Final Implementation Report and
Recommendations of the Committee
on ICANN Evolution and Reform
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On 24 February 2002, ICANN President Stuart Lynn released his President's Report: The Case for Reform, which clearly and persuasively set forth the need for constructive change in ICANN's structure and processes if ICANN is to fulfill its mission responsibilities. That report initiated a very constructive and wide-ranging discussion throughout the ICANN community. This document, and the proposed New Bylaws that accompany it, are the result of that discussion.

1. The Purpose of Reform

ICANN is a bold experiment in the management of an important feature of a global resource with significant public policy implications. The goal is straightforward and unobjectionable: to combine the greater speed and agility of private-sector management with appropriate public sector – including governmental – input to ensure that the results are consistent with the broad public interest. But however worthy the goal, there is a wide variety of views on whether this is even possible, and if so, on how best to accomplish it. ICANN is still clearly an ambitious work in progress, and thus as yet the outcome of the experiment remains unknown.

In certain respects, ICANN has been very successful; in others, less so. Over the almost four years of its existence, its accomplishments have frequently been overshadowed by its continuing struggle to find the right mix of public and private, of broadly inclusive deliberation and effectiveness, of accountability and agility, that is essential if the experiment is to succeed. This mixed record, and the challenges still remaining, provided the motivation for Dr. Lynn's report earlier this year, and that report was itself the precursor to the intense debates and discussions that have taken place since, which will culminate in Shanghai with the adoption of a comprehensive plan for a reformed ICANN.

Dr. Lynn identified three basic issues that stood between the status quo ICANN and success: (1) too little participation by critical entities; (2) too much process; and (3) too little funding, with the latter two a partial reason for the first. He recommended a number of changes in ICANN to deal with these problems. As the public discussion began, it became clear that all of these issues could not be dealt with simultaneously, and the decision was made to focus on the structural, process, and funding issues that could be addressed directly, with the expectation that if ICANN could stabilize its core, critical participants would find it more attractive to participate and other issues could

then be dealt with more effectively.

The focus on ICANN reform over these past seven months has been intense, both within ICANN and outside it, in both the private and public sectors. To coordinate these reform discussions, the ICANN Board created the Evolution and Reform Committee at its meeting in Accra in March. Since then, the ERC has catalyzed a very substantial global discussion, documented in various e-mail lists (both within and outside of ICANN) and in numerous materials prepared by individuals, groups, and entities, again within and outside of ICANN. This discussion, and the ERC's compilation of it, has been catalogued by a number of Working Papers, Status Reports, and Interim Implementation Reports produced by the ERC. These have benefited from and reflected both formal and informal input from the entirety of the sources providing that input, including the full range of ICANN stakeholders and specific Assistance Groups established by the ERC to help it consider various specific subjects. Links to most of these inputs can be found at <http://www.icann.org/committees/evol-reform/links.htm>.

The first phase of the reform effort culminated in the Blueprint for Reform, published on 20 June by the ERC, and adopted and endorsed by the ICANN Board on 28 June at its meeting in Bucharest. The Blueprint represented the synthesis of an enormous number of suggestions on how ICANN could improve its structure and processes, and thus its effectiveness, while preserving its essential character as an open and transparent non-governmental policy-development body. The Blueprint contained an outline; this Report includes the detailed Bylaws that will implement that outline, along with an explanation of why and how the proposed Bylaws deal with the identified problems of ICANN past.

Throughout this process, the goal has been to fix the identified problems, while preserving both what was working and the critical principles and concepts that led to the creation of ICANN in the first place. In this set of "final" recommendations,[1] we set forth the changes that the ERC believes, based on all the inputs from throughout the community over the past seven months, will effectively deal with the identified problems, and position ICANN to successfully fulfill its mission.

We do not claim that every suggestion received from the community has been integrated. Many suggestions are in conflict with each other. Others are in conflict with the Blueprint. Still others reflected narrow perspectives. The ERC has, however, carefully considered all suggestions and incorporated many of them (often in combination with one another). This final implementation report has been greatly by influenced by the extensive comments received. We are extremely grateful to all members of the community and to all ICANN's constituent bodies that took the time and trouble to consider this important topic and to submit their thoughts.

Transition. This document focuses on the new ICANN in steady state; it does not address the transition from the current structure to the new structure. Effectively addressing the steady-state future in the time available is a difficult

enough challenge: the community and the ICANN Board should not be distracted from focus on this critical objective by issues of how to make the transition. Thus, we believe that the Shanghai meeting should focus only on the steady-state future. Once that is decided, a recommended transition plan will be prepared and presented separately to the community and the Board for approval. To achieve this, the ERC recommends to the Board that the Annual Meeting of ICANN for 2002 be a separate, webcast forum and public meeting held in early December, at which the only subject (other than the obligatory election of officers) will be to consider a transition plan developed by the ERC, and posted for public comment and review approximately thirty days prior to that meeting. Because Director terms expire at the conclusion of ICANN's Annual Meetings, there would be no change in the Board until the conclusion of that early-December meeting. The transition plan will recommend a Transition Article to be added to the New Bylaws at the 2002 Annual Meeting that sets forth the interim measures necessary to move from the status quo to the structure set forth in the New Bylaws.

As noted, included with this Report are proposed New Bylaws, which are intended to replace in their entirety the existing ICANN Bylaws. The New Bylaws, if and when adopted by the ICANN Board, will constitute the definitive description of a reformed ICANN, not this Report. As such, the New Bylaws should be reviewed carefully, since they, and not this Report, contain the controlling and, if the New Bylaws are approved, binding language implementing the Blueprint. This Report summarizes, explains and where appropriate amplifies what is contained in the proposed New Bylaws, but the New Bylaws represent the authoritative recommendations of the ERC. The appropriate sections of the New Bylaws are referenced in this Report for convenience.

2. How These Recommendations Respond to the Identified Problems

There are many changes from the status quo in the proposed ICANN Bylaws, but in this portion of our Report, we focus on what we believe are the critical changes, and on why these changes are directly responsive to the identified problems of ICANN.

A. Mission Statement

One recurring challenge for ICANN has been the unease of many that ICANN's scope was not framed by a clear and bounded mission. This unease has been one of the major reasons for the reluctance of some significant stakeholders to participate fully within ICANN, and has also led to calls for the elaborate processes that have made it extremely difficult for ICANN to be effective. Thus, the one point on which there seems unanimous agreement is that defining a clear and bounded mission is an essential pre-condition to addressing the identified problems of ICANN. An appropriate mission statement, along with an articulation of the core values that should guide ICANN's pursuit of its mission, is a necessary first step allowing definition of structures, processes,

and funding requirements that are appropriate for achievement of the mission. The articulation of such a mission statement and core values can be found in Article I of the New Bylaws.

B. The Structure of ICANN

An enormous amount of the global energy related to ICANN over the last four years has been focused on ICANN structure, and in particular, two aspects of that structure: the At Large issues (how to incorporate the informed participation of a broad range of Internet users), and the proper role of governments and other public authorities in ICANN. The proposed New Bylaws deal directly with both of these issues in a manner designed to promote ICANN's effective pursuit of its defined mission.

With respect to At Large issues, the proposed New Bylaws create an At Large Advisory Committee, which will serve as a vehicle for informed participation in ICANN by the global community of interested Internet users. In addition, the proposed New Bylaws provide that just over half of the ICANN Board (8 of 15 seats) will be selected by a broadly based Nominating Committee that includes representatives from the full range of interested stakeholders. More than a quarter of the Nominating Committee members will ultimately be selected by the At Large Advisory Committee, and the criteria that the Nominating Committee is required to follow in making its selections will ensure that the ICANN Board is itself broadly representative of the entire community. The ICANN community spent a good part of the last four years struggling with these issues, and the overhang of this problem had a very adverse effect on the ability of the community to devote its attention to the substantive issues facing ICANN. The resolution of this issue, through the creation of the At Large Advisory Committee, is critical to an effective ICANN moving forward.

It is now clear that a purely private-sector body cannot effectively carry out the ICANN mission. As a result, the proposed New Bylaws provide for a more effective integration of the Governmental Advisory Committee with the other constituent bodies of ICANN, including the ICANN Board. Those directly responsible for public policy must participate appropriately and effectively in ICANN, alongside representatives of the private sector, if ICANN is to be successful. The provisions in the New Bylaws providing that the GAC may provide liaisons to the ICANN Board and other ICANN bodies will allow governments and other public authorities, working through the vehicle of the GAC, to work more closely with the private sector in carrying out ICANN's coordination and policy-development roles.

In addition to these two changes, the proposed New Bylaws

realign the policy development bodies of ICANN so that they are more precisely focused on the areas where ICANN has some global coordination responsibility – global names and address policies. Since it is now clear that those areas require different structures and processes to most effectively deal with their respective issues, the proposed New Bylaws abandon the "one size fits all" model of the old Bylaws, and tailor the structure and responsibilities of each Supporting Organization to the particular needs and entities involved.

C. ICANN's Processes

It has often been pointed out that ICANN's problems may originate not only in its structure but also in the processes by which it functions. One of the critical flaws of the original ICANN design was that it did not anticipate sufficiently the need for structured processes for policy development, especially in the highly contentious and political environment of global names policy, a core aspect of ICANN's mission. The proposed New Bylaws establish (1) specific processes for policy development in the GNSO, incorporating incentives to build consensus around realistic and achievable policies; (2) revised procedures for the independent review and reconsideration of ICANN actions and decisions, which should achieve accountability and transparency without unduly burdening the processes; and (3) clear mechanisms (and the necessary staff support) for thorough-going public exposure of ICANN policy-development efforts so that few occasions will provoke use of the review and reconsideration mechanisms. In addition, the proposed New Bylaws create an Office of Ombudsman, to serve as an advocate for fairness within ICANN, and a resource for those who feel that they have not been treated fairly in some way.

The net result is a full platform of more effective processes directed to the achievement of ICANN's mission, enabling all who want to participate to do so without overwhelming ICANN's ability to actually do the substantive work it was created to do. This platform should also make critical stakeholders more confident in the value and effectiveness of their participation in ICANN.

D. Funding

Ironically, the funding problem has proven to be the easiest to solve. The mechanisms have always been available, through ICANN's contracts with registries and registrars. What was missing in the past was the will to fully utilize those mechanisms, likely driven in large part by a concern that ICANN was not structured to be able to effectively use more funds even if they were made available. Once it became clear that ICANN was on the road to effective reform, the response from the funding stakeholders was

very positive, and ICANN today does not face a significant shortfall in funding operations at its current level of obligations, although there is still a shortfall in funding for building adequate reserves. We also expect that ICANN's current contractual relationships – coupled with the positive reaction of the funding stakeholders – will provide sufficient funding to support the new level of commitments implied in this final report. The long-term funding needs of reform should be addressed through the annual budget process for the 2003-2004 fiscal year, and the shorter-term transition needs should be addressed through adjustments to the current-year budget once the transition needs are fully defined.

Of course, the funding problem is not solved; a more automatic funding mechanism should be developed that depends less on day-to-day events for its implementation. The key point at this moment is that the existing contractual mechanisms permit a level of funding that is sufficient to fund an effective ICANN. With the same level of cooperation experienced recently in this area, a reformed ICANN should be able to generate a sufficient, and sufficiently stable, flow of funds to be able to carry out its mission, and to provide for adequate reserves.

E. Participation by Critical Entities

This is the one area in which the current reform initiatives have not yet accomplished their full purpose; there is still not the level of committed participation by all entities necessary to allow ICANN to be truly successful. There are a variety of reasons for this, all of which can and will be addressed over time, so the work continues. The ERC has made considerable efforts, and will continue to pursue them, to discuss with these entities (and the communities around them) the reasons why they should participate in a reformed ICANN.

If ICANN is to carry out its mission, it must be inclusive of the country code and generic name registries and registrars, the address registries, the root name server operators, major commercial and non-commercial users, the general Internet user community, the major Internet standardization bodies, and governments and public authorities. Not all of those sectors are yet sufficiently included in the ICANN community. With the stabilization of the ICANN core represented by this reform effort and these proposed New Bylaws, the next point of emphasis must be to complete this process by appropriately, almost certainly in different ways reflecting their unique circumstances, involving each of these communities to the extent not yet accomplished.

As the above description demonstrates, the New Bylaws we propose here are directly focused on the core problems first identified in Dr. Lynn's Report last February, and since then broadly accepted as an accurate diagnosis of

ICANN's ills. We believe that the specific changes reflected in the proposed New Bylaws, drawn from seven months of intense community discussion about how to fix these problems, will do just that. No doubt other changes will be necessary in the future; an organization like ICANN, dealing with a medium as rapidly changing as the Internet, must be willing and able to change as required by future events. But humans do not function as effectively in constantly changing environments, and so there must also be periods of repose. To accommodate these somewhat inconsistent facts of life, we include in these New Bylaws (in Section 4 of Article IV) a requirement for periodic review of all elements of ICANN, to ensure that bureaucratic inertia does not set in – but we call for these reviews only every three years for any one aspect of ICANN, so that there can be periods during which participants and observers can become familiar with ICANN's structure and procedures.

What follows is an explanation of the New Bylaws, highlighting the important changes. We reiterate again, however, that the explanations and descriptions in this Report are explanatory only, and not authoritative. The only authoritative document is the New Bylaws, and we urge every interested member of the ICANN community to review them carefully.

3. The New Bylaws

There are many differences between the old ICANN Bylaws and the New Bylaws recommended by this Committee. The New Bylaws are intended to be a complete substitute for the old ICANN Bylaws, and thus it would be difficult and probably hopelessly confusing to try to specify every change made. We highlight below what we consider to be the most important aspects of the New Bylaws, including specific changes from the old ICANN Bylaws where appropriate. Nevertheless, we urge all who are interested to read carefully the New Bylaws in their entirety.

We have taken the opportunity presented by the reform initiative to make a number of changes to time periods and other aspects of the old ICANN Bylaws based on the accumulated experience showing that those changes are appropriate. To avoid claims that these changes are an effort to make changes without notice; we hereby give explicit notice that there are a large number of small changes in the New Bylaws from the old ICANN Bylaws, and we invite all to review them carefully. It would not be surprising to find inadvertent errors or inconsistencies in the proposed New Bylaws, despite our best efforts to avoid them, and we urge all in the community who identify such to bring them to our attention. In addition, of course, any substantive concerns should also be raised as early as possible, so that the Committee and the community can evaluate them prior to the Shanghai meeting.

As noted above, the ERC's recommendation is that at the Shanghai meeting in late October the community and Board focus on the structure and processes of the steady-state future of ICANN, and defer until an annual meeting in early December the many details of how to transition from the current ICANN to the reformed ICANN. The New Bylaws presented with this document therefore do not include the various transition provisions, which the

ERC anticipates will be included in the form of a Transition Article at the end of the New Bylaws.

What follows are descriptions of what the Committee believes to be the most important provisions of the New Bylaws:

A. ICANN's Mission

The final recommendations for the text of ICANN's Mission and Core Values may be found in Article I of the New Bylaws. The basic structure and substance have remained largely unchanged from the Blueprint. The most significant difference is the substitution of the phrase "reasonably and appropriately related" for the word "necessary" in the part of the Mission Statement relating to policy development. For the reasons set forth in some detail in the First Interim Implementation Report (ERC-1), the ERC concluded that "necessary" was not the appropriate limiting phrase, and suggested the substitution noted, asking for community reaction. There has been very little response to this request, leading the ERC to conclude that this change, while not perfect even in the view of the ERC, is both acceptable and satisfactory, so it remains in the final recommendations and has been incorporated into the New Bylaws.

Incorporating concepts into bylaws requires taking account of a variety of considerations, which are reflected and discussed throughout this Report. Language must be carefully reviewed and adjusted as necessary to fit bylaws requirements, and to reduce ambiguity wherever possible. In addition, language is frequently not self-executing, and provisions must sometimes be added to describe how the bylaws language will or should be applied. One illustration of this is found in the last paragraph of Section 2 of Article I of the New Bylaws.

It should also be noted that the Mission Statement speaks generally of "coordinating" unique identifiers (domain names, IP addresses and AS numbers, and protocol port and parameter numbers). The means of coordination differs for different types of identifiers; this makes "one size fits all" approaches inappropriate. To accommodate the different means of coordination, the New Bylaws continue the use of separate Supporting Organizations for different types of identifiers, and differentiate among them based on their circumstances. In the case of protocol port and parameter numbers, experience has shown that ICANN's role differs significantly from its role with respect to the operation of the domain name system and unicast IP address assignment, and should continue to be covered by a separate agreement (ICANN's Memorandum of Understanding with the Internet Engineering Task Force Concerning the Technical Work of the Internet Assigned Numbers Authority (RFC 2860)). Under this arrangement there is

no need to maintain a Supporting Organization for protocol issues. The technical guidance function of the original Protocol Supporting Organization is adequately covered by the proposed Technical Advisory Committee.

B. Board of Directors

Composition and Selection. The relevant provisions of the New Bylaws are found in Article VI. They follow the structure set forth in the Blueprint:

- 8 Directors selected by the Nominating Committee
- 2 Directors selected by each of the three Supporting Organizations
- The President of ICANN as an ex officio Director

As set forth in the Second Interim Implementation Report (ERC-2) and detailed in Section 9 of Article VI, we recommend that there be 6 non-voting liaisons to the Board, rather than the 5 recommended in the Blueprint. The sixth is the result of our recommendation to create an At Large Advisory Committee, following the directive of the ICANN Board in its resolution adopting the Blueprint, which we believe should also provide a non-voting liaison to the Board.

Terms. We continue the recommendation in the Blueprint that the voting members of the Board should serve three-year terms. With respect to the non-voting liaisons, we have modified the Blueprint recommendation of three-year terms, and we now recommend that those liaisons serve one-year terms, subject to reappointment. This will provide those bodies with added flexibility in allocating the responsibilities of their various members.

The New Bylaws no longer provide that a Director selected by a Supporting Organization can be removed by that Supporting Organization. Since the Directors selected by the Nominating Committee should obviously not be subject to removal by that group, and because in any event Directors once seated have a fiduciary obligation to act in the best interests of ICANN and not just the group that selected them, the New Bylaws provide that all Directors, however selected, can be removed only by a three-fourths (3/4) vote of all Directors.

Qualifications. We continue to recommend that Directors should meet specific criteria, found in the New Bylaws in Sections 3 and 4 of Article VI, and that geographical, cultural, and other diversity factors must be incorporated wherever possible, as set forth in both Section 2 and Section 5 of Article VI. These criteria apply by their terms to all Directors, whether selected by the Nominating Committee or by the Supporting Organizations.

C. Supporting Organizations

We continue to recommend the creation of three Supporting Organizations: the Generic Names Supporting Organization (GNSO), the Country Code Names Supporting Organization (ccNSO), and the Address Supporting Organization (ASO). The only change from the Blueprint is in the name of the ccNSO, which results from community comments. The relevant provisions of the New Bylaws are Article VIII (ASO), Article IX (ccNSO), and Article X (GNSO).

The ERC has appointed an Assistance Group to help in the development of detailed recommendations on the structure and operations of the ccNSO. This Group has not yet provided its recommendations, and thus Article IX of the New Bylaws is blank, awaiting those recommendations. In addition, the ERC continues to discuss with the RIRs various aspects of their relationship with ICANN. Pending the conclusion of those discussions, the New Bylaws basically repeat the current bylaws provisions relating to the ASO.

We also recommend that funded ICANN staff assistance be made available to each of the Supporting Organizations (and Advisory Committees) to facilitate effective performance. This is reflected for the GNSO in Section 4 of Article X. It is anticipated that a similar provision will be included for the ccNSO in Article IX after the ccNSO completes its recommendations. The RIRs, which along with ICANN jointly formed the ASO in October 1999 according to a Memorandum of Understanding, have indicated that they may wish to continue providing for the ASO secretariat through in-kind designation of RIR personnel; if a Supporting Organization wishes to obtain staff assistance by means other than ICANN funding, of course it should be allowed to do so.

GNSO. We reaffirm our recommendation in the Blueprint that the GNSO should initially be composed of the following six constituencies:

- the gTLD registries constituency
- the gTLD registrars constituency
- the ISP constituency
- the business users constituency
- the intellectual property constituency
- the non-commercial users constituency

We also recommend that new constituencies be recognized upon a proper showing that (1) the addition of the constituency would improve the ability of the GNSO to carry out its policy development responsibilities and (2) that the proposed new constituency would adequately represent the interests, on a global basis, of the

stakeholders it seeks to represent. The relevant New Bylaw provision is found in Section 5.3 of Article X.

We recommend that the business of the GNSO be managed by a GNSO Council that is composed initially of three representatives of each of the six constituencies listed above, and three voting members selected by the Nominating Committee. All would serve renewable two-year terms. The designation of three representatives from each constituency would be specified as a term of the Transition Article (not included in the attached, but to be adopted at the 2002 annual meeting), which would apply until the 2003 annual meeting. The ERC believes that the large size of the GNSO Council (21 members) required by the having three representatives from each constituency will significantly hamper the effective operation of the GNSO Council. At the end of the first year of operation of the GNSO, we recommend that the Board review this issue, and absent strong evidence that the existing structure is functioning effectively, allow the transition to expire and revert to a GNSO Council composed of two representatives of each recognized constituency. See Section 3 of Article X.

In addition to the voting members described above, we recommend that the GAC be permitted to appoint a non-voting liaison to the GNSO Council if it believes such would be appropriate and desirable. See Section 3.1 of Article X of the New Bylaws.

A significant change from the Blueprint is the exact form of balance sought on the GNSO Council. The Blueprint sought to achieve balance, in the form of equal voting power, between providers and users. This balance was thought desirable to encourage and create incentives for the development of consensus whenever possible. Based on community comments received (and noting that this is a matter of heated debate), the ERC has become convinced that the more appropriate balance is between those constituencies representing entities under contract to ICANN, and those constituencies representing all others, for the reasons set forth in detail in ERC-2. Thus, we recommend that voting on the GNSO Council be equalized so that the gTLD registry and registrar constituencies are allocated the same number of votes in the aggregate as the four other initial constituencies collectively have. We recommend that this be accomplished by allocating two votes to each of the gTLD registry and registrar representatives on the GNSO Council, and one vote to each of the representatives of the other four constituencies. If and when any new constituencies are added or subtracted, these allocations would be adjusted to maintain the balance between those constituencies representing entities under contract and all others. The ERC believes that this balance, augmented by the presence on the GNSO Council of three Nominating Committee selections without any real or

perceived obligations to any particular constituency, will improve the opportunity for the development of consensus policy positions by the GNSO Council. The relevant section in the New Bylaws is Section 5.2 of Article X.

The Blueprint recommended that the GNSO General Assembly be a cross-constituency meeting place, chaired by a member of the GNSO Council, and not be a forum for making decisions or recommendations, or taking formal positions. There is no apparent enthusiasm for this recommendation from the GNSO constituencies, without whose active cooperation it could not function in the manner contemplated by the Blueprint. Therefore, the ERC recommends that in the steady-state future there be no GNSO General Assembly. The purpose of communication among the broader community that it has served to date can be absorbed by the At Large Advisory Committee recommended in this Report. Until such time as the ALAC is able to function effectively, we recommend that the GNSO Council manage a moderated mailing list open to all for discussion of names policy issues.

Finally, the Blueprint recommended that the proposed GNSO (including the structure and operation of its Council) should be reviewed by an entity independent of either after one year of experience under the new structure. This recommendation has subsequently been generalized, as set forth in Section 4 of Article IV.

ccNSO. As noted above, Article IX concerning the ccNSO has not yet been drafted. After the ccNSO assistance group [click here for progress report] makes recommendations and they have undergone public comment and discussion, an appropriate article will be included.

ASO. We recommend that the current ASO structure and operations, as set forth in the Memorandum of Understanding between ICANN and various regional Internet address registries, remain unchanged. We believe that it would be appropriate for the Address Council to have a non-voting liaison designated by the Governmental Advisory Committee, but discussions on this topic are still ongoing with the RIRs. The RIRs have raised other concerns with, and proposed other changes regarding, the role of the ASO, which should be the topic of continuing discussions.

D. Advisory Committees

As noted earlier, we recommend that there should be the four standing Advisory Committees recommended in the Blueprint (the Government Advisory Committee, the Technical Advisory Committee, the Root Server System Advisory Committee, and the Security and Stability Advisory Committee).

The ERC has prepared a carefully limited charter for the Technical Advisory Committee (which does not presently exist) based on input from the bodies to be included in that committee. It is important to note that the Technical Advisory Committee will have no role whatsoever in connection with the IANA's work for the IAB/IETF/IRTF. The Technical Advisory Committee has been painstakingly designed to accommodate numerous, differing views as to what structure will best contribute to its limited purpose.

In addition, we recommend the creation of an At Large Advisory Committee to provide a vehicle for structured involvement and informed participation of the global individual user community in ICANN and the ICANN policy development process. The relevant provisions of the New Bylaws with respect to Advisory Committees are found in Article XI. The New Bylaws provisions relating to the At Large Advisory Committee may be found in Section 2.5 of Article XI.

E. Nominating Committee

We remain persuaded that a broad-based Nominating Committee is the preferred way to select a majority of the ICANN Board. The specific provisions of the New Bylaws dealing with the Nominating Committee can be found in Article VII.

Composition and Selection. The Blueprint recommended a Nominating Committee composed of 19 voting members, a non-voting Chair appointed by the Board, and non-voting liaisons from the RSSAC and the SAC. Four of the 19 voting members were designated to be "unaffiliated public interest persons" and one was to be selected by "individual domain name holders." In addition, one delegate was to be selected by small business users and one delegate by large business users, and one by the IAB/IETF. The ERC's current recommendations differ from the Blueprint in the following ways:

> 1. The addition of the previous year's Chair as a non-voting member, to improve continuity.
>
> 2. The replacement of the one "unaffiliated public interest" and the four "individual domain name holders" delegates with five delegates ultimately to be selected by the At Large Advisory Committee once it becomes fully operational. Section 2.5 of Article VII provides that, in the steady state, these five delegates will be selected by the ALAC; the Transition Article (to be adopted at the early-December annual meeting) will set forth selection procedures in the interim until the At Large Advisory Committee goes into full operation and has shown that it can function effectively.

3. The change from IAB/IETF to simply Internet Engineering Task Force selection of one delegate.

4. The selection of both the small and large business users delegates by the Business User Constituency of the GNSO, because it includes both categories in its membership and is a practical initial solution.

We have indicated that we are uncertain how the "academic and other public entities" delegate should be selected, and are seeking input on that issue. Until this is clarified we do not recommend including such a delegate. We recommend that the "consumer and civil society groups" delegate be selected by the Non-commercial Users Constituency of the GNSO.

Terms. We reaffirm our recommendation in the Blueprint that Nominating Committee members should serve one-year terms, renewable for at most one additional one-year term. The details can be found in Section 3 of Article VII of the New Bylaws.

4. Policy and Process

The ERC reaffirms the discussion of these topics in the Blueprint. The specific application of these principles to the work of ICANN so far articulated may be found in the provisions of the New Bylaws relating to the Policy Development Process in the GNSO, set forth in Section 6 of Article X and Annex A, which largely track the recommendations of the Assistance Group on this subject.

5. Transparency and Accountability

The New Bylaws provide many mechanisms to ensure that ICANN operates transparently, with participation by all with interest in its actions, and that the ICANN structure and operations are accountable to the broad Internet community. The primary ways in which this occurs are in the selection of Directors (through a distributed process reflecting the variety of stakeholders in ICANN), in the operation of ICANN's policy development bodies, and in the various advisory committees that provide input from specific sectors of the ICANN community. But in addition to the basic structure of ICANN, the New Bylaws provide several additional provisions for transparency, accountability, and general fairness in carrying out ICANN's mission.

Transparency. Article III of the New Bylaws retains, and elaborates upon, the general obligation of ICANN to operate transparently to the maximum extent feasible.

Ombudsman. The New Bylaws set forth a requirement for the creation of an Office of Ombudsman in Article V. The structure and operational rules largely track the recommendations of the Assistance Group on this subject. One addition is found in Section 4.5 of Article V, which specifically prohibits the

Ombudsman from assisting in any way any legal actions against ICANN or its constituent bodies. The Ombudsman is an independent part of ICANN, and the role of the Ombudsman does not include litigating, or assisting in litigating, against other parts of ICANN.

Public Participation. The Blueprint advocates that there be a Manager of Public Participation (or equivalent title) to actively manage, ensure, and enhance the means of soliciting and presenting public input and comment. We continue to support this concept and recommend it to the Board, as set forth in Section 3 of Article III.

Reconsideration. The Reconsideration Policy can be found in the New Bylaws at Section 2 of Article IV. It largely tracks the recommendations of the Assistance Group on this subject.

Alleged Infringements of Bylaws and Articles of Incorporation. These issues are the subject of the Independent Review Process, found in Section 3 of Article IV. It largely tracks the recommendations of the Assistance Group on this subject.

The Independent Review Process recommended in these New Bylaws is not the "Supreme Court of ICANN" that some in the community have urged. We do not believe that such a body would add value or effectiveness to the structures and procedures that are recommended, and it would clearly add another layer of governance to a system for which a significant goal of reform has been to reduce overreaching process and increase effectiveness. As have been discussed in numerous forums during and before this reform process, such a "Supreme Court," with the power to revisit and potentially reverse or vacate decisions of the ICANN Board, would itself raise many difficult questions, such as: (1) how the members of this body would be appointed; (2) to whom or what this body would be accountable; and (3) pursuant to what review criteria would this body act?

Considering the intense debates surrounding the process for selection of the ICANN Board, it is hard to imagine that the process for determining how a "Supreme Court of ICANN" would be populated, or the definition of the scope of its powers, would be less contentious. We believe that the ICANN Board envisioned in the New Bylaws, including members appointed by the Nominating Committee, is broadly representative of the entire range of ICANN stakeholders, and is thus the most appropriate body to make final decisions on ICANN policies, within the scope of the mission also set forth in those New Bylaws. Thus, the IRP recommended in the New Bylaws is focused on claims that the Board has acted inconsistently with the New Bylaws.

Periodic Review. We recommend, in Section 4 of Article IV, that every ICANN constituent body undergo independent review of its structure and operations every three years. This is intended to recognize the rapidly changing environment in which ICANN operates, and to reduce the risk of bureaucratic inertia resulting in reduced effectiveness and reduced accountability.

6. Government Participation

The Blueprint recommended that the GAC (a) appoint a non-voting liaison to the Board, (b) appoint one voting delegate to the Nominating Committee, and (c) appoint non-voting liaisons to each of the SO Councils and to the RSSAC, the TAC, and the SAC. (To this list we have added the ALAC.) These liaisons could be either members or non-members of the GAC, with sufficient expertise to participate effectively in each body. Each of these recommendations has been affirmed in the New Bylaws, and can respectively be found in Section 1 of Article VI (Board liaison), Section 2 of Article VII (Nominating Committee), and Section 2.1 (g) of Article XI (Advisory Committee liaisons).

7. Funding

The Blueprint suggested that the way to provide the funding required to support the activities of ICANN would be to provide that 25 cents of the price paid for each domain name registered in those domain name registries that have entered into agreements with ICANN be earmarked as direct funding for ICANN. The ERC, based on an analysis presented by the President, now believes this figure is higher than required to achieve the necessary goals. In the steady state, a maximum passthrough equivalent to 17 cents per domain name should suffice to cover operational requirements, including the additional costs implied by the proposed reform activities (estimated to require the addition of 7 FTEs to the ICANN staff). This number should, in our view, be appropriately restated every year to ensure that the total revenue to ICANN does not increase, except for inflationary reasons, as the number of applicable domain names grows (unless otherwise justified and approved as part of the annual budgetary cycle). By comparison, the current ICANN budget provides for a passthrough of approximately 13 cents per domain name. In addition, the ERC recommends that the passthrough be increased an additional 3 cents per domain name (to a total of 20 cents) until such time as ICANN's audited unrestricted reserves rise to the level of one year's operating costs, following which this additional amount should be discontinued. We note that other funding sources, such as voluntary contributions from ccTLDs not under agreement, may also contribute to the rise in these reserves.

Details on funding of the transition depend on the transition plan itself, and will be included with the transition recommendations to be posted separately. There is reason to believe that any transition costs that would occur in the current 2002-2003 fiscal year could be funded out of the current budget, given the fact that staff hiring is occurring at a slower than budgeted rate, and the time it would take to recruit the new "reform" positions.

8. Conclusion

The recommendations contained in the attached New Bylaws, and described in this Final Implementation Report and Recommendations are the product of an extraordinary amount of effort by a very large number of people. This Committee has had the privilege to be the scribe, but the ideas and concepts

reflected here are largely the work of the community acting as a Committee of the Whole, to use a legislative analogy. As has been noted many times previously, developing global consensus is a very difficult task, whether it is on names policies or the precise words of bylaws. We have done our best to synthesize the diverse positions advanced by the community into what we believe will be a truly workable ICANN, able to put behind it the growing pains of the last four years and move forward effectively to deal with the complex issues that lie within the scope of its narrow but important mission.

With this, we recommend to the ICANN Board of Directors the adoption of the attached New Bylaws as a complete substitute for the existing ICANN Bylaws.

Committee on ICANN Evolution and Reform
2 October 2002

Note:

1. While these recommendations in most respects represent the conclusions of the ERC, taking into account the very considerable thought and effort noted above, and should be thus be considered its final recommendations, there are still some areas where work remains to be done. In addition, it can be expected that there may be additional inputs as a result of review of these recommendations that would call for some slight modifications. Thus, the ERC is likely to augment these recommendations on one or more occasions prior to the Shanghai meeting; we anticipate that any modifications that are recommended are likely to be relatively minor, with the exception of the areas noted in this Report where significant substantive work remains to be done.

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