

## Cross Community Working Group on Enhancing ICANN Accountability

### Review of Public Comments on Second Draft Proposal

#### Work Party 1 (Community Empowerment)

12 October 2015

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# Budget and Strategic Plan Veto

## Areas of Consensus

Overall, there is broad consensus (18 of 23 comments) that the community should have significant input into the budget and strategic plans, ideally in their development but ultimately in the form of a veto. There is equal consensus for the notion that the best *process* by which the board and community interact is not a veto but cooperative plan and budget development. The veto is meant as a tool of empowerment and would represent an unfortunate impasse between board and community.

## Areas Needing Refinement

While this is broad support for a veto, several questions have been raised in the comments that require further refinement and details:

1. **Endless Loop.** 10 comments express concern over an endless loop of budget vetoes and reliance on the prior year's budget as the default.
2. **Escalation Threshold.** Two comments suggest the threshold for a second veto should be higher than the first though this could potentially encourage the board to proceed past the first veto.
3. **Overly Broad.** Three comments suggest that a broad veto places generally supported programs, staff and other expenses in jeopardy when the veto is probably about one or two specific expenditures.
4. **Vote Allocation.** Two comments suggest the GNSO should have more influence on the budget than other SOs and ACs because they represent the source of funds and are most influenced by the Operating Plan on which the budget is based. Two others note that weighted voting is likely to undermine the interests of under weighted ACs.
5. **Revenue Shortfall.** ALAC suggest there will be times when the budget must be decreased and freezing the budget and previous year's level might be fiscally irresponsible. The ICANN Board consider it their responsibility to "to align cost with revenue so that the financial stability of ICANN is not jeopardized."
6. **PTI Separation.** 6 comments make specific mention of clarity around PTI separation. CCWG discussions suggest the notion of separation is non-controversial among supporters of a budget veto so more clarity is simply needed.

## Areas of Divergence

While there is broad support for a community veto power, 4 comments express concerns about the implications and efficacy of such a veto:

1. **Efficacy.** Linx in particular suggests that a budget veto is likely to be an ineffective accountability measure but is nonetheless neutral on the proposal provided it is not expanded. It is also suggested in 4 comments that the best time for interaction is while the budget is being developed. The ICANN Board suggest the area of focus should be the operating plan rather than the budget
2. **Discrimination and Balance of Interests.** ALAC, AFRALO and the ICANN Board are concerned that one part of the community might have undo influence over the interests of another, particularly in an environment of weighted voting. The board as seen as the arbiter of a “just” outcome which might not reflect consensus.
3. **Responsibility.** Partnership Istanbul argues that there might be an erosion of responsibility on the part of the board if budgets are subject to community veto.

## Options for CCWG Consideration

A number of the issues raised above were raised and considered addressed in the CCWG so perhaps more clarity and refinement is required on PTI separation, for example. Some further areas for exploration include:

1. **Line Item Veto.** As AFRALO suggests, this might allow the community to more surgically affect the year’s operating plan without unduly threatening day to day operations.
2. **Limit Round Trips.** While previously discussed the idea of limiting round trips continues to persist and should perhaps be revisited. A number of proposals were advanced in this areas including:
  - a. Adopting a 10% increase from the previous year.
  - b. Escalating to alternative accountability measures (arbitration, board reorganization)
  - c. Suspending new initiatives
3. **Vote allocation.** There were conflicting issues expressed on the issue of vote allocation, with some suggesting the GNSO should have a larger influence as the source of funds while others fear the “tyranny of the majority” that such allocation could represent. Perhaps the CCWG could discuss different voting allocations for different types of projects or give the GNSO additional influence with an annual budget would involve an increase in fees.
4. **Defined Cause Boundaries for Objection:** The ICANN board suggest that only

“New Initiatives that are not in the 5-year Strategic or Operating plan or that are inconsistent with the purpose, mission and role set out in ICANN’s Articles and Bylaws should be subject to community objection.”

5. **5 Year Plan versus Annual:** The ICANN Board argue that the 5-year plan should be subject to community approval but not the annual budget.
6. **Course Correction.** The ICANN Board suggest they maintain the ability, throughout the Fiscal Year, to approve certain new expenses not planned for in the approved Annual Operating Plan and Budget. This allows the Board to act in cases of unforeseen urgent matters that put ICANN’s operation and mission at risk. The Community should maintain the ability to reject items that fall outside the ICANN scope.
7. **PTI Budget Separation.** CyberInvasion make a specific recommendation with respect to PTI processes:

PTI/IANA budget (and relation to CWG requirements); "As per our interventions at the Paris meeting we suggest the following budget process:

1. PTI Formulates its budget for the next fiscal year using its internal processes
  - 1.1. These processes will include detailed input from the ICANN staff members who sit on PTIs board and will be privy to the financial status of the parent entity at any given time
  - 1.2. The independent directors on PTIs board will also be involved in this budget formulation process
  - 1.3. Community input may be then solicited via the CSC or another PTI level mechanism to ensure that the community and the direct customers of the PTI have no concerns as to cost overruns or unnecessary spending as part of the next fiscal years budget for PTI
2. PTI budget is sent to the parent entity for approval, this approval should be automatic except in the case of extreme unexpected financial crisis in the parent entity in which case the budget may be returned to PTI for an emergency reconsideration process
3. ICANN is compelled via a binding agreement or other legal instrument to honour PTIs budget request
4. This process will be ring fenced and explicitly not subject to the ICANN budget veto and/or reconsideration process as suggested by the CCWG"

## Standard Bylaws

### Areas of Consensus

Eight comments were submitted on the proposed community power to reject or force reconsideration of a proposed standard bylaw change. All were supportive of this community power. No commenters were opposed.

### Areas Needing Refinement

Two commenters submitted suggestions for further work and/or consideration:

- Commenter “ELIG” submitted:
  - “Deadlocks in changing bylaws or fundamental Bylaws may require stress test: “We believe that it would be helpful to also explain the details of the legislation procedures in case of a deadlock during the amendment / enactment of a bylaw.”
- The ICANN Board submitted:
  - “Agreed. The Board should not be instituting Bylaws changes that are not supported by the community. The community threshold to demonstrate an objection to a Bylaws change needs to be agreed upon, using the current SO/AC structure as opposed to the voting mechanism proposed in the CCWG-Accountability Proposal.”

### Areas of Divergence

- The ICANN Board supports the community power and acknowledges the need to establish mutually agreeable thresholds for its use, but prefers “using the current SO/AC structure as opposed to the voting mechanism” included in the CCWG’s second draft proposal.
- Both comments highlight the need for further consideration and/or explanation of the mechanisms for implementing and enforcing the agreed-to community powers.

### Options for CCWG Consideration

- The CCWG may consider further clarifications around the triggers, thresholds and dispute resolution paths, required for, or resulting from, the use of this

power.

- The CCWG may consider revising the community empowerment mechanism to rely on consensus among the SOs and ACs, rather than voting.
- The CCWG may consider further explaining how a conflict or deadlock resulting from the use of this power would be resolved.

## Fundamental Bylaws

### Areas of Consensus

A total of 17 comments relating to fundamental bylaws were received by the CCWG that directly addressed fundamental bylaws. Strong support for the concept of enshrining fundamental bylaws into ICANN was received in all of the comments. General support was received for having a high threshold requirement to change any fundamental bylaws.

The establishment of the bylaw relating to the SCWG as a fundamental bylaw received support from all commenters who referenced this bylaw.

### Areas Needing Refinement

- Karsten Manufacturing Corporation & Ping Registry Provider, Inc., noted that any changes to ICANN's bylaws must not preclude it from being subject to US laws both state and federal. They further noted that the fundamental bylaws should contain a requirement to act in the public interest and not in the interests of the corporation or its stakeholders in the event of a conflict.
- The BC noted "*The CCWG's proposed Community Mechanism as Sole Member may not be the right body to launch a Separation Working Group, since the protocol community (IETF) may not be represented. We suggest that the ICG specify that a Separation Working Group, if ever needed, would include the IETF, regardless of whether that group was participating in the Community Mechanism*"
- A number of commenters requested a clearer and more easily understood definition of the process, including any consultation steps such as the community forum.
- ELIG noted that deadlocks caused between the board and the community on changing fundamental bylaws may require a stress test.

- The CWG Stewardship noted that the reference to “IANA Function Review” may need clarification to refer explicitly to the IANA Functions Review (IFR) and the Special IANA Functions Review(SIFR).
- The ICANN board suggested that a bylaw be added to require a public comment period to be observed prior to all bylaw changes. The board additionally notes that for all areas requiring further consideration by the CCWG such as the IRP the community should consider whether they require immediate enshrining as fundamental bylaws or once there are additional process improvements needed.

### Areas of Divergence

- The ICANN board noted its disagreement with the process of changing fundamental bylaws, preferring not to utilize the Sole Member as proposed by the CCWG while supporting the general concept of requiring support from the community to change fundamental bylaws.
- 4 commenters remarked that Article XVII (Relating to the Offices of ICANN) should be enshrined as a fundamental bylaw. 4 commenters believed that Article XVII should not be enshrined as a fundamental bylaw.

### Options for CCWG Consideration

- The CCWG may consider further clarifications in its communications of the process and methods by which fundamental bylaws would be changed or amended.
- The CCWG should consider making an explicit reference to the SIFR in the bylaw referring to the IFR process.
- The CCWG should consider the comments of the ICANN board while discussing the question of the SMCM and any other reference made that the CCWG may deliberate on.
- The ST-WP may consider a stress test related to a deadlock between the community and the board over changing of fundamental bylaws.
- Given that the CCWG made the decision not to further examine the SCWG it may not require further analysis to respond to the comments of the BC with regards to the launching body of the SCWG, further clarification should be sought from the BC to assess if the current status of work on the SCWG is sufficient.
- Given the current divergence on the issue of enshrining Article XVII as a

fundamental bylaw the CCWG may need to revisit this discussion and provide further rationale for their decision.

- The ALAC noted the following clarification for the CCWG to consider, "*Paragraph 259: The definition of the Board threshold to approve changes to Fundamental Bylaws is unclear. Most Board votes are judged based on the number of Members voting or abstaining, but excluding those members not present. For the approval of Bylaw changes, the threshold is 2/3 of all members of the Board. Accordingly, the threshold for approving Fundamental Bylaws should explicitly be 75% of all members of the Board, since "available votes" could be construed as just those present at the time. This matches the description in Paragraph 236.*"

## Individual Director removal

### Areas of Consensus

**All<sup>1</sup> commenters supported the basic premise.** The largest block, 16, voiced unqualified support for the proposal as presented.

**Consensus on documenting the rationale for removal.**

### Areas Needing Clarification/Refinement

**Four commenters were supportive but wanted some mods:**

- Two wanted criteria for board behavior established as part of WS1.
- One commenter had concerns with the provision that if a board member survived a recall, they were indemnified against future action.
- One stated that if a director was within 8 months of the end of their term, they should not be replaced.

### Areas of Concern/Divergence

**1. SO or AC appointed Directors make decision to remove director.**

- a. Seven commenters voiced a serious concern with the proposal that the nominating SO/AC would be the sole remover, this could lead to more of a parliamentary like composition where board members were more parochial. This position was

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<sup>1</sup> (IT Law Institute voiced opposition to removing the board- I believe it was the full board)



reinforced by several participants in the WP meetings.

- b. In WP1 meetings, proponents of the CCWG proposal (supported by most commenters) also reinforced their view that Directors can be removed solely by the appointing SO/AC.

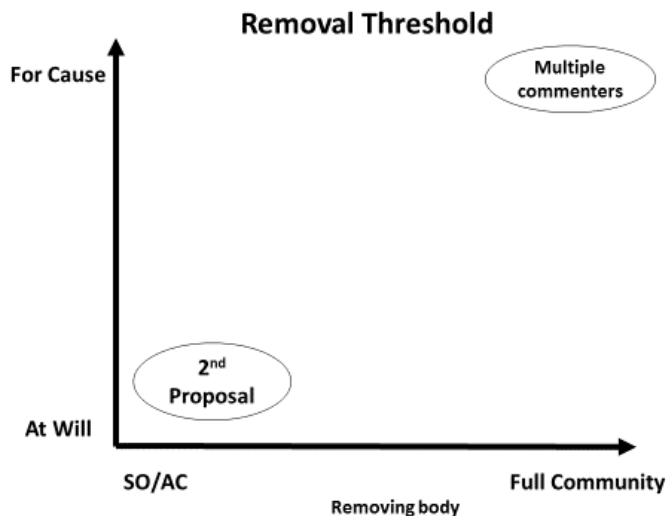
**2. For cause / standards of behavior.** Multiple commenters in the PC and at the L.A. meeting proposed that a standard be established for Directors to be removed.

- a. Two commenters proposed that standards of behavior be adopted before the proposal is approved. One commenter proposed Pre-service letters that would document the cause for removal.
- b. The CCWG proposal of for the SO/AC to document the rationale, but not justify against a fixed standard was also vigorously defended.
- c. It was pointed out that there is an existing Code of Conduct for Directors.  
<https://www.icann.org/resources/pages/code-of-conduct-2012-05-15-en>

**3. Multiple removals.** One commenter, and LA comments, and WP discussions pointed out that the removal of too many individual members within a short time period could have equivalent to removal of entire Board. WP also discussed “serial” dismissals.

## Options

- 1. **Explore combinations of standard vs number of decision makers.** Comments appeared to be bipolar with the CCWG proposal and supporters favoring the lowest barrier to removal, and most on the opposing view supporting both full community and “for cause”. It may be worthwhile exploring different combinations of standards for dismissal and the composition of the body making the decision.
- 2. **Limit the number, and stagger time periods for individual board removal to mitigate “batching”.**



# Recalling the Entire Board

## Areas of Consensus

Fourteen commenters expressly supported the power to recall the entire board. Three commenters<sup>2</sup> did not state support or opposition.

## Areas Needing Clarification/Refinement

**1. General.** One commenter<sup>3</sup> suggested that refinements are needed to the powers, but did not make any specific suggestions.

**2. Community Standards for Board Members.** One commenter expressed specific support for the intention to develop community standards for Board members in WS2.

**3. Standards for Selection of Interim Board.** Three commenters focused on the need to create standards for the selection of the Interim Board. One commenter<sup>4</sup> suggested that an enhanced set of director selection standards could “be developed to assist in guiding the selection of interim Directors in the case of Board recall.” This commenter noted that normal standards for diversity should be suspended for this purpose, since it was “critical to select Directors with the deepest technical and governance abilities above all other criteria.” Another commenter<sup>5</sup> asked what requirements would need to be met by the Interim Board, but did not offer suggestions.

The Board, in its comment, stated that there should be key criteria, such as a high level of independence and professionalism among the Interim Board, and the insistence on operational core competencies such as in finance, risk, audit and governance. There should also be an important role for those familiar with the work of ICANN, but that should not predominate. At no time should the Board not meet the regulatory aspirations of a predominance of independent Directors.

**4. Unclear Consequences for Failure of Community to Meet Process Requirement.** One commenter<sup>6</sup> noted that “We have extensive and detailed goals, principles, and deadlines but we not have clear consequences for failure to meet them.”

## Areas of Concern/Divergence

**1. General Opposition.** Four commenters<sup>7</sup> clearly did not support the power to recall

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<sup>2</sup> AFRALO (African Regional At-Large Association), i2Coalition (Internet Infrastructure Coalition), Linda Bruecker.

<sup>3</sup> Afnic.

<sup>4</sup> CyberInvasion Ltd.

<sup>5</sup> Linda Bruecker

<sup>6</sup> Nell Minow.

<sup>7</sup> Erman Oncel – Partnership Istanbul; Google; Government of Kuwait; IT Law Institute – Istanbul;

the entire Board. One stated that such a power “goes beyond purpose.” Another stated that the report is not clear what justifications or grounds related to accountability would trigger such an action, and noted that removal of the entire board is a risky and disruptive process. This commenter expressed concern that the power could be invoked because of a “view disagreement” between the board and the community unrelated to accountability and could lead to the “hijack” of ICANN as an organization.

**2. Time Period for Selection of Interim Board.** One commenter<sup>8</sup> expressed concern that the 120 day period for selection of an interim board would not be sufficient, and suggested that this be a target rather than a deadline.

**3. Tight Deadlines could Invite Capture.** One commenter<sup>9</sup> expressed concern that the tight timelines for discussion could open the process to capture and suggests that time limits could be set based on prior discussions within the community and that the Community Forum could also be invoked.

**4. Need for Widespread Community Support.** Several commenters, some of whom supported the power and some who opposed it, stated the importance of widespread community support for any recall.

**5. Potential for Failure to Agree on Interim Directors.** One commenter expressed concern that the SOs and ACs may not be able to agree on Interim Directors.

**6. Complexity of Process.** One commenter<sup>10</sup> called the process “labyrinthine and cumbersome.”

**7. Establish an Outline of Minimum Standards for Board Removal in WS1.** One commenter<sup>11</sup> suggested that the CCWG should establish “a basic outline of minimum standards for Board removal” as part of WS1, while supporting the intention to develop such standards more fully in WS2.

**8. Higher Threshold for Board Recall.** One commenter<sup>12</sup> suggested an even higher threshold of 80%.

## Comments on Minority View

There were seven comments on the minority view that the entire Board could be removed by a single SO. Six comments clearly rejected the idea. One<sup>13</sup> stated this would be “profoundly destabilizing” and “needlessly risky.”

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<sup>8</sup> ALAC.

<sup>9</sup> Nominet (.uk ccTLD)

<sup>10</sup> Nell Minow.

<sup>11</sup> Public Knowledge.

<sup>12</sup> USCIB.

<sup>13</sup> USCIB ((US Council on International Business).

Only one commenter<sup>14</sup> supported the minority view, stating that it would be “destabilizing” to have a Board remain in place after an attempt to unseat it by an entire SO.

## Options for Consideration by full CCWG

### **1. Create Standards for Selection of Interim Board.** Suggestions include:

- Deepest technical and governance abilities above all other criteria,
- High level of independence and professionalism
- Operational core competencies such as in finance, risk, audit and governance.
- Familiarity with the work of ICANN is important, but such directors should not predominate.
- Interim Board must include a predominance of independent Directors.

*The Second Draft is silent on selection standards for the Interim Board, except to note that the geographic diversity requirement will be waived. CCWG may wish to consider revising its Proposal to state that standards for the Interim Board will be the same as those set out in the Bylaws for the ICANN Board (other than the requirements relating to geographic diversity).*

### **2. Clarify Consequences for Failure of Community to Meet Process Requirement.**

The CCWG should consider and make clear the consequences if the community does not satisfy the goals, principles, and deadlines in the process.

*The CCWG should consider what consequences if any, would attach if particular goals, principles or deadlines are not met. The CCWG may wish to note the difference between deadlines, which are part of the process, and goals and principles, which inform the process.*

**3. Make Time Periods Less Rigid.** One commenter expressed concern that the 120 day period for selection of the replacement board, while reasonable, might not be sufficient, and suggested that this be a target rather than a deadline. Another commenter expressed a more general concern that the tight timelines for discussion could open the process to capture.

*This is related to the previous item. The CCWG may wish to make some or all of the time periods less rigid, including the replacement director deadline, or make other adjustments to limit possibilities for “capture” based on unequal ability to respond to tight timelines. At the same time, the CCWG should consider how to avoid opening the door to unreasonable delays.*

**4. Eliminate Potential for Failure to Agree on Interim Directors.** The CCWG may wish to review the interim director process to ensure that it will not result in a failure to agree on Interim Directors.

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<sup>14</sup> LINX (London Internet Exchange).

**5. Simplify Process.** One commenter called the process “labyrinthine and cumbersome.”

*While this may be partly intentional, in order to make sure that total recall is not too easy, the CCWG should review the process to see if it can be clarified and simplified, without actually making it easier to recall the Board.*

**6. Establish a Basic Outline of Minimum Standards in WS1.**

*The CCWG should strongly consider whether to establish at least a basic outline of minimum standards for Board removal as part of WS1, rather than leaving this entirely to WS2.*

**7. Higher Threshold for Board Recall.** The CCWG should consider the suggestion that Board recall should have an even higher threshold of 80%.

## Bringing AoC into ICANN Bylaws

### 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> draft, "The draft report of the Review Team should describe the degree of consensus reached by the Review Team."

On p. 76 of 2<sup>nd</sup> 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 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)

*This is an informational item. No action needed.*

## Areas of Concern/Divergence

**1. ATRT recommending sunset/amendment/creation of other reviews.** In the 2<sup>nd</sup> 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 subset 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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:

<b>ATRT1</b> (15 people): <ul style="list-style-type: none"><li>• 1 ALAC</li><li>• 2 GAC</li><li>• 1 ASO</li><li>• 3 ccNSO</li><li>• 5 GNSO</li><li>• Chair of the GAC or designee</li><li>• ICANN Board Chair or designee</li><li>• Assistant Secretary for NTIA</li></ul>	<b>ATRT2</b> (16 people): <ul style="list-style-type: none"><li>• 2 ALAC</li><li>• 3 GAC</li><li>• 1 SSAC</li><li>• 1 ASO</li><li>• 2 ccNSO</li><li>• 2 GNSO</li><li>• 2 Experts</li><li>• Chair of the GAC or designee</li><li>• ICANN Board Chairman or designee</li><li>• Assistant Secretary for NTIA</li></ul>
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<p><b>SSR</b> (16 people):</p> <ul style="list-style-type: none"> <li>• 1 ALAC</li> <li>• 1 GAC</li> <li>• 2 SSAC</li> <li>• 1 RSSAC</li> <li>• 2 ASO</li> <li>• 3 ccNSO</li> <li>• 2 GNSO</li> <li>• 2 Independent Experts</li> <li>• Chair of the GAC or designee</li> <li>• ICANN CEO or designee</li> </ul>	<p><b>WHOIS</b> (15 people):</p> <ul style="list-style-type: none"> <li>• 2 ALAC</li> <li>• 1 GAC</li> <li>• 1 SSAC</li> <li>• 1 ASO</li> <li>• 1 ccNSO</li> <li>• 3 GNSO</li> <li>• 3 Independent Experts / Law Enforcement</li> <li>• Chair of the GAC or designee</li> <li>• ICANN CEO or designated nominee</li> </ul>
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*WP1 recommends that the full CCWG consider two options for responding to this comment:*

*Option A: retain para 514 from the CCWG 2<sup>nd</sup> 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 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 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)

*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 2<sup>nd</sup> 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 2<sup>nd</sup> 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>
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*WP1 believes this should be considered by the full CCWG, since it is also a matter being discussed in WP2.*

## Community Forum

### Areas of Consensus

Overall, there is broad support for the Forum and its purpose and function (encouraging discussion and sharing of information prior to exercising community powers and its place in the “petition – discussion – decision” process). There is also broad support for a Forum that is open to participation beyond the ICANN community, and for open and transparent processes and documented discussions.

One commenter suggested that the multistakeholder nature of the Forum should be highlighted as a key element of the community mechanism.

### Areas Needing Refinement

While there is broad support for the Forum as noted above, a number of questions (synthesized below) were raised in the public comment, the LA meeting and in e-mail exchanges on the CCWG lists, largely around the need for additional detail:

1. **Triggers:** Commenters asked for clarity as to what the triggers are for initiating a Community Forum.
2. **Permanency:** A number of comments questioned whether the Forum should be permanent or ad hoc. One suggestion from the LA meeting was that it should be standing panel but called “as necessary”. Other commenters suggested that the Forum is a process which can be triggered whenever a decision to exercise the community powers is initiated.
3. **Periodicity:** There were suggestions that the Forum could occur alongside the ICANN meetings but commenters also suggested the possible need for ad hoc

meetings and that a Forum might, given the complexity of the issues, require a number of different sessions and phases of interaction. A further issue was how issues would be discussed between F2F Forum meetings – for example, would there be virtual meetings? Questions were also raised as to the degree to which SO/ACs could be asked or should be expected to share information with the Forum.

4. **Composition and representation:** The number of representatives and from where was noted, whether they would be chosen from a slate of candidates or selected by the SOs/ACs. Questions were raised as to whether there would term limits, or the use of a NomCom. Additional comments suggested that the Forum should have access to legal counsel and could be modelled on a CCWG. Another asked if participation by SOs and ACs should be mandatory. Other commenters understand the forum not as an event or a group, but as a process, comprising phases of mutual information, deliberation and successive conversation among the SO/ACs and other interested individuals, with adequate timescales to address the topic at hand and allowing for inclusive participation.
5. **Standing (and outcomes):** A number of commenters asked whether or not the Forum would have any standing in terms of the discussion/outputs and whether the use of the Forum should be a mandatory part of the community powers process.
6. **Outcomes:** Commenters asked whether there should be Forum “outcomes” and what standing they might have, and whether or not such outcomes would or should be taken into account in the decision to exercise the powers. It was also suggested that a neutral facilitator could summarize information and discussions in an independent report.
7. **Contradictory inputs:** Commenters queried how contradictory or opposing views in the Forum would be accounted for and what the implications of such views might be if the Forum outcomes were to have standing.
8. **Moderation:** Questions were raised over whether or not the Forum discussions would need to be moderated and/or facilitated by a neutral party to ensure that a public record is created, and all views were heard and appropriately noted, and whether the discussions could be “mediated” to find consensus.
9. **Timescales:** There is concern that the timescales within the petition-discussion-decision process in the proposal may be too short. In the case of the Forum there is concern that there would not be sufficient time to allow for the fullest of discussion given the importance of the powers. Some commenters stressed the need for adequate timescales that would ensure the full participation of interested SO/AC and individuals.
10. **Costs:** A number of commentators queried whether the Forum would need

funding – and what size of representation would be reasonably funded by ICANN. Others suggested that the issue of representation would be less relevant if the forum is understood as a process.

**11. Relationship to CMSM decision-making:** As alluded to above, there were questions about how the Forum relates to or impacts/contributes to SMCM decision-making. No particular suggestions were made as to how to integrate it (or not). Irrespective of the decision-making system, the Forum was considered by some as key in order to lay a foundation of shared information and to being able to discuss the issues openly and transparently.

**12. Relationship to Public Accountability Forum:** questions raised related to whether or not the Forum would also be the PAF or what the relationship would be between the two.

(We note that some of the questions/points raised above are answered/addressed when looking at both sections 6.3 (on the Community Forum itself) and 7.0 (on the petition-discussion-decision process) of the CCWG proposal)

## Areas of Divergence

The only issue that generated some divergence of views was whether the Forum should result in outcomes or not – and what the consequences of such outcomes might be on the decision-taking part of the process. However, the WP believes that this issue does not necessitate further deliberation given the overall support for the Community Forum as a place for discussion and information sharing.

## Options for CCWG Consideration

Given the overall support for the Community Forum and its role as outlined in the CCWG proposal, the WP does not believe that there are options that require further consideration by the CCWG.

However, while the proposal notes that work on establishing the Community Forum will occur during the implementation phase of WS1, there remain, as identified above, areas for further refinement that might warrant being addressed prior the finalization of the proposal. These could include but are not limited to how the Community Forum is formed once triggered, the composition of the Community Forum, whether there would need to be moderation, and what timescales are appropriate for the discussion of the various powers.

# CMSM

## Areas of agreement

- There is support and appreciation for the enforceability of community powers.
- Sole Member Model is an improvement from 1<sup>st</sup> draft Reference Model: SO/AC Membership Model.
- CWG-Stewardship: "We believe that the powers provided by the CCWG-Accountability draft proposal as described above and the community empowerment mechanism described in the proposal together adequately satisfy these CWG-Stewardship requirements, including by ensuring that the community powers specified in the CWG-Stewardship final transition proposal are legally enforceable."
- Support for principle of community mechanism to enforce community powers.
- There is consensus to be as restrained as possible in the degree of structural or organization changes required in ICANN to create the mechanism for these powers.
- There is consensus to organize the mechanism along the same lines as the community – that is, in line and compatible with the current SO and AC structures (without making it impossible to change these in future).
- There is consensus about the importance of having open community deliberation as part of the exercise of Community powers (the Community Forum).

## Areas Needing Clarification/Refinement

- Further detail needed of the process surrounding the Community Forum.
- Indications from commenters that full support and, in some cases determining a position, would not be achievable until further detail and clarification were provided.
- Calls for more simplicity in the Model and its explanation.
- Must be a minimum number of SOs and ACs participating for the Model to work.

## Areas of Concern/Divergence

- Lack of consensus on whether the community should take decisions through



formal voting or through establishing consensus.

- Lack of consensus on the voting allocations between SOs and ACs. Comments expressed concern for “dilution and authority and influence of SO community”. Most commenters on this issue expressed support for voting allocations along the lines of ICANN’s existing board structure.
- Lack of consensus on the composition of the community within the Model (e.g. role of Advisory Committees). Comments indicated concern over the possible “duality” of the governmental role in the Model. Several comments expressed concern that providing votes to GAC will fail to meet NTIA requirements.
- Comments expressed concern over the extent of changes required in ICANN’s structure with the model.
- Proposal that enforceability for narrowed community powers could be provided for by binding arbitration to enforce fundamental bylaws, instead of the CMSM Model.

## Options for CCWG Consideration

1. Continue to evolve SMM to address specific points of concern raised in public comment, while maintaining “membership” model.
2. Explore how maximum legal enforcement can be achieved for desired community powers under an empowered designator model for comparison.

## Sub-Issues within the Models:

1. Single Member and Single Designator Models
  - a. Voting or consensus basis;
    - i. Move away from “voting” and towards “consensus” for decision-making purposes within the community mechanism.
    - ii. Consider community powers only may be exercised by the community as a whole, based on consensus or near consensus of the whole of it.
    - iii. Consider option of consensus definition depending on absence of recommendations or advice against when using community powers.
    - iv. Consider option of consensus definition depending on absence of recommendations or advice against.
  - b. Reconsider role of the ACs in the Model’s community forum. Should some ACs be non-voting / decisional and rather, advisory only?
  - c. Reconsider voting allocations between SOs-ACs to be more in-line with balance of appointments to ICANN board.
  - d. Consideration of advice from those SOs and ACs opting out of the decision-making mechanism;•
  - e. Maintaining balance of power to prevent capture of/by those opting-in to the

- decision-making mechanism;•
- f. Factoring in conflicts of interest and fiduciary or other responsibilities (such as public interest) into the decision-making design;•
- g. Ensuring accountability of the new structure to the broader community and the global public interest.

2. **MEM based issues:**

- a. Decide which powers, if any, can be enforced in a MEM based model, and if they are sufficient to meet community powers and other requirements.
  - b. Ascertain whether community can enter binding arbitration without personhood.
  - c. Ascertain whether community has standing in court without personhood.
  - d. Ascertain whether ICANN can be bound by a binding arbitration if it declines to enter into it or otherwise attempts to frustrate the process.
  - e. Ascertain the level of personal or other risk community members must undertake to exercise or enforce any of the community powers.
  - f. Ascertain whether the MEM meets CWG-Stewardship, NTIA, and other external requirements.
  - g. Ascertain whether the MEM meets all required stress tests.
  - h. How does the community make decisions within this model
3. **Issues pertinent to either model:** decision-making process has to be absolutely capture-proof and require that any exercise of community powers is backed by a consensus or near consensus of the whole community
4. Consider determining a “fixed understanding” of who will vote or otherwise make decisions in the mechanism before decisions are made by CCWG about which Model to finally propose.