

Improving Institutional Confidence: The Way Forward

31 May 2009

INTRODUCTION

The President's Strategy Committee (PSC) has worked since 2006 to advise the President and Board on strategic issues facing ICANN, focusing on ICANN's legal status and identity and its regional presence. During a Midterm Review by the National Telecommunications and Information Administration in February 2008 of the Joint Project Agreement that ICANN has with the United States government, the PSC was identified by ICANN's chairman, Peter Dengate Thrush, as the group to facilitate discussions with the community about the issues raised regarding ICANN's planned transition to the private sector.

The PSC was asked to outline a plan for developing such a transition framework. The PSC conducted several public meetings around the world and ran two online consultations on successive drafts of its documents: <http://www.icann.org/en/jpa/iic/>. The PSC delivered a draft Implementation Plan on Improving Institutional Confidence to the Board at ICANN's Mexico City meeting in March 2009: <http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf>.

At its meeting on 6 March 2009, the Board thanked the PSC for its work and undertook to review the report. The Board posted the report for 60 days' public comment, and directed staff to evaluate implementation of the proposals and report its findings to the Board. The Board-directed public comment period concluded on 11 May 2009, and the comments are available here: <http://forum.icann.org/lists/iic-implementation-plan/>

The current document, "**Improving Institutional Confidence: The Way Forward**", is the staff evaluation of possible implementation of the PSC proposals. A summary of the PSC recommendations, the community feedback received to those recommendations, and the staff implementation recommendations for each is contained in Appendix A, "**Improving Institutional Confidence: Implementation Report**". These documents are being published at the same time they are submitted to the Board to allow the global Internet community to consider and reflect on these documents, and to facilitate discussions during ICANN's next public meeting in Sydney, 21-26 June 2009. **The Board has not yet considered these proposals nor do these proposals represent the views of the Board.** Further future steps emanating from Board consideration may also involve formal public consultation.

RECOMMENDATIONS

The global Internet community, through a series of public meetings and three online comment periods conducted by ICANN's President's Strategy Committee, has spoken

very clearly and consistently on several key issues regarding Improving Institutional Confidence. Three of several themes worth noting are:

1. Board accountability mechanisms
2. Internationalization (Meeting the Needs of the Global Internet Community of the Future)
3. Role of the Governmental Advisory Committee

1. BOARD ACCOUNTABILITY

Community responses have been consistent regarding the PSC's proposals for two additional Board accountability mechanisms; the first to require a Board review of its decision and the second, sometimes referred to as "the nuclear option", to remove the Board.

The proposal to establish a special mechanism for the community to require the Board to re-examine a Board decision, invoked by a two-thirds majority vote of two-thirds of the Councils of all the Supporting Organizations and two-thirds of members of all the Advisory Committees received strong support from members of the community.

A proposal to amend the bylaws to implement this proposal is included in Appendix B, , **"Proposal To Establish a Special ICANN Community Vote Requesting a Board Re-Examination of a Board Decision"**.

The extraordinary mechanism to remove and replace the Board has been described as 'too difficult to invoke and would create unacceptable and uncontrollable risks if it were invoked'. A concern has also been expressed that the focus on voting and majorities the mechanisms require are far removed from ICANN's consensus-based model.

Consistently, community members addressing accountability have stressed the need for a review mechanism that is external to the Board itself. It is proposed that the ICANN Bylaws should be amended to establish a new and newly constituted Independent Review Tribunal with powers to review the exercise of decision-making powers of the ICANN Board under three general rubrics of fairness, fidelity and rationality:

- o Fairness
 - *i.e. integrity of the process* of decision-making including, for example;
 - o persons immediately affected by a decision have a reasonable opportunity to make submissions before the decision is made;
 - o they have reasonable access to information relied on by the decision maker
 - o the decision-making process is impartial.
- o Fidelity

- *faithfulness to the scope and objects of the power* being exercised, including;
 - decision within the scope of the authority conferred, and reached in compliance with any mandated procedures
 - decision made without reference to considerations that were irrelevant
 - decision made after taking into account all considerations that were relevant necessary
 - decision made in good faith and not for a purpose foreign to the objects of the power (that is, for a collateral or ulterior purpose)
 - decision was a *real* exercise of the power (as opposed to slavish following of policy).
- Rationality
 - Decisions should be reviewable if they lack sufficient *cogency* to command basic levels of assent from those affected, including;
 - decisions wholly outside the scope of a reasonable exercise of power;
 - decisions based on facts for which there is no support;
 - (perhaps) decisions which are a disproportionate exercise of the power, in the sense that they interfere with the rights or interests of some persons but are not reasonably adapted to achieve an appropriate objective or are a disproportionate interference having regard to the objective.

The Independent Review Tribunal should consist of a standing panel of internationally recognized relevant technical experts as well as internationally recognized jurists, including persons with senior appellate judge experience. Members should be appointed for either a set period of five years or until they resign. A provision should be set forth in the bylaws stating that the Board will follow the recommendations of the panel unless it determines that such recommendations are not in the best interest of the corporation and publishes a report to the community setting forth its reasons.

N.B. For more detail on this proposal, please refer to Annex C, “**Proposal To Establish an Independent Review Tribunal**”.

2 INTERNATIONALIZATION

The PSC’s final report recommended that ICANN maintain its current headquarters and operational presence in California. It also recommends that, after sufficient fact-gathering is completed, ICANN should “consider establishing an additional subsidiary legal presence as an international, non-governmental entity”. The February 2009 PSC document, ‘Improving Institutional Confidence’ includes a substantial appendix with further information regarding the establishment of an additional legal presence.

The community view, expressed in the three successive online comment periods including one subsequent to the publication of additional information in February 2009, is that further information is needed to assess whether additional legal presences in other jurisdictions will present sufficient benefits to the ICANN community that would justify the establishment.

Executives have conducted initial conversations with Official of Belgium and the Swiss federation. Further discussions are planned.

- The Board should consider directing ICANN staff to continue conversations with authorities in jurisdictions such as Belgium and Switzerland, but report back with a detailed analysis of risks and benefits to the Board and community of any additional of legal presence to inform future consultations with the community.
- The Board should consider accepting the PSC recommendation that ICANN maintain its headquarters in the United States, specifically in Marina del Rey, California.

3 ROLE OF THE GOVERNMENTAL ADVISORY COMMITTEE (GAC)

Many community members, including the GAC itself, have expressed the wish that the GAC's role be more fully integrated into ICANN's unique multi-stakeholder decision-making processes.

The JPA Affirmation of responsibilities states; 'ICANN shall work with the GAC members to review the GAC's role within ICANN so as to facilitate effective consideration of GAC advice on public policy aspects of the technical coordination of the Internet'.

- The Board should consider means to work with the GAC and the ICANN community on a fully consultative process to publicly review the GAC's role within ICANN. This review process might focus on coordination and consultation between the GAC and other supporting organizations and advisory committees of ICANN.
- The Board should consider the extension of travel support for GAC members from the Least Developed Countries and support for more remote participation at GAC meetings, translation and interpretation of documents and other work to continue to support participation and working practices at the GAC.
- The Board should consider the exploration of how the practice of issuing a formal and detailed response to GAC communiques can be done in a timely way.

APPENDIX A
Improving Institutional Confidence
Staff Implementation Report
As at 31 May 2009

RECOMMENDATION	FEEDBACK from community through PSC and Board consultations	STAFF RECOMMENDATION FOR BAORD ACTION
1 AVOIDING CAPTURE		
1.1 Safeguards must address all types of capture	Improve participation of all elements, especially those not currently active or involved, possibly through issues-based involvement Support “community-wide issues-based interaction”.	Issues-based involvement is being dealt with in the implementation of the GNSO review recommendations. Benchmarking of volunteer recruitment for each SO and AC is now being conducted and proposed targets may be incorporated into the Operational Plan for FY 2010
1.6 Strengthen GAC to avoid capture	Broad agreement that governments should be engaged in the multi-stakeholder process and their participation improved.	Board should consider means to work with the GAC and the ICANN community on a fully consultative process to publicly review the GAC’s role within ICANN. This review process might focus on coordination and consultation between the GAC and other supporting organizations and advisory committees of ICANN. The Board should consider the exploration of how the practice of issuing a formal and detailed response to GAC communiques can be done in a timely way.
1.6.1 Language interpretation at GAC meetings	Translation and interpretation would particularly help GAC members participating remotely.	The Board should consider ... translation and interpretation of documents and other work to continue to support participation and working practices at the

		GAC.
1.6.2 Board meeting or workshop once a year in a city with much government representation, e.g. Geneva, New York	Governments + Board relationship shouldn't be privileged. Interaction of governments with broader ICANN community needed. Variety of suggestions about how Board and GAC could interact more effectively.	Possible updated recommendation 1.6.2: "Find better ways for governments to be informed about and meet with the ICANN community and, as a part of that, interact with the Board."
1.6.3 Travel support programme for GAC reps from UN LDCs	Travel support is useful for GAC reps, but remote participation should be further developed.	Staff recommendation to the Board: Board should consider the extension of travel support for GAC members from the Least Developed Countries and support for more remote participation at GAC meetings,
1.10 Retain ICANN's headquarters in the United States to ensure certainty about ICANN's registry, registrar and IANA contracts and other stakeholder agreements and frameworks.		The Board should consider accepting the PSC recommendation and recommends that ICANN maintain its headquarters in the United States, specifically in Marina del Rey, California.
1.13 Maintain and strengthen transparency in the constituent parts of ICANN.		
1.13.1 Require statements on conflict of interest from all members of the Advisory Committees, Supporting Organizations and Nominating Committee.	General support for this proposal from commenters who discussed it.	The Board Governance Committee should develop appropriately binding policy on statements on conflict of interest across the SOs and ACs.
1.13.2 Develop clear guidance for Supporting	Few discussed this proposal; most who did	The Board Governance Committee should work with

Organizations, Advisory Committees and the Nominating Committee on disclosing and handling conflicts.	supported it.	the leadership of the SOs and ACs to establish guidance on disclosing and handling conflicts of interest across the SOs and ACs.
1.13.4 Create a framework that allows cross-participation in supporting organizations and advisory committees but prohibits voting in more than one ICANN entity.	Focus on need for cross-participation rather than on voting.	The Structural Improvements Committee should consider further improvements in coordination and potentially increased cross-participation between SOs and ACs, especially during the issue-identification stage of a new policy initiative.
1.14 Safeguard against capture by inappropriate or inadequate staff conduct.	Support proposed code of conduct in general.	Building on ICANN's Accountability and Transparency Frameworks and Principles, the Board Governance Committee and the CEO should work together to develop a staff code of conduct.
1.14.1 Review and enhance the professional code of conduct for the staff to highlight their obligations of independence, impartiality and support for the community.	Support proposed code of conduct in general.	Building on ICANN's Accountability and Transparency Frameworks and Principles, the Board Governance Committee and the CEO should work together to develop a staff code of conduct.
2 ACCOUNTABILITY		
2.2 Ensure due consideration of GAC's advice on matters of public policy.		
2.2.1 ICANN and the GAC shall set up a joint mechanism to review performance of the ICANN Board's Affirmation of Responsibilities, paragraph 7, Annex A to the Joint Project Agreement with the US Dept. of Commerce : <i>"Role of governments:</i>	Commenters generally agreed with this, stressing the strong need for community input on this and community should discuss directly with GAC.	The Structural Improvement Committee should convene, commencing at the Sydney meeting, a dialog among the leadership of the GAD and the leadership of the other SOs and ACs to publicly review the GAC's role within ICANN. This review

<i>ICANN shall work with the Government Advisory Committee Members to review the GAC's role within ICANN so as to facilitate effective consideration of GAC advice on public policy aspects of the technical coordination of the Internet".</i>		process should focus on coordination and consultation between the GAC and other supporting organizations and advisory committees of ICANN. Any outcome of this dialogue should be open to public comment before Board approval for implementation
RECOMMENDATION 2.5: Make consultation documents easily accessible and understandable.		
2.5.1 Executive summaries shall be attached to all substantive documents.	Support this from commenters who mentioned it.	The Public Participation Committee is continuing to recommend process and substantive improvements to the Board for implementation by staff and others.
2.5.2 Standardized formatting and timelines shall be used for dealing with all published documents	Give more detail on the predictable timeline for materials, and make specific recommendations about timelines.	The Public Participation Committee has recently recommended, and the Board enacted, a new set of pre-physical meeting deadlines for the production of relevant documents. These deadlines are being observed, beginning with the Sydney meeting in June 2009.
RECOMMENDATION 2.7: Seek advice from a committee of independent experts on the restructuring of the review mechanisms to provide a set of mechanisms that will provide for improved accountability in relation to individual rights and having regard to the two proposed further mechanisms in <i>RECOMMENDATIONS 2.8</i>	These measures alone are insufficient to address all community concerns.	The ICANN Bylaws should be amended to establish a new and newly constituted Independent Review Tribunal with powers to review the exercise of decision-making powers of the ICANN Board under three general rubrics of fairness, fidelity and rationality

<i>and 2.9 immediately below.</i>		
RECOMMENDATION 2.8: Establish an additional mechanism for the community to require the Board to re-examine a Board decision, invoked by a two-thirds majority vote of two-thirds of the Councils of all the Supporting Organizations and two-thirds of members of all the Advisory Committees. For the Governmental Advisory Committee, a consensus statement from all the members present at a physical meeting shall suffice.	These measures alone are insufficient to address all community concerns.	The ICANN Bylaws should be amended to establish a new and newly constituted Independent Review Tribunal with powers to review the exercise of decision-making powers of the ICANN Board under three general rubrics of fairness, fidelity and rationality
RECOMMENDATION 2.9: Establish an extraordinary mechanism for the community to remove and replace the Board in special circumstances.	These measures alone are insufficient to address all community concerns. This recommendation recently drew much resistance and doubt from community members.	This recommendation should not be implemented at this time. Instead, the ICANN Bylaws should be amended to establish a new and newly constituted Independent Review Tribunal with powers to review the exercise of decision-making powers of the ICANN Board under three general rubrics of fairness, fidelity and rationality
3 MEETING THE NEEDS OF THE GLOBAL INTERNET COMMUNITY		
RECOMMENDATION 3.3: Produce a review of translation and interpretation policies and expenditure to assess the need for further improvements.	Few commenters mentioned this recommendation; those who did were generally supportive.	The Public Participation Committee should consider and possible review against the published Translation Policy.
RECOMMENDATION 3.4: Continue to improve	Most commenters who referred to this	The Board should consider recommending ICANN staff

participation by extending outreach so that all relevant stakeholders around the world are able to interact with ICANN, including by establishing ICANN's presence in additional jurisdictions. Priority should be given to presence/office establishment in south, central and northern Asia and in Africa.	considered the existing information insufficient to make a fully informed decision.	to continue conversations with authorities in jurisdictions such as Belgium and Switzerland, and report back with a detailed analysis of risks and benefits to the Board and community.
RECOMMENDATION 3.6: Maintain ICANN's current headquarters and operational presence in California, regardless of any change in its corporate organizational structure.	Most commenters agreed with this recommendation.	The Board should consider accepting the PSC recommendation and recommends that ICANN maintain its headquarters in the United States, specifically in Marina del Rey, California.
3.9 Hold initial discussions and do fact-finding on international not for profit organization status to see what the advantages might be. Then consider establishing an additional subsidiary legal presence whose corporate headquarters remain in the US. Subject to full public consultation.	Commenters noted potential risks in having the same kinds of contracts subject to more than one jurisdiction's law and asked if a separate board created in Switzerland or Belgium be accountable to ICANN's global stakeholders.	The Board should consider recommending ICANN staff to continue conversations with authorities in jurisdictions such as Belgium and Switzerland, and report back with a detailed analysis of risks and benefits to the Board and community, including a comparison of legal presences versus additional office.
4 OPERATIONAL AND FINANCIAL SECURITY OF ICANN		
RECOMMENDATION 4.3: Maintain and enhance detailed, results-based and transparent planning and reporting processes.	General agreement from commenters	Continue with and provide more detail on Strategic and Operational Planning and reporting systems, including Dashboard and other tools.
4.3.1 Continue to	General agreement from	Continue with and provide

implement best financial practices, including of financial disclosure to the community. 4.3.2 Ensure financial materials are disclosed in a timely way and with sufficient explanation to permit full comprehension.	commenters	more detail on Strategic and Operational Planning and reporting systems, including Dashboard and other tools.
RECOMMENDATION 4.6: Give consideration to how to manage ICANN's future revenue growth in line with ICANN's not-for-profit status and its core mission and mandate.	General agreement amongst commenters.	The Finance Committee should continue with and provide more detail on Strategic and Operational Planning and reporting systems, including Dashboard and other tools, and encourage increased community involvement in the bottom-up planning and budget process.
4.6.1 Include a public discussion and comment period on any surplus as part of the FY10 draft Operating Plan and Budget consultations.	General agreement amongst commenters.	The Finance Committee should continue with and provide more detail on Strategic and Operational Planning and reporting systems, including Dashboard and other tools, and encourage increased community involvement in the bottom-up planning and budget process.
4.6.2 ICANN should consult the community on sources of revenue, recognising ICANN's core mission, so that it is not too reliant on one sector of the community.	Some commenters support a public discussion of revenue growth and services, but others held that the source of revenues were not as important as overall transparency and accountability measures that work to prevent capture by one or more groups.	The Finance Committee should continue with and provide more detail on Strategic and Operational Planning and reporting systems, including Dashboard and other tools, and encourage increased community involvement in the bottom-up planning and budget process.
5 STABILITY AND SECURITY OF THE UNIQUE IDENTIFIERS		

RECOMMENDATION 5.3: ICANN should be a discussion leader and raise awareness of issues linked to stability and security of the Internet.	General support, as long as ICANN remains within its existing mandate.	21 May 2009, ICANN published for public comments the “Plan for Enhanced Internet Security, Stability and Resiliency”
5.3.1 ICANN should further define and strengthen its role in relation to security and stability of the unique identifiers and their impact on the Internet.	General support, as long as ICANN remains within its existing mandate.	21 May 2009, ICANN published for public comments the “Plan for Enhanced Internet Security, Stability and Resiliency”
RECOMMENDATION 5.7: ICANN shall pursue operational efficiency measures under the IANA procurement agreement with the United States Department of Commerce.	General support	Implementation of e-IANA proposals are being finalized with the Department of Commerce for implementation.

APPENDIX B

PROPOSAL TO ESTABLISH A SPECIAL ICANN COMMUNITY VOTE REQUESTING A BOARD RE-EXAMINATION OF A BOARD DECISION

Executive Summary

The ICANN Bylaws should be amended to establish a special mechanism for the community to require the Board to re-examine a Board decision, invoked by a two-thirds majority vote of two-thirds of the Councils of all the Supporting Organizations and two-thirds of members of all the Advisory Committees. For the Governmental Advisory Committee, a consensus statement from all the members present at a physical meeting shall suffice for the purpose of this vote.

1. Introduction

The concept of the ICANN community, through the Supporting Organizations and Advisory Committees broader independent review of ICANN's decisions was again promoted by a number of parties during the President Strategy Committee (PSC) consultation on Improving Institutional Confidence and is the force behind Recommendation 2.8 of the PSC's subsequent report to the ICANN Board. (<http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf>) In November 2002, the Advisory Committee on Independent Review posited the following purpose for the review process: "The purpose of independent review is to provide a meaningful check on the powers and actions (or inactions) of the ICANN Board of Directors." This expression of purpose remains consistent with the views expressed by stakeholders through the Improving Institutional Confidence consultation processes.

Since the PSC's report was delivered to the Board at the ICANN Mexico meeting,

ICANN staff have continued to receive verbal support for such review from a range of stakeholders including contracted parties, industry organizations and officials from some countries. Such a proposal was also included in a public personal communication by the European Commissioner of the Information Society, Viviane Reding in June 2009.

The introduction of an independent review mechanism going beyond the existing review panel process would need to recognize the balance of accountabilities under which ICANN operates. The need to balance three somewhat conflicting sets of accountabilities is addressed in ICANN's Accountability and Transparency Frameworks and Principles published in January 2008 (<http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>)

"ICANN is a unique model and therefore ICANN accountability structures do not fit into any one traditional definition...

ICANN is accountable in three ways:

1. Public sphere accountability that deals with mechanisms for assuring stakeholders that ICANN has behaved responsibly;
2. Corporate and legal accountability which covers the obligations that ICANN has through the legal system and under its bylaws; and
3. Participating community accountability that ensures that the Board and executive perform functions in line with the wishes and expectations of the ICANN community...

It is important to note that there are inherent tensions that exist between the three types. An effective set of accountability mechanisms requires careful navigation through these points of tension." (For further, see pages 5-6 in <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>)

2. Proposal

A new Article IV, Section 5 of the ICANN bylaws should be established.

The new section should read:

Section 5. SPECIAL ICANN COMMUNITY VOTE FOR BOARD TO RE-EXAMINE A BOARD DECISION

- (1) Within 90 Days of a Board resolution or the conclusion of the next ICANN international meeting, whichever is the longer, the ICANN community can require the Board to re-examine the resolution through a two-thirds majority vote of two-thirds of the Councils of Supporting Organizations and two-thirds of members of Advisory Committees.
- (2) For the Government Advisory Committee it will be sufficient to meet the two-thirds

rule in (1) to have a consensus statement from all the members present at a physical meeting.

- (3) The ICANN Board shall re-examine in good faith the resolution at its next meeting after the necessary votes have been taken.

APPENDIX C

PROPOSAL TO ESTABLISH AN INDEPENDENT REVIEW TRIBUNAL

Executive Summary

The ICANN Bylaws should be amended to establish a new Independent Review Tribunal with powers to review the exercise of decision-making powers of the ICANN Board under three general rubrics – fairness, fidelity to the power, or cogency of decision-making. The Independent Review Tribunal should consist of a standing panel of internationally recognized relevant technical experts as well as internationally recognized jurists, including persons with senior appellate judge experience. Members should be appointed for either a set period of five years or until they resign.

Consideration of approaches adopted globally indicates that the grounds of review are given effect in general by sending the issue back to the original decision-maker to address the matter afresh, but with the benefit of the guidance of the review body. A provision should be set forth in the bylaws stating that the Board will follow the recommendations of the panel unless it determines that such recommendations are not in the best interest of the corporation and publishes a report to the community setting forth its reasons.

1. Introduction

Some parties first raised the question of establishing a process for independent review of the decisions of the ICANN Board during discussions around the formation of ICANN in 1998. It was further considered by the Advisory Committee on Independent Review in November 2002 (<http://www.icann.org/en/meetings/santiago/irac-final-report.htm>) The

Advisory Committee's work was under the broader remit of ICANN's Evolution and Reform Committee processes. At least part of the Advisory Committee's recommendations and intent was met by the provision in ICANN's current bylaws for three distinct processes through which a decision of the Board may be challenged. These are (a) the "Reconsideration Request" process whereby the Board Governance Committee reviews actions or inactions that may have adversely impacted any person or entity, (b) the Independent Review Panel process whereby an independent panel of one to three arbitrators is selected to decide whether or not certain Board actions or inactions contravene the corporation's articles of incorporation or bylaws, and (3) the Ombudsman process whereby interested parties may object to certain board actions or inactions without resorting to the two aforementioned processes.

But some members of the community have continued to express concerns that these three instruments have not fully achieved the goal of independent review.

The concept of broader independent review of ICANN's decisions was again promoted by a number of parties during the President Strategy Committee (PSC) consultation on Improving Institutional Confidence and is the force behind Recommendation 2.7 of the PSC's subsequent report to the ICANN Board. (<http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf>) In November 2002, the Advisory Committee on Independent Review posited the following purpose for the review process: "The purpose of independent review is to provide a meaningful check on the powers and actions (or inactions) of the ICANN Board of Directors." This expression of purpose remains consistent with the views expressed by stakeholders through the Improving Institutional Confidence consultation processes.

Since the PSC's report was delivered to the Board at the ICANN Mexico meeting, ICANN staff has continued to receive verbal support for such review from a range of stakeholders including contracted parties, industry organizations and officials from some countries. Such a proposal was also included in a public personal communication by the European Commissioner of the Information Society, Viviane Reding in June 2009.

The introduction of an independent review mechanism going beyond the existing review panel process would need to recognize the balance of accountabilities under which ICANN operates. The need to balance three somewhat conflicting sets of accountabilities is addressed in ICANN's Accountability and Transparency Frameworks and Principles published in January 2008 (<http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>)

"ICANN is a unique model and therefore ICANN accountability structures do not fit into any one traditional definition...

ICANN is accountable in three ways:

1. Public sphere accountability which deals with mechanisms for assuring stakeholders that ICANN has behaved responsibly;
2. Corporate and legal accountability which covers the obligations that ICANN has through the legal system and under its bylaws; and

3. Participating community accountability that ensures that the Board and executive perform functions in line with the wishes and expectations of the ICANN community...

It is important to note that there are inherent tensions that exist between the three types. An effective set of accountability mechanisms requires careful navigation through these points of tension.” (For further, see pages 5-6 in <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>)

In considering in this paper how to establish an independent review mechanism, it has been possible to draw not only on the work of the Advisory Committee on Independent Review and the President’s Strategy Committee but also on the experience of independent arbitration now incorporated in the ICANN gTLD contracts and the processes for managing objections envisaged in the new gTLD program. All of these precedents have been subject to extensive community and public input.

2. Framework for Review

The question of how to review the exercise of administrative, quasi-legislative, regulatory or delegated powers is addressed in the jurisprudence of many national jurisdictions. While adopting various approaches to the review process, one common element is the recognition that no powers are unlimited. In particular when a decision-making power is conferred on an agency not for its own benefit but for the benefit of others it is generally proper that the exercise of the power be subject to review; the same applies to a failure to exercise a power that is conferred for the benefit of others.

A survey of at least some of the approaches adopted globally indicates that the grounds on which the exercise of decision-making powers may be reviewed can be considered under three rubrics – fairness, fidelity and rationality.

Fairness

1. This is a requirement about the *integrity of the process* of decision-making. It might encompass, for example:
 - a. that persons immediately affected by a decision are given a reasonable opportunity to make submissions before the decision is made;
 - b. that they have reasonable access to the information to be relied on by the decision maker (subject to the needs of confidentiality); and
 - c. that the decision-making process is impartial.

Fidelity

2. This refers to *faithfulness to the scope and objects of the power* being exercised. It would require:
 - a. that the decision was within the scope of the authority conferred, and was reached in compliance with any mandated procedures;
 - b. that the decision was made without reference to considerations that were irrelevant (having regard to the objects of the power and the circumstances of the matter);

- c. that the decision was made after taking into account all considerations that were relevant and necessary to be taken into account (again, having regard to the objects of the power and the circumstances of the matter);
- d. that the decision was made in good faith and not for a purpose foreign to that objects of the power (that is, for a collateral or ulterior purpose);
- e. that the decision was a *real* exercise of the power (as opposed to slavish following of policy).

Rationality

- 3. Decisions should be reviewable if they lack sufficient *cogency* to command basic levels of assent from those affected. This would include:
 - a. decisions that are wholly outside the scope of a reasonable exercise of the power;
 - b. decisions based on facts for which there is no support;
 - c. decisions which are a disproportionate exercise of the power, in the sense that they interfere with the rights or interests of some persons but are not reasonably adapted to achieve an appropriate objective or are a disproportionate interference having regard to the objective.

3. Proposal

Article IV, Section 3 (1) of the ICANN bylaws states that “ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.” The existing ICANN Independent Review Panel process is limited in scope to the Fidelity rubric, particularly 2 a, above and the procedural elements of the Bylaws and Articles of Incorporation which would partly fit the Fairness rubric described above.

It is proposed that the scope of the present Independent Review Panel process be expanded to include all three rubrics of review outlined above.

A newly constituted Independent Review Tribunal should conduct the new process.

The existing procedures for Independent Review Panel are outlined in the following:

- 1. Article IV of the Bylaws, Section 3 establishes the Independent Review Panel:
<http://www.icann.org/en/general/bylaws.htm#IV>
- 2. More about Independent Review Panel (along with links to International Centre for Dispute Resolution Rules) can be found at:
http://www.icann.org/en/general/accountability_review.html
- 3. Direct link to International Centre for Dispute Resolution International Arbitration Rules:
<http://www.adr.org/sp.asp?id=33994#INTERNATIONAL%20ARBITRATION%20RULES>

4. The International Centre for Dispute Resolution Supplementary Procedures for ICANN Proceedings: <http://www.adr.org/sp.asp?id=32197>

These Procedures and Rules would largely serve well the expanded scope of the new Independent Review Tribunal (which for clarity will be referred to from now on as IRT). But Article IV, Section 3 of the ICANN Bylaws will need to be amended to reflect the broadened scope. Further, the International Centre for Dispute Resolution Supplementary Procedures for ICANN Proceedings would need to be amended to reflect the new role of technical experts and the changed appointment conditions for members outlined in 4 below.

It is proposed that Article IV, Section 3 (1), (2) and (3) of the ICANN Bylaws be amended to read:

- (1) In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of ICANN actions. “Action” for this purpose includes a decision to act by the Board and a failure to act by the Board when ICANN has the power to act.
- (2) Any person materially affected by an ICANN action may submit a request for independent review of that decision or action. The grounds on which review may be requested are:
 - a. that the applicant was a person that ICANN should have known was likely to be materially affected by the ICANN action and the applicant:
 - i. was not given a reasonable opportunity to make submissions to ICANN before the decision was made;
 - ii. was not given reasonable access to the information on the basis of which ICANN was proposing to act;
 - b. that the action was not within the scope of the authority conferred on ICANN, or was not reached in compliance with any applicable procedures mandated by ICANN’s Articles of Incorporation, By-laws, the procedural provisions of ICANN’s Accountability and Transparency Frameworks and Principles, or the published decisions of the ICANN Board;
 - c. that the action took place after the ICANN Board took into account considerations that were irrelevant (having regard to the objects of the power being exercised and the circumstances of the matter);
 - d. that the action took place after the ICANN Board failed to take into account all considerations that were relevant and necessary to be taken into account having regard to the objects of the power and the circumstances of the matter;
 - e. that the action was not in good faith in that its predominant purpose was a purpose foreign to the objects of the power being exercised by ICANN (that is, for an ulterior purpose);

- f. that the action was not the result of a genuine consideration of the circumstances of the particular case;
- g. that the action was wholly outside the scope of a reasonable exercise of the power that was exercised by ICANN;
- h. that the action was based on facts for which there was no support; or
- i. that the action detrimentally interfered with the existing rights or interests of the applicant but was a disproportionate exercise of the power being exercised by ICANN in that ICANN's objective could practicably and reasonably be achieved by other means which did not have such an impact on the applicant or others.

- (3) Requests for such independent review shall be referred to an Independent Review Tribunal ("IRT") consisting of a standing panel of internationally recognized relevant technical experts as well as internationally recognized jurists, including persons with senior appellate judge experience. Members should be appointed for either a set period of five years or until they resign

Section 3 (4) to (15) should be amended to replace IRP with IRT.

Section 3 (8) b ("The IRP shall have the authority to: declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws") should be deleted.

4. Expand the Stature of the Independent Review Panel

Considering the importance of ICANN's role under its Mission in Article 1 of the Bylaws to "coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular ***to ensure the stable and secure operation of the Internet's unique identifier systems***" (emphasis added), it is proposed that the membership of the panels convened be expanded to include internationally recognized relevant technical experts as well as internationally recognized jurists. When a claim is made relevant to the Board's action or inaction on a matter related to the "stable and secure operation of the Internet's unique identifier systems", it is proposed that the three person panel consist of two internationally recognized relevant technical experts and one internationally recognized jurist.

Further, it is proposed that the International Dispute Resolution Provider name a standing panel of internationally recognized relevant technical experts as well as internationally recognized jurists, including persons with senior appellate judge experience. The existence of a known and recognized "bench" of "judges" will add to the stature and authority of the Independent Review Panel.

The panel's members should be appointed for either a set period of five years or until

they resign, whichever is the earlier.

5. Remedy

Consideration of at least some of the approaches adopted globally indicates that the grounds of review described above are given effect in general by sending the issue back to the original decision-maker to address the matter afresh, but with the benefit of the guidance of the review body as to proper standards of fairness, fidelity to the power, or cogency of decision-making as the case may be.

This would be an approach consistent with the law under which ICANN is founded. Under California law, the Board must have the prerogative to make policy at any time and must have the ultimate authority to determine the outcome of a matter.

The California Nonprofit Public Benefit Corporation Law (*Cal. Corp. Code § 5110 et. seq.*) requires that, subject to the voting rights of any members, the “activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.” (see *Cal. Corp. Code § 5210*). The law draws a distinction between delegation and abdication of responsibilities and duties. As such, although the Board is empowered to delegate certain management functions to committees and other third parties, the Board cannot empower any entity to overturn decision or actions of the Board, because that would result in that entity indirectly controlling the activities and affairs of the corporation and thus usurping the legal duties of the Board. Accordingly, the creation of a panel or other body that would effectively sit atop the Board from a corporate control perspective would not be consistent with California law.

The approach of sending the issue back to the Board for its re-consideration and decision is also the approach adopted by the Advisory Committee on Independent Review in November 2002. While this procedural approach in general was incorporated in the International Centre for Dispute Resolution Supplementary Procedures for ICANN Proceedings - “An IRP [Independent Review Panel] may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration” – the International Centre for Dispute Resolution International Arbitration Rules and the Supplementary Procedures are silent on how prescriptive the IRP can be in its declaration.

It is therefore proposed that the Independent Review Tribunal have the following powers:

- a. if it finds a complaint justified, to require the Board to reconsider the matter;
- b. in such a case to give advice to the board as to the respects in which the complaint was justified, and, if it considers it appropriate to do so, to advise

the Board as to how the Board might ensure that it in reconsidering the matter it used fair procedures, was faithful to its Constitution, procedures, by laws and to the objects of the power in question, and that its decision making was cogent and its actions not disproportionate;

- c. to recommend that that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reconsiders the matter.

It is proposed that a provision be set forth in the bylaws stating that the Board will follow the recommendations of the panel unless it determines that such recommendations are not in the best interest of the corporation. The Board should also be required, pursuant to the bylaws, to publish a report to the community setting forth its reasons for determining that the recommendation was not in the best interest of the corporation.

This new structure would replace the existing independent review panel framework set forth in ICANN's bylaws. But ICANN would need to make sure that the Independent Review Tribunal does not become the de facto Board. For example, it would be inappropriate for the Board to abdicate its responsibilities by waiting for the IRT to decide a matter and then simply follow its lead.

These new provisions would ensure that new Independent Review Tribunal would enjoy very significant moral stature and expertise, with an overwhelming likelihood that its decisions would be implemented fully. But consistent with Californian law, the new IRT would not control the Board or usurp its authority.

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6. Standing

The Advisory Committee on Independent Review considered this question and proposed that any individual or entity may file a claim if that individual or entity has been materially affected by the contested action or failure to act by the ICANN Board. This standard seems appropriate for the independent review process proposed here.

“This principle restates the "affected party" standard set forth in the ICANN Bylaws, Art. III, Sec. 4(b). The Committee believes that the term "affected party" sweeps too broadly, however, as nearly every Internet user can be said to be affected in some quantum by nearly any decision of the ICANN Board. Accordingly, the Committee recommends that the conventional legal threshold of materiality be incorporated, keeping independent review available to those individuals or entities that have more directly been affected by the action (or failure to act) at issue.”

In an attempt to decrease the possibility of frivolous claims that might come from this broad standing, it is proposed that the dispute resolution service provider also implement

a type of “quick look” process to identify and eliminate frivolous objections without requiring a full-blown dispute resolution proceeding.

7. Claimants to first avail themselves of ICANN's internal reconsideration process

Individuals and entities must first exhaust ICANN's internal reconsideration process before filing a claim for independent review by the IRT.

The Advisory Committee on Independent Review noted: “The Committee believes that complaining individuals should first exhaust ICANN's internal reconsideration process before bringing their claim before the IRP. A requirement of exhaustion of internal remedies promotes efficiency by maximizing the odds that the ICANN Board will resolve disputes on its own before they reach the IRP. In addition, the IRP will benefit from any record of decision, including factual investigation and findings, developed during the course of ICANN's internal reconsideration process.”

31 May 2009