6.2 Affirmation of Commitments Reviews

Final Draft: 28 July 2015

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.

If the Affirmation of Commitments 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 Affirmation of Commitments as a separate agreement would be a 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 evaluated the contingency of ICANN unilaterally withdrawing from the Affirmation of Commitments (see Stress Test 14 in Section 8) and proposed these two accountability measures:

> Preserve in ICANN Bylaws any relevant ICANN commitments from the Affirmation of Commitments, including Sections 3, 4, and 8
>
> Bring the four Affirmation of Commitments 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 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, amend reviews, and create new reviews.
- Community stakeholder groups should appoint their own representatives to review teams.
- Give review teams access to ICANN internal documents.
- Require the ICANN Board to consider approval and begin implementation of review team recommendations, including from previous reviews. The CCWG-

Accountability concluded that some review team recommendations could be rejected or modified by ICANN, for reasons such as feasibility, time, or cost. If the community disagreed with the Board's decision on implementation, it could invoke a Reconsideration or IRP to challenge that decision, with a binding result in the case of an IRP. In addition, CCWG-Accountability independent legal counsel advised that ICANN Bylaws could not require the Board to implement review team recommendations because that could conflict with fiduciary duties or other Bylaws obligations.

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

  [***Note*:** Legal counsel has not reviewed the underlying proposed Bylaw revisions at this stage. The proposed language for Bylaw revisions is conceptual in nature at this stage; once there is consensus about direction developed through this comment process, the legal team will need time to draft appropriate proposed language for revisions to the Articles of Incorporation and Bylaws.]

BYLAW THAT PROVIDES A FRAMEWORK FOR ALL PERIODIC REVIEWS

All of the reviews listed in this Section would be governed by Bylaw provisions along the following general lines:

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 a new recommendation based on one in ATRT2 and is more important as reviews are spread further apart.
Review teams are established to include both a fixed number of members and an open number of participants. Each AC/SO participating in the review may suggest up to 7 prospective members for the review team. The group of chairs of the participating AC/SOs 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 AC/SO. In addition, the ICANN Board may designate one director as a member of the review team.	The AoC has no specific requirements for number of members from each AC/SO. The AoC lets Board and GAC Chairs designate review team members, and has no diversity requirement.

PROPOSED BYLAW TEXT	COMMENT
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 should be provided in the final report of the review team.	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.
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.	This was not stated in AoC, but experts have been appointed to some AoC review teams.
Confidential Disclosure to Review Teams: To facilitate transparency and openness regarding ICANN's deliberations and operations, the review teams, or a subset thereof, shall have access to ICANN internal information and documents. If ICANN refuses to reveal documents or information requested by the review team, ICANN must provide a justification to the review team. If the review team is not satisfied with ICANN's justification, it can appeal to the Ombudsman and/or the ICANN Board for a ruling on the disclosure request. For documents and information that ICANN does disclose to the review team, ICANN may designate certain documents and information as not for disclosure by the review team, either in its report or otherwise. If the review team is not satisfied with ICANN's designation of non-disclosable documents or information, it can appeal to the Ombudsman and/or the ICANN Board for a ruling on the non-disclosure designation. A confidential disclosure framework shall be published by ICANN. The confidential disclosure framework shall describe the process by which documents and information are classified, including a description of the levels of classification that documents or information may be subject to, and the classes of persons who may access such documents and information. The confidential disclosure framework shall describe the process by which a review team may request access to documents and information that are designated as classified or restricted access. The confidential disclosure framework shall also describe the provisions of any non-disclosure agreement that members of a review team may be asked to sign. The confidential disclosure framework must provide a mechanism to escalate and/or appeal the refusal to release documents and information to duly recognized review teams.	New ability to access internal documents, with non-disclosure provisions.

PROPOSED BYLAW TEXT	COMMENT
The draft report of the review team should describe the degree of consensus reached by the review team.	Public commenter requested transparency as to degree of consensus reached.
The review team should attempt to assign priorities to its recommendations.	Board requested prioritization of recommendations
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.	
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.	AoC 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.	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.
Issues that may merit attention in this review include: (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;	Public commenter suggested making this a suggestion instead of a mandated list of topics.
(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; (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.	Rephrased to avoid implying a review of GAC's effectiveness.
The review team shall assess the extent to which prior Accountability and Transparency review recommendations have been implemented.	AoC required ATRT to assess <u>all</u> AoC reviews.
The review team may recommend termination or amendment of other periodic reviews required by this section, and may recommend additional periodic reviews.	This is new. A recommendation to amend or 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 previous review was convened.	AoC required this review 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.	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).
The review team shall assess the extent to which prior review recommendations have been implemented.	Make this explicit.
This periodic review shall be convened no less frequently than every five years, measured from the date the previous review was convened.	AoC required this review 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 review includes a commitment that becomes part of ICANN Bylaws, regarding future expansions of the TLD space.
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 convened no less frequently than every five years, measured from the date the previous review was convened.	AoC also required this review 2 years after the 1st 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 likelihood 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.	This review includes a commitment that becomes part of ICANN Bylaws, regarding enforcement of existing policy WHOIS requirements.
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.	
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 review team shall assess the extent to which prior review recommendations have been implemented.	Make this explicit.
This periodic review shall be convened no less frequently than every five years, measured from the date the previous review was convened.	AoC required this review 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 AND SPECIAL IANA FUNCTION REVIEW

The CWG-Stewardship recommends that PTI's performance against the ICANN – PTI contract and the Statement of Work (SOW) be reviewed as part of the IANA Function Review (IFR). The IFR would be obliged to take into account multiple input sources including community comments, IANA Customer Standing Committee (CSC) evaluations, reports submitted by the 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 IFR will also review the SOW to determine if any amendments should be recommended. The IFR mandate is strictly limited to evaluation of PTI performance against the SOW and does not include any evaluation relating to policy or contracting issues that are not part of the IANA Functions Contract between ICANN and PTI or the SOW. In particular it does not include issues related to policy development and adoption processes, or contract enforcement measures between contracted registries and ICANN.

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

While the IFR will normally be scheduled based on a regular cycle of no more than five years in line with other ICANN reviews, a Special IANA Function Review (Special IFR) may also be initiated when CSC Remedial Action Procedures (as described in the CWG-Stewardship Proposal) are followed and fail to correct the identified deficiency and the IANA Problem Resolution Process (as described in the CWG-Stewardship Proposal) is followed and fails to correct the identified deficiency. Following the exhaustion of these escalation mechanisms, the ccNSO and GNSO will be responsible for checking and reviewing the outcome of the CSC process, and the IANA Problem Resolution Process and for determining whether or not a Special IFR is necessary. After consideration, which may include a public comment period and must include meaningful consultation with other SO/ACs, the Special IFR could be triggered. In order to trigger a Special IFR, it would require a vote of both of the ccNSO and GNSO Councils (each by a supermajority vote according to their normal procedures for determining supermajority).

The Special IFR will follow the same multistakeholder cross community composition and process structure as the periodic IANA Function Review. The scope of the Special IFR will be narrower than a periodic IFR, focused primarily on the identified deficiency or problem, its implications for overall IANA performance, and how that issue is best resolved. As with the periodic IFR, the Special IFR is limited to a review of the performance of the IANA Functions operation, including the CSC, but should not consider policy development and adoption processes or the relationship between ICANN and its contracted TLDs. The results of the IFR or Special IFR will not be prescribed or restricted and could include recommendations to initiate a separation process, which could result in termination or non-renewal of the IANA Functions Contract between ICANN and PTI among other actions.