments by ICANN, and so they cannot usefully be incorporated in the Bylaws.

After these aspects of the AoC are adopted in the ICANN Bylaws, ICANN and the NTIA should mutually agree to terminate the AoC. Care should be taken when terminating the AoC to not disrupt any AoC Reviews that may be in process at that time.

Public Comments

There were 18 public commenters on the AoC reviews. There were also 6 public commenters on AoC commitment 8b, which staff placed in the "Fundamental Bylaws" tab in the PC Tool sheet.

Areas of Consensus

All 18 commenters support inclusion of AoC reviews in ICANN bylaws. Several commenters suggest changes in the proposed details for review team responsibilities and guidelines.

Notably, there were no concerns raised about CCWG's new proposed process for Confidential Disclosure to Review Teams, described on page 75.

Areas Needing Clarification/Refinement

1. CCWG proposed bringing AoC commitments 3,4, and 8 into Core Values. One commenter (IPC) noted that CCWG may have inadvertently omitted AoC commitment 7 from the 2nd draft proposal. In the first draft proposal (p.52) CCWG proposed:

Proposed insertion of new Section 8 in Article III Transparency (this is the Affirmation of Commitments paragraph 7 in its entirety including additional text):

ICANN **shall** adhere to transparent and accountable budgeting processes, providing **[reasonable]** **[adequate] advance notice to facilitate stakeholder engagement in policy decision-making**, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's Bylaws, responsibilities, and strategic and operating plans.

WP1 believes this text should go into ICANN bylaws, as originally proposed by CCWG.

2. Clarification on selection/composition of Review Teams, as to whether community stakeholder groups and constituencies appoint members. On p.74 in 2nd draft:

Review teams are established to include both a fixed number of members and an open number of participants. Each SO and AC participating in the Review may suggest up to 7 prospective members for the Review Team. The group of chairs of the participating SOs and ACs will select a group of up to 21 Review Team members, balanced for diversity and skills, to include up to 3 members from each participating SO and AC. In addition, the ICANN Board may designate one director as a member of the Review Team.

WP1 will inform this commenter that ACs/SOs select candidates, and AC/SO chairs select members.

3. Clarification requested on CCWG para 507: “Care should be taken when terminating the AoC to not disrupt any AoC Reviews that may be in process at that time.” One commenter suggested that any reviews slated to begin in the next calendar year not be halted or otherwise affected by the CCWG-Accountability process. *Note: what does “slated to begin” mean in this context?*

WP1 will clarify that new review rules will prevail as soon as the bylaws have been changed. Any in-progress reviews will adopt the new rules to the extent practical. WP1 agrees that a planned review should not be deferred just because the new rules allow up to 5 years between cycles. If the community wants to do a review sooner than 5 years from the previous review, that is allowed under new rules.

4. Action on recommendations. CCWG proposed (p.76) “The Board shall consider approval and begin implementation within six months of receipt of the recommendations.” One commenter wants to retain the AOC requirement that the Board “take action” upon recommendations.

WP1 believes that AoC requirement for board to “take action” has, in practice, meant that the board would consider the recommendations and either approve or explain why it would not approve. The

CCWG's proposed text gives the board 6 months to consider the recommendations and to begin implementation of approved items. No change needed to text, but an explanatory note would help.

5. Do initial ATRT review no later than three years after the termination of AoC, to look at progress in implementing reforms.

WP1 will respond to his commenter to clarify that reviews may begin sooner than 5 years if the community has consensus about starting a review. The 2nd draft text says, "These periodic Reviews shall be convened no less frequently than every five years"

6. AoC review team transparency. Commenter wants documentation of level of support for AoC review team proposals, and how community input was considered.

On p.75 of our 2nd draft, "The draft report of the Review Team should describe the degree of consensus reached by the Review Team."

On p. 76 of 2nd draft, "The draft report of the Review will be published for public comment. 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."

In that paragraph (533), WP1 will add "The final report should include an explanation of how public comments were considered."

7. New Transparency requirements. There is now a lively discussion on CCWG list regarding new requirements for transparency. I note that CCWG 2nd draft proposal included 3 transparency requirements as part of bringing the AoC into the bylaws:

Our new requirement for an annual report on Transparency (para 511-512 on p.74): ICANN will produce an annual report on the state of improvements to Accountability and Transparency.

We give all AoC review teams unprecedented access to ICANN internal documents. See Confidential Disclosure policy, para 521 – 527 on p.75.

We require each AoC review team to be transparent about the degree of consensus achieved in their report. (para 529 on p.75)

This is an informational item. No action needed.

Areas of Concern/Divergence

1. ATRT recommending sunset/amendment/creation of other reviews. In the 2nd draft on p.77 CCWG said the ATRT “may recommend termination or amendment of other periodic Reviews required by this section, and may recommend additional periodic Reviews.”

Commenters say each individual review team should determine whether to recommend amending or sunset of its own review.

WP1 agrees that each review team may recommend to amend or sunset its own review, as part of its report. The ATRT as the overarching review team is able to amend or sunset other reviews, and to recommend new reviews, as proposed in the 2nd draft report.

2. WHOIS/Directory Services Review text. CCWG proposed bringing AoC requirement for WHOIS review into bylaws (p.81). The Board proposed text for Whois/Directory Services review on 1-Sep:

ICANN commits to enforcing its policy relating to the current WHOIS and any future gTLD Directory Service, subject to applicable laws, and working with the community to explore structural changes to improve accuracy and access to gTLD registration data, as well as consider safeguards for protecting data.

Only BC commented on the board’s text, supporting the board’s version while preferring a 5-year window “from the date the previous Review was convened”. This text was chosen to ensure that a review would be initiated at least every 5 years. The Board’s formulation could result in 6 or 7 years between reviews, since the date of Board “action” could be 2 years after a review was convened.

WP1 agrees with the board’s proposed text for WHOIS/Directory Services Review, while retaining the CCWG’s proposed method to measure cycle time between reviews.

Options for Consideration by full CCWG

Areas where we could present options for CCWG consideration include:

1. Commitment to implement Review recommendations before opening next round of new gTLDs. On p.80 of the 2nd draft report, CCWG retained the AoC commitment regarding expansion of TLD space, which is part of the Competition, Consumer Choice, and Consumer Trust (CCT) review:

“ICANN will ensure that as it expands the Top-Level Domain (TLD) space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.”

And in para 575 CCWG explicitly applies that commitment:

“Subsequent rounds of new gTLDs should not be opened until the recommendations of the previous Review required by this section have been implemented.”

The Board did not support waiting for implementation of CCT Review before next round, saying “the bar of future rounds of introduction of new gTLDs until prior recommendations are implemented poses a risk of a barrier to entry, and the Board is not supportive of that change.”

The board subsequently expanded on its comment, in an email from Rinalia Abdul Rahim, including these points:

The Board will complete the CCT review along with several other reviews related to the new gTLD program before we decide whether and how to move forward with the next round. (Note: There are a total of nine reviews.)

- The Board will take into account the recommendations from all of these reviews.
- Depending on what the recommendations actually are, **the Board will decide which of the CCT review recommendations must be implemented before moving forward with the next round.** It may be appropriate to implement some of the recommendations in tandem with moving forward. It all depends on what recommendations emerge from the reviews.

(2) For any future round of new gTLDs, it is important for the ICANN community to agree when ICANN is ready to move forward. The outcomes of the CCT review are expected to be key inputs into the discussion. The outcomes of the CCT review alone, however, should not be the sole determinant for moving into the next round. The GNSO’s policy development work on the expansion of the gTLD namespace is a key consideration in addition to other reviews.

(3) There are 9 reviews related to the new gTLD Program scheduled for implementation between Q3 2014 and Q2 2017 – one of these reviews is the CCT Review. The Board would not consider initiating the next round of new gTLDs without completing all the reviews to learn what improvements are necessary for the next round.

(4) The scope of the CCT review is not limited to the expansion of the gTLD namespace. It may result in complex recommendations that require a longer period of time for implementation. Placing a specific requirement in the Bylaws to restrain ICANN from moving forward with future rounds of new gTLDs until all CCT review recommendations are implemented does not assure alignment with ICANN’s core value of promoting competition in the registration of domain names.

Per Rinalia's latest email, the board proposes that the CCT Review Team include in its report a designation for each of its recommendations, indicating either:

1. Accept and implement BEFORE the next round of new gTLDs; or
2. Accept and implement in tandem with the next round of new gTLDs

The Board said it would "make its decision based on input from the RT as well as input from the community and staff."

WP1 recommends that the full CCWG consider two options for responding to this comment:

Option A: retain para 575 from the CCWG 2nd draft report, which requires implementation of accepted CCT review team recommendations before opening the next round of gTLD expansion.

Option B: replace para 575 with "For each of its recommendations, this review team should indicate whether the recommendation, if accepted, must be implemented before opening subsequent rounds of gTLD expansion"

2. Review Team composition. CCWG 2nd draft proposal states in para 514 on p.74:

Review teams are established to include both a fixed number of members and an open number of participants. Each SO and AC participating in the Review may suggest up to 7 prospective members for the Review Team. The group of chairs of the participating SOs and ACs will select a group of up to 21 Review Team members, balanced for diversity and skills, to include up to 3 members from each participating SO and AC . In addition, the ICANN Board may designate one director as a member of the Review Team.

Commenters said the above proposal would represent a drastic reduction in representation from the status quo. Also a suggestion to rethink review team composition to increase presence of affected constituencies. Composition would dilute GNSO influence, and the limit on 3 Members per AC/SO means some GNSO Constituencies will not be represented.

WP1 asked ICANN staff for data on composition of prior AoC Review Teams:

<p>ATRT1 (15 people):</p> <ul style="list-style-type: none"> • 1 ALAC • 2 GAC • 1 ASO • 3 ccNSO • 5 GNSO • Chair of the GAC or designee • ICANN Board Chair or designee • Assistant Secretary for NTIA 	<p>ATRT2 (16 people):</p> <ul style="list-style-type: none"> • 2 ALAC • 3 GAC • 1 SSAC • 1 ASO • 2 ccNSO • 2 GNSO • 2 Experts • Chair of the GAC or designee • ICANN Board Chairman or designee • Assistant Secretary for NTIA
<p>SSR (16 people):</p> <ul style="list-style-type: none"> • 1 ALAC • 1 GAC • 2 SSAC • 1 RSSAC • 2 ASO • 3 ccNSO • 2 GNSO • 2 Independent Experts • Chair of the GAC or designee • ICANN CEO or designee 	<p>WHOIS (15 people):</p> <ul style="list-style-type: none"> • 2 ALAC • 1 GAC • 1 SSAC • 1 ASO • 1 ccNSO • 3 GNSO • 3 Independent Experts / Law Enforcement • Chair of the GAC or designee • ICANN CEO or designated nominee

WP1 recommends that the full CCWG consider two options for responding to this comment:

Option A: retain para 514 from the CCWG 2nd draft report, which limits each AC and SO to 3 representatives on a review team.

Option B: change para 514 to allow AC/SO chairs to select more than 3 from an AC or SO, if any of the 21 member slots are not allocated to other ACs/SOs. The revised para 514 would be:

Review teams are established to include both a fixed number of members and an open number of participants. Each SO and AC participating in the Review may suggest up to 7 prospective members for the Review Team. The group of chairs of the participating SOs and ACs will select a group of up to 21 Review Team members, balanced for diversity and skills, allocating at least 3 members from each participating SO and AC that suggests 3 or more prospective members. In addition, the ICANN Board may designate one director as a member of the Review Team.

3. AoC 8b/Article XVIII as a Fundamental Bylaw? There is a split in the comments on whether ICANN's Article XVIII should be a Fundamental Bylaw. We discuss this in the AoC group since this question originated in our earlier consideration of AoC commitment 8b: "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..."

The 2nd draft report covers this question on p.36, where CCWG said Article XVIII did not need to be a Fundamental Bylaw, for three reasons:

CMSM must approve with 2/3 vote any change to ICANN's Articles of Incorporation, which already states that ICANN is a California Nonprofit Public Benefit Corporation.

CMSM could block any proposed change to ICANN Bylaws Article XVIII, which states "The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California."

On first report, 3 commenters (IPC, BC, CoA) wanted Art XVII to be Fundamental, 3 did not.

Five commenters on 2nd draft report said Article XVIII should be fundamental (BC, COA, IPC, Ping, USCIB). 4 commenters said Article XVIII should not be Fundamental. (Centre for Internet and Society, India, Brazil, New Zealand)

WP1 believes this should be considered by the full CCWG, since it is also a matter being discussed in WP2 and in the Fundamental Bylaws group in WP1. The full CCWG could consider two options for responding to this comment:

Option A: retain the CCWG 2nd draft recommendation to designate ICANN Bylaws Article XVIII as a regular bylaw.

Option B: designate ICANN Bylaws Article XVIII as a Fundamental Bylaw.

4. The Commitments contained in AoC reviews of gTLD expansion and WHOIS would go into the bylaws as part of the reviews. But some want these commitments to go into Mission/Core Values. Here is how these commitments were described in the 2nd draft report:

<p>ATRT: 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.</p>	<p>The commitment to do a Review now becomes part of ICANN Bylaws. The second part of this sentence (“its commitment to maintain...”) clarifies an ICANN commitment that would also become part of the Bylaws.</p>
<p>SSR: 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.</p>	<p>The commitment to “operational stability, reliability, resiliency, and global interoperability of the DNS” will also be part of Bylaws Core Values (see Section 3 for further detail).</p>
<p>CCT: ICANN will ensure that as it expands the Top-Level Domain (TLD) space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.</p>	<p>This Review includes a commitment that becomes part of ICANN Bylaws, regarding future expansions of the TLD space.</p>
<p>WHOIS/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.</p>	<p>This Review includes a commitment that becomes part of ICANN Bylaws, regarding enforcement of existing policy WHOIS requirements.</p>

WP1 believes this should be considered by the full CCWG, since it is also a matter being discussed in WP2.