

Draft 1 v5: Non-Triggered Accountability Mechanisms with regard to the Affirmation of Commitments and related reviews:

Introduction:

The paper seeks to highlight the key issues within the Affirmation of Commitments that impact Accountability within ICANN. It also looks at the reviews within the Affirmation of Commitments and very narrowly focuses on the Accountability mechanisms that are in place as a result of the AoC reviews.

Objectives:

The objectives are to assess:

1. What power(s) is ICANN enabled to exercise within the AoC
2. Who has what Standing and under what conditions?
3. What is the standard of AoC reviews?
4. What is the Composition of the review teams ?
 - a. Numbers
 - b. Election or appointment process
 - c. Independence conditions
 - d. Recall mechanisms
5. How does it come to a decision ?
 - a. consensus, vote...
 - b. Is the decision bound by mandates of electors ?
6. What are the potential means to implement the AoC and the related reviews ?
7. How accessible are the review reports ?
 - What are the related costs ?
 - What are the delays associated with getting the reviews started or recommendations implemented ?

Scope of Analysis

In view of previous input to the CCWG the scope of the Affirmation of Commitments and related reviews has been defined as mainly building on AoC (Affirmation of Commitments) Reviews. This is expected to transfer as much of the AoC approach as practically possible into ICANN by undertaking the following:

1. Merge AoC into the ICANN Bylaws (Work Stream 1) : In Bylaws or Articles, incorporate commitments and review teams currently required in the AoC
2. Ability to sunset review teams and launch new ones: In Bylaws or Articles, empower community representatives (Members, CCWG, etc.) to sunset required reviews and create new reviews.
3. Community appoints Affirmation review team members: In Bylaws or Articles, require that when formal reviews are initiated, empower community representatives (Members, CCWG, etc.) to designate members of the review teams. This is presently controlled by the ICANN CEO and GAC Chair
4. Enforcement of implementation of recommendations from Affirmation reviews: In Bylaws or Articles, empower the community (members, AC/SOs etc. as per the mechanisms) to require the Board to implement, and amend or accelerate implementation of, a previously approved recommendation from an ATRT.
5. In Bylaws or Articles, give Review Teams access to all ICANN internal documents

Existing Accountability Mechanisms within the Affirmation of Commitments:

Section 9 and 10 of the Affirmation of Commitments detail the various reviews and accountability mechanisms as follows:

From the AoC "9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:

9.1 Ensuring accountability, transparency and the interests of global Internet users: ICANN commits 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 by: (a) continually assessing and improving ICANN Board of Directors (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; (b) assessing the role and effectiveness of the GAC and its 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) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) continually 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. ICANN will organize a review of its execution of the above commitments no less frequently than every three years, with the first such review concluding no later than December 31, 2010. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the Chair of the Board of ICANN, the Assistant Secretary for Communications and Information of the DOC, representatives of the relevant ICANN Advisory Committees and Supporting Organizations and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the Chair of the Board of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations. Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.

9.2 Preserving security, stability and resiliency: ICANN has developed a plan to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS, which will be regularly updated by ICANN to reflect emerging threats to the DNS. ICANN will organize a review of its execution of the above commitments no less frequently than every three years. The first such review shall commence one year from the effective date of this Affirmation. 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 review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3 Promoting competition, consumer trust, and consumer choice: ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine

the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years. The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3.1 ICANN additionally commits to enforcing its existing policy relating to WHOIS, 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. One year from the effective date of this document and then no less frequently than every three years thereafter, ICANN will organize a review of WHOIS policy and its implementation to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, as well as experts, and representatives of the global law enforcement community, and global privacy experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

10. To facilitate transparency and openness in ICANN's deliberations and operations, the terms and output of each of the reviews will be published for public comment. Each review team will consider such public comment and amend the review as it deems appropriate before it issues its final report to the Board.”

Proposed Recommendations:

1. It is important that the general principles of the AoC be captured in the ICANN bylaws so as to ensure continuity post NTIA contract.

Craft from the AoC the proposed wording for the bylaws

2. The proposed reviews in the AoC are not in a practical cycle, which makes it difficult for them to address the required accountability issues. The AoC reviews which runs on a 3year cycle are not aligned to the other ICANN reviews that run on a 5year to 8year cycle.

Craft from the AoC the proposed wording for the bylaws

3. Selection of Review teams: The powers are vested in the two people who have to make the final decision.

Craft from the AoC the proposed wording for the bylaws

4. There is no sunset of review teams or process to guide how the review team engages with the Board and ICANN staff during the implementation of the review process

Craft from the AoC the proposed wording for the bylaws

In Bylaws Article IV, add a new section:

Section 5. Periodic Review of ICANN Execution of Key Commitments

section 5 would include one subsection for each of the 4 Affirmation Reviews.

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.

In this review, particular attention will be paid to:

- (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;
- (b) assessing the role ~~and effectiveness~~ of the GAC and its 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; [note: Kavouss asked that we not review 'effectiveness of the GAC; Jordan asked whether the other structural reviews look at 'effectiveness'. They do not.]
- (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.; and
- (f) assessing the extent to which the Board and staff have implemented the recommendations arising out of the other periodic reviews required by this section.

The review team may recommend termination of other periodic reviews required by this section, and may recommend additional periodic reviews.

The review will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, Stakeholder Groups, and the chair of the ICANN Board. The review team 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.

To facilitate transparency and openness in ICANN's deliberations and operations, the review team shall have access to ICANN internal documents, and the output 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 recommendations to the Board. The Board shall ~~take action~~ [consider approval and begin implementation] within six months of receipt of the recommendations.

These periodic reviews shall be conducted no less frequently than every five years, measured from the date the Board received the final report of the relevant review team.

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 review will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, and Stakeholder Groups. The review team 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.

To facilitate transparency and openness in ICANN's deliberations and operations, the review team shall have access to relevant ICANN internal documents. The review team will not disclose or distribute ICANN internal documents provided under a legitimate duty of confidence.

The output 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 recommendations to the Board. The Board shall ~~take action~~ consider approval and begin implementation within six months of receipt of the recommendations.

These periodic reviews shall be conducted no less frequently than every five years, measured from the date the Board received the final report of the relevant review team.

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. The Board shall cause a review of ICANN's execution of this commitment after any 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.

The review will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, and Stakeholder Groups. The review team 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.

To facilitate transparency and openness in ICANN's deliberations and operations, the review team shall have access to relevant ICANN internal documents. The review team will not disclose or distribute ICANN internal documents provided under a legitimate duty of confidence.

The output 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 recommendations to the Board. The Board shall ~~take action~~ [consider approval and begin implementation] within six months of receipt of the recommendations.

[Kavouss proposed adding: Subsequent rounds of new gTLDs should not be opened until the recommendations of the previous review required by this section have been implemented.]

These periodic reviews shall be conducted no less frequently than every four years, measured from the date the Board received the final report of the relevant review team.

4. Reviewing effectiveness of WHOIS policy and the extent to which its implementation meets the legitimate needs of law enforcement and promotes consumer trust. ICANN commits to enforcing its existing policy relating to WHOIS, 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.

The Board shall cause a periodic review to assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust.

[Robin Gross & Bruce Tonkin suggested adding OECD privacy principles to the criterion of this review]

The review will be conducted by a volunteer community review team comprised of representatives of the relevant Advisory Committees, Supporting Organizations, and Stakeholder Groups. The review team may also solicit and select independent experts, including representatives of law enforcement and experts on privacy, 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.

To facilitate transparency and openness in ICANN's deliberations and operations, the review team shall have access to relevant ICANN internal documents. The review team will not disclose or distribute ICANN internal documents provided under a legitimate duty of confidence.

The output 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 recommendations to the Board. The Board shall ~~take action~~ [consider approval and begin implementation] within six months of receipt of the recommendations.

These periodic reviews shall be conducted no less frequently than every three years, measured from the date the Board received the final report of the relevant review team.