

ANNEX C FROM CWG PROPOSAL (SECTIONS 7 AND 8)¹
Analysis of Implementation Proposal provided by Sidley

Beginning note: Annex C of the CWG proposal is entitled “Principles and Criteria that Should Underpin Decisions on the Transition of NTIA Stewardship for Names Functions” and the introduction states: “These principles and criteria are meant to be the basis upon which the decisions of the NTIA stewardship are formed. This means that the proposals can be tested against the principles and criteria before they are sent to the ICG.” The CWG Report confirmed “[i]n developing this response, the CWG-Stewardship has been mindful of the ‘Principles and Criteria that Should Underpin Decisions on the Transition of NTIA Stewardship for Names Functions’ as developed and agreed to by the CWG-Stewardship and included in Annex C.” As a result, the CWG-Stewardship confirmed that the principles at Sections 7 and 8 were considered and evaluated in the development of the proposal. These concepts should have already been taken into account during the proposal development, and there is not language provided in the Report that supports the development of new requirements after the Proposal was submitted for public comment, finalized, submitted to the ICG and ultimately to NTIA. Caution should be taken in relying on the principles for evaluation to impose new or additional requirements that were not within the CWG report.

It is also important to discern between the purpose of the Bylaws, which is to set to governance standard for PTI as a whole, and the PTI Naming Functions Contract, which sets out the terms upon which PTI is expected to perform the naming-related functions. Keeping the governance documents for PTI straightforward and simple furthers the CWG-Stewardship’s stated preference for maintaining primary accountability for PTI’s performance at the ICANN level, allowing resort to ICANN’s accountability mechanisms.² Keeping detailed contractual obligations in the ICANN-PTI contract furthers this goal, as both service complaints against PTI as well as challenges to ICANN’s failure to enforce the PTI contract have clear paths to binding resolution through the IRP provisions set out in ICANN Bylaws. The impact of replicating contractual provisions for which there is already a clear line of accountability into unique obligations for PTI does not appear to have been assessed against the CWG’s stated goals.

¹ Excerpts from Annex C attached for reference.

² Paragraph 1112 of the ICG Report.

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1	7i) Be predictable (i.e., decisions are clearly rooted in agreed and applicable policy as set by the relevant policy body).	The decisions and actions of the Corporation ⁴ should be made objectively and predictably. To that end, the Corporation will provide services consistent with the following:	PTI Bylaws and PTI/ICANN Contract	ICANN agrees that the concept from 7i can be incorporated into the PTI Bylaws and the Naming Function Contract ,though not through the proposed text.
2	7 ii) Adhere to laws/processes (i.e., for ccTLDs: Respect national laws and processes, as well as any applicable consensus ICANN policies and IETF technical standards). Post-transition of the IANA Functions, the IANA Functions Operator will continue to provide service to existing registries in conformance with prevailing technical norms, conforming with the policy decisions of registries and the security and stability of the Root Zone itself.	1. With respect to country code top-level domain name (“ccTLD”) registries, the decisions and actions of the Corporation in respect of ccTLDs registries shall be based on the processes designated by such ccTLDs registries to the Corporation and shall comply with the local laws applicable to such ccTLD registries, except to the extent that compliance with such processes or local laws by the Corporation would cause the Corporation to be in violation of laws applicable to the Corporation.	PTI Bylaws and PTI/ICANN Contract	This proposed text may not be consistent with or in alignment with the CWG proposal. The proposed language for inclusion in the term sheet (Annex S) says: PTI shall apply existing policy frameworks in processing requests related to the delegation and redelegation of a ccTLD, such as RFC 1591, the GAC Principles (2005) and any further clarification of these policies by Interested and Affected Parties. If a policy framework does not exist to cover a specific instance, PTI will consult with the Interested and Affected Parties; relevant public authorities; and governments on any recommendation that is not within or consistent with an existing policy framework.

³ ICANN tried to map the C7 and C8 provisions to the proposed text. This is our best estimate of what was intended.

⁴ In PTI contract, change to PTI or defined term for PTI.

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				<p>PTI shall also take into account the relevant national frameworks and applicable laws of the jurisdiction that the TLD registry serves.</p> <p>PTI shall verify that all requests related to the delegation and redelegation of gTLDs are consistent with the procedures developed by ICANN.</p> <p>PTI not authorized to make material changes in the policies and procedures developed by the relevant entities associated with the performance of the IANA functions. PTI shall not change the established methods associated with the performance of the IANA functions without prior approval of ICANN.</p> <p>The CWG proposal also directed that Section C.2.7 of the NTIA/ICANN Contract be carried over, as well as C.2.9.2.c. Those provisions state:</p> <p>C.2.7 - ...with all interested and affected parties...develop a process for documenting...how it will apply relevant processes and procedures for the relevant IANA function...</p> <p>C.2.9.2.c Delegation and Redelegation of ccTLD - ...shall apply the existing policy</p>

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				<p>framework...such as RFC 1591, ...GAC Principles...and any further clarification of these policies...If a policy does not exist...Contractor will consult with interested and affected parties; relevant public authorities; and governments that is not within or consistent with an existing policy framework...Contractor shall take into account the relevant national frameworks and the applicable laws of the jurisdiction that the TLD serves...</p> <p>Analysis: The points raised in C7i are more accurately and fully addressed through the use of language as proposed in the CWG proposal. The Sidley Proposed Language here appears to conflict with the provisions that were in the approved CWG proposal. For example, the new text moves the responsibility for process development to individual ccTLDs, which is in direct conflict with the existing NTIA contract obligations and the proposal. If this is intended to address that the Corporation is bound to follow the processes and procedures as developed through the appropriate development channels, and that Contract must take into account relevant national frameworks and applicable laws, the existing language should be used.</p> <p>This level of detail is fully appropriate for inclusion in the Naming Function Contract.</p>

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				However, to the extent this concept can be expressed in the Bylaws, it is appropriate only on an aspirational level; the Bylaws are likely not the appropriate place to include specific contractual obligations.
3	7ii) Adhere to laws/processes (i.e., for ccTLDs: Respect national laws and processes, as well as any applicable consensus ICANN policies and IETF technical standards). Post-transition of the IANA Functions, the IANA Functions Operator will continue to provide service to existing registries in conformance with prevailing technical norms, conforming with the policy decisions of registries and the security and stability of the Root Zone itself.	2. The Corporation shall not be authorized to make material changes in the policies and procedures developed by any ccTLD registry or generic top-level domain (“gTLD”) registry without the express written consent of the impacted registry. ⁵ The Corporation shall not change or implement the established methods associated with the performance of the IANA functions without consulting the significantly interested parties and obtaining prior approval of the Member. ⁶	PTI Bylaws and PTI/ICANN Contract	<p>This proposed text may not be consistent with or in alignment with the CWG proposal.</p> <p>The proposed language for inclusion in the term sheet (Annex S) says: PTI not authorized to make material changes in the policies and procedures developed by the relevant entities associated with the performance of the IANA functions. PTI shall not change the established methods associated with the performance of the IANA functions without prior approval of ICANN.</p> <p>Analysis: This provision seems to create a divergence from the CWG Proposal. Instead of a prohibition on the Contractor being able to change policies and procedures, this says that the Contractor is</p>

⁵ 3.8.2 of NTIA Contract.

⁶ 3.8.2 of NTIA Contract. In PTI contract, change “the Member” to ICANN or defined term for ICANN.

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				<p>NOT required to abide by policies and procedures so long as it gets written consent from a single registry. It also suggests (depending on what “methods” means here) that Contractor could change the established policies based on a standard that is not grounded in the multistakeholder policy development process.</p> <p>The proposed language does not appear to be appropriate for inclusion in the Bylaws or the Naming Functions Contract.</p>
4	<p>8 ii) For ccTLDs, the IANA Functions Operator should provide a service without requiring a contract and should respect the diversity of agreements and arrangements in place for ccTLDs. In particular, the IANA Functions Operator should not impose any additional requirements on the registry unless they are directly and demonstrably linked to the global security, stability, and resilience of the DNS.</p>	<p>3. The Corporation shall provide services to ccTLD registries in manner that is consistent with prevailing technical norms as identified by such ccTLD registries to the Corporation.</p>	<p>PTI Bylaws and PTI/ICANN Contract</p>	<p>C.7.ii of the IANA Functions Contract says:</p> <p>Post-transition of the IANA Functions, the IANA Functions Operator will continue to provide service to existing registries in conformance with prevailing technical norms, conforming with the policy decisions of registries and the security and stability of the Root Zone itself.</p> <p>The proposal language refers to policy decisions from the ccNSO. The drafted language is specific to policy decision to specific ccTLDs, which is not consistent with how ccTLD policies are developed or with the CWG proposal.</p>

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				<p>As a result, the language as proposed by Sidley does not appear to be appropriate for inclusion.</p> <p>However, the following language has been included at Article 3 of the Bylaws: The Corporation shall respect the diversity of customers of the IANA functions and shall provide service to its customers in conformance with technical norms and in support of the global security, stability and resilience of the DNS.</p>
5	<p>7iii) Be non-discriminatory.</p> <p>8 i) The IANA Functions operator needs to take account of the variety of forms of relationship with TLD operators. The proposal will need to reflect the diversity of arrangements in accountability to the direct users of the IANA Functions.</p>	<p>4. The Corporation shall provide services in a manner that does not discriminate between types of registries (whether such registries are ccTLD or gTLD operators, paying or non-paying, contracted or non-contracted, members of supporting organizations, advisory committees or other governing bodies of the Member⁷ or otherwise).</p>	<p>PTI Bylaws and PTI/ICANN Contract</p>	<p>This concept of non-discrimination is also supported in the NTIA Contract – C.2.4 - ...The Contractor shall treat each of the IANA functions with equal priority and process all requests promptly and efficiently.</p> <p>The concept of non-discriminatory treatment has been inserted in the Bylaws (Article 3) and can also be inserted into the PTI Contract. As the PTI Bylaws can cover the delivery of services to those that are broader than just registries, the further suggested detail provided would be exclusionary at the Bylaws level (as it would not recognize the other types of customers served by PTI.)</p>

⁷ In PTI contract, change to ICANN or defined term for ICANN.

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				<p>The language included at Article 3 of the Bylaws to address this concern is: <u>The Corporation shall treat the IANA functions with equal priority. The Corporation shall make decisions by applying documented policies consistently, neutrally, objectively and fairly, without singling out any particular customer for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different customers).</u></p> <p><u>The Corporation shall respect the diversity of customers of the IANA functions and shall provide service to its customers in conformance with technical norms and in support of the global security, stability and resilience of the DNS.</u></p>
6	<p>8 ii) For ccTLDs, the IANA Functions Operator should provide a service without requiring a contract and should respect the diversity of agreements and arrangements in place for ccTLDs. In particular, the IANA Functions Operator should not impose any additional requirements on the registry unless they are directly and demonstrably linked to the global security,</p>	<p>5. The Corporation shall not require a contract in order to provide services to ccTLDs registries. The performance of the IANA functions shall not be, in any manner, predicated or conditioned on the existence or entry into any contract, agreement or negotiation between the Corporation and any ccTLD or gTLD registry or any</p>	<p>PTI Bylaws and PTI/ICANN Contract</p>	<p>In alignment with the Annex S, the PTI Naming Functions Contract is expected to include language that reflects the following concept: “The performance of the functions under the ICANN-PTI Contract, including the development of recommendations in connection with Section C.2.9.2 of the ICANN-NTIA Contract, shall not be, in any manner, predicated or conditioned on the existence or entry into any contract, agreement or negotiation between PTI and any party requesting such changes or any other third- party. Compliance with this Section</p>

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	stability, and resilience of the DNS.	other third-party. ⁸		<p>must be consistent with C.2.9.2d of the ICANN-NTIA Contract.” This is in alignment with the NTIA contract at C.8.3, which also uses the broad language of “any party.” The more specific language provided by Sidley, which only refers to ccTLD and gTLDs, could serve to be exclusionary.</p> <p>The concepts included at Article 3 of the Bylaws are more appropriate expressions of this principle at the governance document level: <u>The Corporation shall treat the IANA functions with equal priority. The Corporation shall make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular customer for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different customers).</u></p> <p><u>The Corporation shall respect the diversity of customers of the IANA functions and shall provide service to its customers in conformance with technical norms and in support of the global security, stability and resilience of the DNS.</u></p>

⁸ 3.8.3 of NTIA Contract.

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7	<p>8iii) For gTLDs, the IANA Functions Operator should continue to provide service notwithstanding any on-going or anticipated contractual disputes between ICANN and the gTLD operator. No additional requirements for prompt delivery of IANA services should be imposed unless they are directly and demonstrably linked to the global security, stability and resilience of the DNS.</p>	<p>6. The Corporation shall continue to provide services to a gTLD registry notwithstanding any on-going or anticipated contractual disputes between ICANN and such gTLD registry.</p>	<p>PTI Bylaws and PTI/ICANN Contract</p>	<p>The text provided here does not appear outside of Annex C, nor in the existing NTIA Contract. This is the type of principle that one would expect to be reflected in the escalation and resolution paths provided for the performance of the PTI functions. PTI was developed with service standards, and failure to perform to those is a failure to perform.</p> <p>Further, the inclusion of the non-discriminatory clause at Article 3 guides PTIs inability to discriminate based upon situations such as this: <u>The Corporation shall treat the IANA functions with equal priority. The Corporation shall make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular customer for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different customers).</u></p>
8	<p>8 ii) For ccTLDs, the IANA Functions Operator should provide a service without requiring a contract and should respect the diversity of agreements and arrangements in place for</p>	<p>7. The Corporation shall not impose additional requirements for prompt delivery of services on registries unless such requirements are directly and demonstrably linked to</p>	<p>PTI Bylaws and PTI/ICANN Contract</p>	<p>The text presented here does not appear elsewhere in the proposal (outside of Annex C) nor is it a carry-over concept from the IANA Functions Agreement. Neither the broader community, NTIA nor ICANN has an opportunity to evaluate this additional restriction to determine how it</p>

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	<p>ccTLDs. In particular, the IANA Functions Operator should not impose any additional requirements on the registry unless they are directly and demonstrably linked to the global security, stability, and resilience of the DNS.</p> <p>8iii) For gTLDs, the IANA Functions Operator should continue to provide service notwithstanding any on-going or anticipated contractual disputes between ICANN and the gTLD operator. No additional requirements for prompt delivery of IANA services should be imposed unless they are directly and demonstrably linked to the global security, stability and resilience of the DNS.</p>	<p>the global security, stability and resilience of the Domain Name System.</p>		<p>would impact the performance of the function and the delivery of services underneath.</p> <p>Furthermore, it is not clear to what this language refers, particularly in its use of “prompt delivery of services” (i.e., what requirements are the baseline to evaluate what is “additional”?; how does this interact with the SLEs that PTI is expected to deliver?). This is an example of when a principle used to evaluate a proposal does not appear to appropriately translate into a standalone obligation.</p>
<p>9</p>	<p><i>None</i></p>	<p>8. Any person or entity materially affected by a decision or action of the Corporation may request documents and information</p>	<p>PTI/ICANN Contract</p>	<p>This language is not within the CWG proposal, does not map to the principles for evaluation set out at Annex C, Sections 7 and 8, and does not appear to be consistent with the practice for IANA-related documentation.</p>

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		<p>reasonably related to any such decision or action, except that the Corporation may redact such documents and information to the extent that such documents or information: (i) relate to confidential personnel matters, (ii) are covered by attorney-client privilege, work product doctrine or other recognized legal privilege, (iii) are subject to a legal obligation that the Corporation maintain its confidentiality, (iv) would disclose trade secrets, or (v) would present a material risk of negative impact to the security, stability or resiliency of the Internet. In the case of any redaction, the Corporation will provide the requestor a written rationale for such redaction.⁹</p>		<p>Section C.1.4 of the existing IANA Functions Contract acknowledges that the information provided by customers may be confidential, and that ICANN is bound to treat it as such.</p> <p>Within the IANA Department, information regarding individual requests is only made available to the requester itself, taking into consideration the Defined Conditions for Non-disclosure set forth in the DIDP. This language as drafted is far broader. Requirements on the release of information are recommended to be a matter of discussion for the community, and not imposed as a requirement after the proposal was finalized, without a community conversation on that item.</p>

⁹ This conforms to a similar process in the ICANN bylaws.

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10	7v) Be appealable by significantly interested parties .	9. The decisions of the Corporation shall be appealable by significantly interested parties.	See draft ICANN Bylaws	<p>The CWG Proposal details an escalation/resolution and appeals process for naming-related decisions, and the ICANN Bylaws allow specifically for the availability of the IRP as a place of appeal as well. Separately, the protocol parameters community and the numbering community each have their own escalation/resolution paths identified.</p> <p>As a result, adding in a general statement that “The decisions of the Corporation shall be appealable by significantly interested parties” does not appear to be needed, as there are already the specific mechanisms identified for those paths. Such a statement on its own could cause confusion that additional appeals mechanisms are intended to be available.</p>

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7) Policy based: The decisions and actions of the IANA Functions Operator should be made objectively based on policy agreed to through the recognized bottom-up multistakeholder processes. As such, decisions and actions of the IANA Functions Operator should:

- i) Be predictable (i.e, decisions are clearly rooted in agreed and applicable policy as set by the relevant policy body).
- ii) Adhere to laws/processes (i.e., for ccTLDs: Respect national laws and processes, as well as any applicable consensus ICANN policies and IETF technical standards). Post-transition of the IANA Functions, the IANA Functions Operator will continue to provide service to existing registries in conformance with prevailing technical norms, conforming with the policy decisions of registries and the security and stability of the Root Zone itself.
- iii) Be non-discriminatory.
- iv) Be auditable (*ex-post* review).
- v) Be appealable by significantly interested parties.

8) Diversity of the customers of the IANA Functions:

- i) The IANA Functions operator needs to take account of the variety of forms of relationship with TLD operators. The proposal will need to reflect the diversity of arrangements in accountability to the direct users of the IANA Functions.
- ii) For ccTLDs, the IANA Functions Operator should provide a service without requiring a contract and should respect the diversity of agreements and arrangements in place for ccTLDs. In particular, the IANA Functions Operator should not impose any additional requirements on the registry unless they are directly and demonstrably linked to the global security, stability, and resilience of the DNS.
- iii) For gTLDs, the IANA Functions Operator should continue to provide service notwithstanding any on-going or anticipated contractual disputes between ICANN and the gTLD operator. No additional requirements for prompt delivery of IANA services should be imposed unless they are directly and demonstrably linked to the global security, stability and resilience of the DNS.