

IMPROVING INSTITUTIONAL CONFIDENCE CONSULTATION

SUMMARY OF 2ND PUBLIC COMMENT PERIOD (19 September – 20 October 2008)

ICANN ran a second public comment period from 19 September to 20 October 2008 to continue the community discussion and seek further public input on revised versions of the documents *Improving Institutional Confidence* and the *Transition Action Plan* which set forth requirements of a post-JPA ICANN and the steps needed to consult the community and to implement the plan.

Thirteen parties submitted responses in the 2nd public comment period. The full text of these comments is available at <http://comment.icann.org/ee7bca7> ; <http://comment.icann.org/ee7bace> ; <http://comment.icann.org/ee7bbd1>; and <http://comment.icann.org/?14@@.ee7bbd2/1>. A list of the respondents appears at the end of this document.

This document is a summary of the responses submitted in the 2nd public comment period. Page citations to specific input from the responses are provided in the text.

OVERALL SUMMARY

A number of the responses in the 2nd period raise timing and process concerns about the IIC consultation as well as ICANN decision making generally. The comments also provide further input regarding the five key requirements outlined in the *Transition Action Plan* as essential to fulfillment of ICANN's mandate: freedom from capture; accountability; globalization; financial and operational security; and security and stability. The "Summary of Input" section below is organized into subsections outlining respondents' views regarding each of these areas.

SUMMARY OF INPUT

Process

IIC Consultation--Timing and Proposal Details

The timing of the public consultation period for the IIC analysis and design phase is too short. *ATT* at 1; see also *USCIB* at 3 (timeframes not sufficient to allow organisations and constituencies to provide meaningful support and input from experts and stakeholders); *ISOC* at 2 (ICANN should provide longer time for next comment period); *Canada* at 1; *ICC* at 2; *ETNO* at 2.

The revised PSC documents do not adequately address issues raised in the first comment period. *ETNO* at 1; *ICC* at 1; *ACT* at 1; *NetChoice* at 1.

ICANN and the PSC must provide detailed proposals for community input in the analysis and design phase. *ATT* at 1; see also *Nominet* at 4; *ISOC* at 1; *ICC* at 2; *ETNO* at 1-2. There should be a "specific, achievable and firmly committed timeline" for distribution of detailed proposals to the community. *ATT* at 2; see also *ETNO* at 2. The analysis and design phase should be extended into 2009. *ATT* at 3. September 2009 is a useful target but not a hard deadline for ICANN's transition; the task is not to create a new model but to build on ICANN's fundamental features. *Canada* at 1. The PSC has not included metrics and it seems not to have allowed time to assess effects of its proposals prior to termination of the JPA in September 2009. *ACT* at 2.

Some respondents highlighted support for the Expert Advisory Group (EAG) proposal to assist with the IIC project. *ISOC* at 2; see also *ICC* at 4 (more EAG details needed; assign experts in “the five areas” and publicly disclose their names); *ATT* at 2.

ICANN Decision Making

ICANN must conduct a transparent and well-documented decisionmaking process fully analyzing the public input and explaining the basis for the ultimate decisions made. ICANN should track public comments, recommendations and their disposition. *ATT* at 2; see also *Canada* at 1 (objective measures should be used, allowing effective tracking of implementation by stakeholders). ICANN needs to work on increased certainty of processes and balanced outcomes, both in policy development and overall decision making. *ICC* at 1.

The Board must ensure that its decisions are clearly explained and give reasons why certain stakeholder views have not been accepted. *Nominet* at 2. The public comment process requires significant revision to improve its accountability. *INTA* at 2.

Capture

Current Assessment

Existing safeguards against capture must be assessed to determine if more is needed. Any further proposals offered should be explained in detail. *ICC* at 2.

Business Users

The revised transition plan fails to address specifically the business user community, its representation and voting rights within ICANN despite strong concerns about this issue raised by several parties. Loss of support from the global business community would lead to the destabilization of ICANN. *ATT* at 2. See also *INTA* at 2 (clear need to improve business user input); *ICC* at 1. As called for by the Business User constituency, Nominating Committee appointees to the GNSO should be abolished due to the potential for capture and lack of transparency. *Andruff* at 1.

Noncommercial Users

Noncommercial users should be more broadly represented in ICANN. *Preston* at 7-8 (ways suggested for ICANN to change its structure to improve representation). See generally *Preston* for a viewpoint on noncommercial users “capture” and lack of adequate representation of child protection and pro-family interests in ICANN process. The Noncommercial Users Constituency (NCUC) has been dominated by a handful of individuals. *Preston* at 3.

External Capture

More details are needed about how to prevent “external” capture, including calibrated mechanisms to ensure that ICANN does not willingly abdicate private-sector leadership in favor of government control; such details were not provided in the revised TAP or IIC documents. *USCIB* at 1. See also *NetChoice* at 1-2 (the IIC process must address ICANN’s vulnerability to capture by governments and governmental organizations, a recurring concern for the business community; the IIC to date only focuses on internal capture); *ICC* at 2. *ACT* at 1-2; *NetChoice* at 2 (PSC should update the IIC and transition documents with substantive guidance on how ICANN will prevent against external capture).

ICANN must have ways to prevent external capture by governments or intergovernmental entities, including but not limited to mechanisms for effective and timely consideration of government advisory committee (GAC) advice by all ICANN bodies, not just the ICANN Board. Private-sector leadership must be “maintained without doubt” beyond conclusion of the JPA. *USCIB* at 1.

Expanded Public Participation and Clear Communications

Good engagement on issues reduces the risk of capture. All parts of ICANN should promote more public outreach and ensure that views of “outsiders” not engaged in ICANN are heard. ICANN does not communicate its priorities clearly. Complex processes and jargon make it difficult for those not closely involved to understand what is happening. More evidence-based policy development could make it easier to identify who is affected by policy developments and to engage with them. *Nominet* at 1-2. See also *ISOC* at 1; *Preston* at 8-9 (suggested ways to broaden participation and integrate newcomers to ICANN process).

ICANN should consider how funding serves the goal of broader participation to include a wider range of interests and chronically under-represented interests. *Preston* at 8. ICANN should continue global community outreach, but subject to sound budgetary principles. *INTA* at 2-3. ICANN should set or clarify rules requiring officer and appointee rotation with meaningful term limits. *Preston* at 9.

Role of Governments and Governmental Advisory Committee (GAC)

Internet governance should consist of both the ICANN technical role and the public policy setting role agreed by the World Summit on the Information Society (WSIS). The WSIS agreement has not been implemented, resulting in the ICANN/GAC model filling the void. ICANN should support the international community’s renewed interest and activity to ensure implementation of the Tunis agreements on the Enhanced Cooperation Process (articles 67-70 of the Tunis Agenda), from which resolution of international Internet-related public policy issues must derive. *CITC Saudi Arabia* at 2.

The GAC should continue its own reform efforts; it should not be viewed as a decisionmaking body or be expected routinely to provide consensus or “official” positions on issues. Governments’ role in ICANN should be limited and focused on (1) being an information conduit between governments and ICANN and providing advice on issues of broad public policy concern; and (2) building capacity among governments to contribute to discussions of ICANN issues (key issue for developing countries). *Canada* at 2. GAC participation should be increased. *Nominet* at 3.

Internationalized Domain Names (IDNs)

Current IDNs discussions demonstrate ICANN’s vulnerability to capture by governments and lack of accountability to multiple stakeholders; the “fast track” created by ICANN for IDN versions of country code top level domains (ccTLDs) will result in letting governments capture and control the IDN implementation process and garner a “first to market” advantage. *NetChoice* at 1-2.

The ccNSO-GAC joint work on IDN ccTLDs shows successful cooperation. *Nominet* at 2. ICANN should not create barriers to introducing IDNs, whether country code or generic. *Nominet* at 3.

Voting

Many ICANN participants have interests in more than one supporting organisation or advisory committee; this diversity of experience adds value and should be preserved. *ICC* at 2. Fair processes are required to avoid capture, but risk of capture should not be used as an excuse for unfair voting limits. Entities should only be able to vote once within any supporting organisation, and voting rights should be clearly set forth in each constituency. *ETNO* at 2-3.

Safeguarding against capture by any stakeholder group is a key issue. Limiting voting by the same individual or organisation to one ICANN entity could assist in safeguarding against capture. *Canada* at 1.

Accountability

Sufficiency of Proposals

The two proposed accountability mechanisms—Board decision reconsideration and total Board removal—are not effective. *ACT* at 2. Clear procedures and short timelines would be needed to make a Board decision reconsideration mechanism effective. *INTA* at 1-2. The proposal for a 2/3 vote of councils and advisory bodies to require Board reconsideration of a decision may not adequately account for legitimate minority interests. *USCIB* at 2. The proposed reconsideration and Board removal (as absolute last resort) mechanisms are worthy of further consideration. *Canada* at 1.

ICANN should set clear written guidelines for conducting its business and the PSC should provide details regarding transparent decisionmaking processes and proposed accountability mechanisms. *ATT* at 2.

The proposed board removal is too extreme to be an effective accountability measure in practice. *ATT* at 2; *ACT* at 2. See *INTA* at 2 (Board removal proposal carries risks of abuse and requires effective support threshold; new Board should prohibit recently dismissed members from immediate re-election); *USCIB* at 2 (there may be other less drastic but effective measures); *Nominet* at 3 (need other ways to call Board to account; effort needed to monitor global stakeholder satisfaction to develop objective accountability measures).

Accountability should include mechanisms answerable to an independent non-governmental body in which ICANN staff and Board actions “can be measured against an agreed upon standard.” *USCIB* at 2; *ACT* at 2 (focus on measurable goals process instead of “arbitrary” transition deadline); *ICC* at 3-4 (more details should be provided in the IIC process about possible accountability mechanisms and associated metrics). See also *INTA* at 1 (use objective methods to measure performance). ICANN should integrate results-based management and detailed budgeting practices to reinforce accountability. *Canada* at 2. Accountability and transparency improvements should be put into ICANN’s bylaws. *ICC* at 4.

The Board’s role and structure needs to be reviewed to prepare for post-JPA environment. The Board has a duty to identify and engage with those likely to be affected by policies and take into account the views of the wider community. *Nominet* at 2.

Statements of Interest and Conflicts

ICANN’s DNS policies should avoid creating an economic interest for ICANN and address potential conflicts (e.g., use of auctions to address TLD allocation disputes). *ATT* at 2. See also *INTA* at 3.

There should be clear requirements on declarations of interests and guidance on handling conflicts for Board, councils and constituencies. *Nominet* at 2; *ETNO* at 3. See also *INTA* at 1 (standardize the statement of interest form and define which entities must submit it).

IANA and Stakeholder Input

ICANN should start a process for reviewing stakeholder input regarding IANA functions and effectiveness, including broader input about ccTLDs. ICANN should publicly disclose ICANN-U.S. Department of Commerce discussions about IANA operations improvement and seek public input. *INTA* at 4.

Globalization

Additional Legal Presences

ICANN should not establish another legal presence in jurisdictions enabling it to have international not-for-profit status; the proposal is risky and unclear, and additional detail and community input would be needed about all the implications. *AT&T* at 3 (“strongly opposes”); see also *INTA* at 2 (global legal presences unnecessarily complicate structure).

More details and deeper analysis are needed regarding how multi-jurisdictional presence might affect ICANN’s functioning. *USCIB* at 2. See also *Canada* at 2; *ISOC* at 1 (supports ICANN continuing its internationalization, but more details and analysis needed); *ICC* at 3. There are a variety of ways to ensure that needs of global stakeholders are met. ICANN should be headquartered in name and operational presence in the U.S. with benefits of U.S. law. *USCIB* at 2; see also *INTA* at 2, 3-4 (citing benefits of U.S. legal system and laws; supports including such mandate in ICANN bylaws).

The location of ICANN headquarters and any branch locations are important only insofar as they advance the goals of strengthening and facilitating ICANN’s relationships with its stakeholders, are agreed upon by relevant advisory committees and maximize ICANN’s global effectiveness. *CITC Saudi Arabia* at 3. Internationalization is not about location but about engaging with and listening to stakeholders wherever they are. The GAC is a forum helpful for understanding jurisdictional issues. ICANN is already large and geographically spread. ICANN should consider multilingualism as well as cultural differences and provide options to promote participation and geographical diversity. See *Nominet* at 3.

ICANN should not change the bylaws to specify that ICANN headquarters be located in the U.S. It should not be taken for granted that only the U.S. has strong antitrust law. Jurisdiction and headquarters are separate issues; focus should be on minimum conditions needed for proper ICANN functioning. *ETNO* at 3.

Financial and Operational Security

Alternative Funding Sources

ICANN should identify alternative sources of funding but must provide greater detail about anticipated funding needs and actual sources to be used. *AT&T* at 3; see also *ICC* at 4 (supports the principle but seeks details); *INTA* at 3 (public comment should be sought on alternative funding sources); *ISOC* at 1 (diversified funding helps address capture threat).

Widening the funding base should not lead to extending ICANN’s specific focused technical mission and mandate. *Nominet* at 3; *ISOC* at 1-2.

Transparency

ICANN should have overall financial transparency including measurable objectives in each of its budgeted activities and adequate disclosure with ongoing opportunities for public review. *INTA* at 3.

Security and Stability

DNS Priority

ICANN thought leadership on stability and security is appropriate provided that ICANN’s focus remains on its core mission. “Stability and security of the DNS and its impact on the Internet should be the primary and overriding priority” in all ICANN decisions and activities. *ATT* at 3. See also *USCIB* at 3; *Canada* at 2 (ICANN’s technical mandate should continue to determine future areas of work); *CITC Saudi Arabia* at 1 (“strongly subscribes” to WSIS international agreements, including that authority for Internet-related public policy issues is the sovereign right of states). Cost-based fees are an appropriate funding mechanism for ICANN that would guard against conflicts of interest and “mission creep” that would destabilize ICANN. *ATT* at 3.

The transition process should not extend to discussion of the IANA procurement agreement. *ATT* at 3.

The separation of functions between ICANN and the IANA functions contract could delay operation and functionality improvements. Lack of progress on DNSSEC and signing the root raises concerns; ICANN has an appropriate technical role to play. *Nominet* at 3-4. Coordination and management of the ARPA TLD and the root zone system should be transitioned to ICANN. *ETNO* at 3.

Focus on some non-technical matters and threats to security and stability of the Internet's unique identifier system is appropriate—e.g., domain tasting, phishing, pharming, lack of global standard for proxy registrations and release of WHOIS data. Security and stability are not limited to gTLDs but also include ccTLDs. Strong oversight of ICANN's security and stability activities is necessary to guard against politicization, compromise and undue influence. *INTA* at 3.

Public Input on Security and Stability

Security and stability should be part of ICANN's strategic and operational planning. *Nominet* at 3. The role of security and related ICANN activities must be clearly identified, detailed and presented to stakeholders for input and agreement. More details are needed regarding the proposal to amend ICANN bylaws to include annual Strategic and Operating Plans with a principal role for stability and security. ICANN should consider increasing the public input timeframe for the plans' development. *USCIB* at 3.

RESPONDENTS

Association for Competitive Technology (ACT)
Ron Andruff, RNA Partners, Inc. (Andruff)
AT&T (ATT)
Government of Canada (Canada)
Communication and Information Technology Commission of the Kingdom of Saudi Arabia (CITC Saudi Arabia)
European Telecommunications Network Operators' Association (ETNO)
International Chamber of Commerce (ICC)
International Trademark Association (INTA)
Internet Society (ISOC)
NetChoice
Nominet
Cheryl B. Preston, Professor of Law, Brigham Young University (Preston)
U.S. Council for International Business (USCIB)