

IMPROVING INSTITUTIONAL CONFIDENCE IN ICANN

(REVISED, SEPTEMBER 2008)

Background

More than two years ago, the President's Strategy Committee (PSC) commenced a series of consultations on how to strengthen and complete the ICANN multi-stakeholder model. In addition, the recent midterm review of the Joint Project Agreement (JPA) between the United States Department of Commerce and ICANN produced useful comments about ICANN's performance and future. Most commentators in that consultation believe ICANN has made significant progress, but that some key areas need to be improved in order to complete the transition to an agreed model of multi-stakeholder coordination of the Internet's unique identifiers.

This paper, prepared by the PSC, outlines those key areas and possible responses to address them. The PSC wants to be clear – all these suggestions are for discussion. They are not fixed positions, but they are the result of work over two years by the PSC that also incorporates input, including that in public comments and discussions from June to September 2008.

This material should be read in conjunction with the 'Transition Action Plan', which is a set of recommendations developed by the PSC about how to complete transition of the organization after the conclusion of the Joint Project Agreement.

Key Areas to Be Addressed

In response to the call for comments in the JPA Midterm review, many respondents raised key structural improvements that need to be addressed. They have been summarized as ensuring:

1. ICANN will be sufficiently safeguarded against capture.
2. ICANN will be sufficiently accountable to its multi-stakeholder community.
3. ICANN will meet the needs of the global Internet community of the future.
4. ICANN will be financially and operationally secure.
5. ICANN will maintain its focus on organizational and operational excellence in performing its technical mission of ensuring safe and stable operations relating to the unique identifiers of the Internet, and of the IANA functions.

ICANN must also continue to make progress on operational areas raised during the JPA Midterm review; including strengthening compliance, encouraging competition and streamlining policy processes. However, these improvements should continue to be made and communicated separately to the transition process.

The PSC also recognizes that there was a very clear message in the JPA Midterm review that ICANN needs to strengthen its relationships with the business community given the private sector's historic investment and reliance upon the Internet as an economic driver. There is also a very clear need to improve business user input to the policy development process and the organization in general. These issues can be addressed immediately through improved outreach at ICANN meetings and engagement of private sector representative organizations. ICANN should continue

to improve its participation mechanisms so that, along with all other constituencies and/or stakeholders, the business community may engage fully with ICANN policy processes. The PSC believes ICANN should also solicit further input on how to address this issue through the consultations on the ICANN Operating Plan and consider any other feedback that may be received through the consultation process the PSC will run on this paper.

Proposals to Address the Key Areas

1. Sufficient Safeguarding ICANN Against Capture

1.1 This discussion is about avoiding capture by any one party, whether that party is a government, an organization or any other entity.

1.2 The White Paper and other documents critical to ICANN's formation, structure and reformation (for example, the bylaws) contain procedures and structural safeguards to ensure that ICANN is fair and protect against capture by groups with narrow representation or a single stakeholder grouping.

1.3 The PSC believes that consensus or super-majority requirements will continue to be the main device to protect against self-interested capture. ICANN must continue in any changes to its structures to craft careful and vigilant protection, as it has done historically. ICANN also needs to avoid 'apathetic' capture - where participation by certain groups may dissipate, leaving the organization with narrow participation. To prevent this, there is a need for continued focus on maintaining large and diverse interest groups within the Supporting Organization and Advisory Committee structures.

1.4 The impact of anti-trust and competition laws is also important. ICANN needs to ensure it remains in jurisdictions that have strong anti-trust laws so that there is continued and comprehensive legal overview of decisions that are made, to ensure they are not biased or preferential to a particular group or organization. This is a fundamental protection.

1.5 Voting rights and representational participation in the constituencies are a main area for influence and capture. The PSC believes that there needs to be greater transparency surrounding the participants in the Advisory Committees and Supporting Organizations. There needs to be discussion of cross participation in Councils and constituencies by single or related entities. Requiring statements to clearly identify conflict of interest is necessary.

1.6 Finally, the PSC notes that ICANN's committee structure and processes provide strong counters to capture, as outlined in the Frameworks and Principles on Transparency and Accountability. The number of committees and the breadth of representation provide important guards against capture by one interest group and that it is not possible for any individual to force their ideas onto others. As identified above they can be enhanced.

Proposal for discussion: ICANN could make bylaw amendments requiring a specific prohibition against voting by the same individual or organization in more than one of the related Advisory or Supporting Organizations. Should it do so?

SUGGESTIONS:

1.1.1 To protect against conflicts of interest and improve ICANN's transparency, require participants in all supporting organizations and advisory committees, and their committees and working groups, to provide public statements of interest.

1.1.2 Continue to allow participants (individuals or organizations) to participate in more than one Supporting Organization or Advisory Committee. Participants should continue to be allowed to vote in one Supporting Organization or Advisory Committee only.

2. Sufficient Accountability to the Multi-Stakeholder Community

2.1 The PSC notes that the ICANN Board has approved a set of Frameworks and Principles on Accountability and Transparency that outline the organization's existing legal and corporate responsibilities. As part of these, ICANN has a three-part dispute resolution process, which includes the Board Reconsideration Committee, the Independent Review Panel, and the Ombudsman. An independent review of ICANN's accountability and transparency by the One World Trust organization in the United Kingdom concluded that: "Together they offer a robust approach to complaints handling, providing internal oversight of Board decisions and staff actions and thus reducing the likelihood of litigation." Indeed, the point of the processes in the ICANN model is to resolve matters through discussion and self-regulation.

2.2 However, given the importance of ICANN's role, the PSC believes that the organization needs to have world-leading accountability mechanisms.

2.3 The PSC believes that two new mechanisms already put into the public domain by ICANN in December 2007 should be discussed as new accountability measures.

2.4 First, parties may be in dispute with ICANN because they disagree not with the process but with the outcome of an ICANN decision process. Based on feedback received from the community, the Board could consider a mechanism whereby the community can require the Board to re-examine a decision. This mechanism needs to be constructed with awareness that the Directors are legally accountable for the business dealings of the organization and have fiduciary obligations including:

- (a) duty of care;
- (b) duty of inquiry;
- (c) duty of loyalty; and
- (d) duty of prudent investment.

2.5 The community could require the Board to re-examine a decision through a two-thirds majority vote of two-thirds of the Councils of Supporting Organizations and two-thirds of members of Advisory Committees; for the Government Advisory Committee it may be sufficient to have a consensus statement from all the members present at a physical meeting. As final accountability rests with the Board, the Board cannot be forced to change its decision, only to re-examine it. There would need to be a reasonable time limit on such a vote to ensure that contracting parties or third parties can have certainty in Board decisions.

2.6 Second, if the Board does not change a decision after the above re-examination mechanism, there may be circumstances where it is appropriate for the ICANN community through its supporting organizations and advisory committees to move for changes to the composition of the Board, by way of a "no confidence" vote.

2.7 This would provide an accountability mechanism for the board, namely a mechanism for dissolution created by adopting bylaws that would provide for individual Director's pre-designated resignations. Such resignations would be agreed by each individual board member, in the event of

“no-confidence” votes from a significant portion of the designated supporting organizations and advisory committees. This suggested method is similar to board accountability mechanisms recently added by multi-national organizations that operate in international jurisdictions to ICANN.

2.8 In addition to these proposals, it is to be noted that as a public benefit non-profit corporation organized within the State of California, ICANN is subject to California laws and business codes relating to the operation of such entities (see http://www.ss.ca.gov/business/corp/corp_artsnpinf.htm).

2.9 These laws explicitly permit oversight of criminal actions by the California court system and the California Attorney General. In recent years it is notable that California’s Attorney General is very active in non- profit reform measures. (See: <http://www.charitynavigator.org/index.cfm/bay/content.view/catid/38/cpid /191.htm>)

2.10 The PSC considers these proposals (in 2.4 and 2.5 above) could be major elements of the solution to the issue of accountability, subject to analysis and the views of the community through consultation.

Proposal for Discussion: Establish additional accountability mechanisms that allow the community to request the re-examination of a decision from the Board, and, as an ultimate sanction, to remove the Board collectively and reconstitute it.

SUGGESTIONS:

- 2.1.1 Establish an additional accountability mechanism to allow the community to request the re-examination of a decision of the Board.
- 2.1.2 Establish additional accountability mechanism whereby if the Board does not change a decision after the above reconsideration mechanism, there may be circumstances where it is appropriate for the ICANN community through its Supporting Organizations and Advisory Committees to move for changes to the composition of the Board, as an act of a “no confidence” vote. The mechanism for dissolution would require an accountability mechanism for the Board created by adopting bylaws that would provide for individual Directors’ pre-designated resignations. Such resignations would be agreed by each individual Board member in the event of “no confidence” votes from a very significant portion of the designated Supporting Organizations and Advisory Committees. This suggested method is similar to board accountability mechanisms recently adopted by Cisco, Pfizer, Microsoft, Morgan Stanley and others. Replacing the ICANN Board could impact not just elected candidates from the Supporting Organizations, but also require a re-convened Nominating Committee to appoint new Nominating Committee appointees to the Board.
- 2.1.3 The Government Advisory Committee should maintain its advisory status.

3. Meeting the Needs of the Global Internet Community of the Future

- 3.1 ICANN is a California-based not-for-profit organization. This fact will not change.
- 3.2 At the same time, ICANN is a global organization with stakeholders in all regions of the world.
- 3.3 When ICANN was launched almost ten years ago, the full extent of the Internet’s promise as a critical communications infrastructure of the world was just beginning to be understood. Today, the Internet reaches more than one billion users. The next billion users will come from those

regions of the world where the Internet is currently less prevalent – Africa, Latin America, Asia and Eastern Europe.

3.4 ICANN is already addressing some of these challenges in its structure. Its bylaws establish geographical diversity in terms of the composition of its board and other structures. As ICANN has expanded its staff, it has taken steps to also ensure its global diversity. ICANN is also on the verge of introducing internationalized domain names.

3.5 During its consultations (not only recently but over the last two years), the PSC has received input from global stakeholders external to the United States that ICANN should also be represented in other jurisdictions. The PSC believes that that it would assist increase the credibility of ICANN's claim to be an entity serving a global community for ICANN to have representation in other countries additional to that which it has in the United States.

3.6 The PSC emphasizes that an additional legal presence will strengthen ICANN's fundamental multi-stakeholder model and underline the element of public trust that is a key element of its mission. The PSC believes that such a presence is not about reducing accountability. Indeed it will provide for more acceptance and confidence in ICANN as it will have a legal personality that is additional to its US presence. There are also clear advantages to diversity and representation in having presences in additional jurisdictions, as well as operational advantages in the employment of staff.

3.7 The PSC stresses that additional presences are not about building a treaty or intergovernmental organization with diplomatic immunities. ICANN - both in its US-based corporate form and any additional presence it may have globally - must remain true to the unique multi-stakeholder, “private sector led” model that has been its hallmark from the beginning.

Proposal for discussion: Should ICANN have global legal presences in addition to its headquarters established in the United States?

SUGGESTIONS:

ICANN is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized and operated as a California Nonprofit Public Benefit Corporation Law for charitable and public purposes and United States' taxation laws under Section 501 (c)(3) of the Internal Revenue Code.

The PSC has conducted an evaluation of potential changes to ICANN's organizational corporate structure and has worked with the ICANN General Counsel's Office in surveying available options for potential structures in 15 different countries.

The survey has reviewed various private organization structures available to provide additional global benefits relating to ICANN's technical coordination function. The judicial functions within countries are the most localized part of reviewing globalized functions like ICANN, and ICANN as a private organization will likely need to have a presence in one or more countries and accordingly will be required to comply with national laws within that country.

This comparative structure evaluation has been focused around information a review of the different countries laws regarding (1) specific legislation applicable to reorganization; (2) parent-subsidiary issues; (3) labor costs and ease of visas for non-nationals (4) tax advantages; (5) “best practices”

corporate governance rules; and (6) national legislation allowing some privileges, while maintaining full ICANN accountability to its community.

The PSC has assumed that ICANN will continue to maintain its current headquarters and also maintain an operational presence in California, regardless of any change in its corporate organizational structure.

The PSC has also reviewed the emerging area of international non-profit law, which is emerging in some countries. This review has indicated that some jurisdictions offer legal identities which may help ICANN better manage some areas of administration which pose degrees of difficulty under its present circumstances; notably improved working visa arrangements for staff from some parts of the world, improved health care and other benefits for staff from some parts of the world, improved access for some members of the international ICANN community, and improved recognition of ICANN's international status in the perceptions of some jurisdictions and organizations.

3.1.1 ICANN should establish a legal presence in a jurisdiction that could provide it with an international not-for-profit status. Such a status would necessarily be in addition to ICANN's permanent headquarters and incorporation in the United States.

4. Financial and Operational Security

4.1 The PSC believes that ICANN must always be financially and operationally secure. ICANN must continue to maintain business practices that instill confidence, certainty and stability.

4.2 The Strategic, Operating and Budget planning processes, including measures such as the current Reserves Policy, provide confidence that ICANN is a stable and well functioning organization. The PSC believes that these processes should be maintained and enhanced.

4.3 In addition, ICANN's current funding is highly dependent on registries and registrars. Other funding sources need to be explored and enhanced to lessen that dependency.

Proposal for Discussion: ICANN should adopt alternative sources of funding to lessen dependence on current funding channeled through registries and registrars. ICANN should maintain and enhance existing strategic and operational planning and budgeting mechanisms.

SUGGESTIONS:

4.1.1 The ICANN Board should request the community to identify and approve alternative sources of funding to lessen dependence on current funding streams.

4.1.2 Maintain and enhance existing strategic and operational planning and budgeting mechanisms.

5. Continued Security and Stability of the Internet's Unique Identifiers

5.1 This area relates to concern that the ICANN should always remain focused on its narrow technical mission and remain a not-for-profit corporation that has a mission of public trust. ICANN should be headquartered in a stable environment with a strong history of freedom of expression and a legal structure that favors competition and private sector leadership.

5.2 The PSC views these concerns as being integral to ICANN's formation and purpose. They need to be reinforced.

5.3 Continuation of the US legal jurisdiction is essential for the ongoing stability of the nearly 1000 contracts ICANN presently has with registries and registrars, many of them in the United States.

5.4 Furthermore, while ICANN's mission is narrow, it is fundamental and critical to the secure and stable operation of the Internet. The PSC believes that ICANN has a responsibility to be a discussion leader and raise awareness of issues linked to stability and security of the Internet. Broader interest and concern about security and stability issues is, in the view of the PSC, an important support to the core mission, but should not result in "mission creep".

5.5 The PSC considers the security and stability of the Internet's unique identifiers is one of the most important aspects of ICANN's mission. Consequently, it suggests that this be enshrined in the format of ICANN's future strategic and operational planning.

5.6 The PSC notes that some respondents also indicated that more effective and efficient operation of the IANA function was also a necessary part of instilling confidence in a coordinated, not controlled, Internet addressing system.

5.7 The PSC believes the current IANA functions work well but is aware that many members of the community believe that they can be improved.

5.8 The PSC notes that under the IANA contract ICANN was required to develop and implement a process for consulting with the relevant governments and ccTLD managers to encourage greater efficiency and responsiveness to these entities in processing ccTLD requests, consistent with the processing metrics. That process arrived at suggested improvements to streamline the IANA function and is presently subject to discussion between ICANN and the United States Department of Commerce. We welcome the National Telecommunication Administration's recent comment that it is "open to operational efficiency measures that address governments' legitimate public policy and sovereignty concerns with respect to the management of their ccTLDs".

5.9 The PSC encourages this discussion as it is focused on the automation of processes (sometimes referred to as e-IANA), with ICANN ensuring more visibility to the existing public reporting of such changes.

5.10 ICANN and Verisign signed an agreement in 2006, under which they agreed to work together to establish a timetable for the completion of the transition to ICANN of the coordination and management of the ARPA TLD, and the root zone system, in particular to enable ICANN to edit, sign and publish the root and ARPA zones.

Proposal for Discussion: ICANN should consider whether or not to amend its bylaws to confirm that its headquarters will remain in the United States. ICANN should seek to be a thought leader on issues on security and stability issues consistent with its narrow but critical role in the secure and stable operation of the Internet, but not at the expense of causing "mission creep". In that regard, ICANN's bylaws should be amended to provide for the preparation of the Strategic and Operating plans in which security and stability remain a principal part. ICANN should also continue to pursue discussions with the United States Department of Commerce on the streamlining of the IANA function. Work should begin on implementing the root server management transition.

SUGGESTIONS:

5.1.1 ICANN should be a thought leader on issues on security and stability issues consistent with its narrow but critical role in the secure and stable operation of the Internet.

5.1.2 Amend bylaws to include the process of developing annual Strategic and Operating plans, in which security and stability play a principal part.

5.1.3 Noting that the United States government has indicated in its contribution to the President's Strategy Committee consultation in July 2008 that it has no plans to transition management of the root zone file from its present tripartite arrangement, operational efficiency measures under the IANA procurement agreement should be discussed with the United States Department of Commerce.