

## Bringing AoC into ICANN Bylaws -- Analysis of public comments on 2<sup>nd</sup> draft

### From CCWG 2<sup>nd</sup> Draft Proposal

The CCWG 2<sup>nd</sup> 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

We had 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 we may have inadvertently omitted AoC commitment 7 from our 2<sup>nd</sup> draft proposal. In our first draft proposal (p.52) we 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.

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

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.

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?*

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.

**5. New Transparency requirements.** There is now a lively discussion on CCWG list regarding new requirements for transparency. I note that CCWG 2<sup>nd</sup> draft proposal included 3 transparency requirements as part of brining 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)

**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 2<sup>nd</sup> draft we have, "The draft report of the Review Team should describe the degree of consensus reached by the Review Team." *Should this statement be expanded?*

## Areas of Concern/Divergence

**1. ATRT recommending sunset/amendment/creation of other reviews.** In our 2<sup>nd</sup> draft on p. we said the ATRT “may recommend termination or amendment of other periodic Reviews required by this section, and may recommend additional periodic Reviews.” Commenters say the ATRT should not have power to amend or sunset the other reviews. *Should we invest the amend/sunset with the individual review teams?*

**2. Review Team composition.** CCWG 2<sup>nd</sup> draft proposal states 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.

**3. 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.

4. Board (alone) does not support waiting for implementation of CCT Review before next round. (p.80)

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

## Options for Consideration by full CCWG

Areas where we could present options for CCWG consideration include:

1. 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.

**2. AoC 8b/Article XVIII as a Fundamental Bylaw?** There is a split in the comments 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..."

Our 2<sup>nd</sup> 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 our 2<sup>nd</sup> 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)