



The Internet Corporation for Assigned Names and Numbers

DRAFT

Implementation Plan for Improving Institutional Confidence

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The Internet Corporation for Assigned Names and Numbers

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1 INTRODUCTION

The President's Strategy Committee (PSC) presents this draft Implementation Plan for Improving Institutional Confidence to the global Internet community for information and discussion. The PSC's role is to give advice to the President and the Board on strategic issues facing ICANN. Since 2006, the PSC's focus has been on ICANN's legal status and identity, as well as its regional presence. Following extensive research, analysis, deliberation and consultation with the global Internet community over the past three years, the PSC has produced a proposed set of twenty-four detailed recommendations.

The goal of these recommendations is to maintain and strengthen ICANN as the participatory, multi-stakeholder body responsible for coordinating the global Internet's systems of unique identifiers and ensuring the stable and secure operation of the Internet's unique identifier systems. The recommendations address several key areas:

- I. ICANN has to be safeguarded against capture.
- II. ICANN has to be accountable and responsive to its multi-stakeholder communities.
- III. ICANN has to meet the needs of the global Internet community of the future.
- IV. ICANN has to be a financially and operationally secure organization.
- V. ICANN has to maintain its focus on ensuring safe and stable operations relating to the unique identifiers of the Internet.

The Internet community responded clearly and comprehensively to recently published draft recommendations. Many providing comments on previous PSC documents (the Transition Action Plan and Improving Institutional Confidence) asked for more information about the key issues of accountability and internationalization, and precisely how the PSC recommends those issues be addressed. The PSC thanks all who responded for their considered and helpful comments.

We hope this document will address many concerns and questions, and set out a clear set of tasks that must be accomplished for ICANN to maintain and strengthen its unique multi-stakeholder governance structure. More detailed information about a proposed implementation timeline for these recommendations will be published in due course. This draft Implementation Plan is followed by an appendix with legal analysis that was used by the PSC in its deliberations. We invite you to consider our recommendations and the research and analysis they are based

on, provide your input publicly, and continue to engage in constructive discussions with the rest of the global Internet community.

The most up to date documents and information about this process will continue to be published at <http://www.icann.org/en/jpa/iic/index.htm>.

2 RECOMMENDATIONS

The President’s Strategy Committee recommendations align with five thematic concerns raised during various public consultations. This section summarizes the basic recommendations. For context and explanation, please refer to Section 4 of this document, *Findings and Recommendations*.

Please note that the numbering of recommendations below corresponds to paragraph numbering in section 4 of this document, so recommendation numbers are not all contiguous.

I ICANN has to be safeguarded against capture.

RECOMMENDATION 1.1: Safeguards must address all types of capture.

RECOMMENDATION 1.6: Strengthen participation in the Governmental Advisory Committee to avoid capture.

- 1.6.1 Provide simultaneous interpretation in official UN languages as needed for GAC meetings
- 1.6.2 Hold a scheduled meeting or workshop of the Board at least once a year in a city where all or most governments have representation, e.g. New York or Geneva.
- 1.6.3 Provide a travel support programme for a GAC representative from each of the United Nations list of 50 Least Developed Countries (LDCs).¹

RECOMMENDATION 1.10: Maintain presences in jurisdictions with strong anti-trust and competition law.

- 1.10.3 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.

RECOMMENDATION 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.
- 1.13.2 Develop clear guidance for Supporting Organizations, Advisory Committees and

¹ UN Office of the High Representative for Least Developed Countries, Landlocked Developing Countries and Small Island Developing States: List of Least Developed Countries: <http://www.un.org/special-rep/ohrlls/ldc/list.htm>

the Nominating Committee on disclosing and handling conflicts.

- 1.13.3 Enhance existing conflict and other rules for the Nominating Committee in order to ensure the appointment of independent directors.
- 1.13.4 Create a framework which allows cross-participation in Supporting Organizations, Advisory Committees and/or constituencies, but which prohibits and considers sanctions for voting by the same individual or organization in more than one ICANN entity.

RECOMMENDATION 1.14: Safeguard against capture by inappropriate or inadequate staff 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.

II ICANN has to be accountable and responsive to its multi-stakeholder communities.

RECOMMENDATION 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: *"Role of Governments: 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 the public policy aspects of the technical coordination of the Internet."*

RECOMMENDATION 2.4

- 2.4.1 ICANN shall enhance its public consultation process, including strengthening the steps of providing detailed analysis of all comments received, acknowledging, synthesizing, and implementing them in decision-making as appropriate, and explaining the decision.
- 2.4.2 Formally declared advice or statements of principles by the GAC shall be formally responded to and made publicly available.
- 2.4.3 The GAC should work through a process to determine what constitutes formal advice to

the Board of Directors (as referenced in Article 11, section 2, paragraph 1(j) of the ICANN Bylaws: *“The Governmental Advisory Committee may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.”*¹).

RECOMMENDATION 2.5: Make consultation documents easily accessible and understandable.

2.5.1 Executive summaries shall be attached to all substantive documents.

2.5.2 Standardized formatting and timelines shall be used for dealing with all published documents.

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 *RECOMMENDATIONS 2.8 and 2.9* immediately below.

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.

RECOMMENDATION 2.9: Establish an extraordinary mechanism for the community to remove and replace the Board in special circumstances.

III ICANN has to meet the needs of the global Internet community of the future.

RECOMMENDATION 3.3: Produce a review of translation and interpretation policies and expenditure to assess the need for further improvements.

RECOMMENDATION 3.4: Continue to improve 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.

RECOMMENDATION 3.6: Maintain ICANN’s current headquarters and operational presence in California, regardless of any change in its corporate organizational structure.

RECOMMENDATION 3.9: For the purposes of information gathering, ICANN shall hold initial discussions with authorities in selected jurisdictions that recognize international not-for-profit organization status to determine whether such jurisdictions would offer a status that would confer the advantages described below (*Section 4: Findings and Recommendations*, paragraph 3.8). Only after such fact gathering was completed should ICANN consider establishing an additional subsidiary legal presence as an international non-governmental entity whose corporate headquarters remain in the United States. Any proposal would be subject to full public consultation.

IV ICANN has to be a financially and operationally secure organization.

RECOMMENDATION 4.3: Maintain and enhance detailed, results-based and transparent planning and reporting processes.

- 4.3.1 Continue to 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.

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.

- 4.6.1 Include a public discussion and comment period on any surplus as part of the FY10 draft Operating Plan and Budget consultations.
- 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.

V ICANN has to maintain its focus on ensuring safe and stable operations relating to the unique identifiers of the Internet

RECOMMENDATION 5.3: ICANN should be a discussion leader and raise awareness of issues linked to stability and security of the Internet.

- 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.

5.3.2 ICANN's strategic and operational planning should involve the organization in interaction with key organizations responsible for security related protocols and standards.

RECOMMENDATION 5.7: ICANN shall pursue operational efficiency measures under the IANA procurement agreement with the United States Department of Commerce.

3 BACKGROUND

The President's Strategy Committee (PSC) was formed in December 2005, following a resolution by the Board:

"Whereas, ICANN's mission is 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.

Whereas, the President and Board are committed to the bottom-up strategic and operational planning drawing on the inputs of the supporting organizations, advisory committees, and members of the ICANN community.

Whereas, the ICANN community could also benefit from the advice of a group responsible for making observations and recommendations concerning strategic issues facing ICANN; these observations and recommendations will contribute to ICANN's strategic planning process.

Resolved, the President is directed to appoint, by 28 February 2006, a President's Strategy Committee, to be responsible for giving advice to the President and the Board on strategy issues."²

Following discussion, the Board adopted the resolution 15-0.

The PSC currently comprises the following members:

- Peter Dengate Thrush (co-chair), Chairman of the ICANN Board of Directors
- Paul Twomey (co-chair), President/CEO of ICANN
- Raimundo Beca, partner at Imaginación, a Chilean consulting company, formerly CRO of Telefónica CTC Chile
- Marilyn Cade, CEO at ICT Strategies, mCADE llc, Chair, GPPC at Information Technology Association of America, SG3 rapporteur on IP Telephony at International Telecommunications Union, formerly Vice President, Internet and Internet Governance, AT&T
- Pierre Dandjinou, Benin, Policy Advisor, ICTD, United Nations Development Programme
- Yrjö Länsipuro, ICT and Information Society Policy Coordinator and GAC representative of the Ministry for Foreign Affairs of Finland
- Jean-Jacques Subrenat, currently Chairman of the Advisory Board of Institut Pierre Werner in Luxembourg, and formerly Ambassador in the French diplomatic service.

The PSC's members have previously included:

² <http://www.icann.org/en/minutes/minutes-04dec05.htm#psc>

- Dr. Vint Cerf, Vice President and Chief Internet Evangelist, Google
- Steve Goldstein, formerly of the National Science Foundation, United States
- Ambassador Janis Karklins, Latvia
- Adama Samassékou, President of the African Academy of Languages, formerly Minister of Education, Mali and government spokesman, Mali.
- Art Coviello, Executive Vice President, EMC Corporation and President, RSA
- Carl Bildt, formerly Prime Minister of Sweden, currently Minister of Foreign Affairs, Sweden
- Thomas Niles, President of the United States Council for International Business

The PSC's role is to give advice to the President and the Board on strategic issues facing ICANN. Since 2006, the PSC's focus has been on ICANN's legal status and identity, and regional presence. It has prepared reports and recommendations that have been presented to the wider community at ICANN's international public meetings.

Since its inception in 2006, the PSC has played an important role in ICANN's strategic planning process. The PSC has now been carrying out research and analysis, consulting the community and developing recommendations on the central issues of the current document for three years. The PSC has met frequently and prepared numerous reports and recommendations which were presented to the wider community at ICANN's international public meetings. The PSC has also held several online consultations focusing on:

- ICANN's legal status and identity
- The organization's regional presence and internationalization
- Root-zone management and transparency
- Contingency planning
- Contribution to capacity development
- Participation and the role of stakeholders

In early 2006, the PSC considered and published analysis on the question of international private organizations³, developed by Under-Secretary-General for Legal Affairs and a former Legal Counsel of the United Nations, Ambassador Hans Corell. During the ICANN meeting in

³ "Educational Material to Assist ICANN in Deciding What Status The Corporation Should Aim for as A Private International Entity in Its Host Country", <http://www.icann.org/en/psc/corell-24aug06.html>

Marrakech in June 2006, the PSC began public consultations on questions including how the ICANN model could be strengthened in the context of the evolution and growth of the Internet.⁴

During the ICANN meeting in São Paulo, December 2006, the PSC presented its Draft Report⁵ and recommendations to the community for consideration and discussion.⁶

The PSC presented its Final Report⁷ in March 2007. The report included recommendations on ICANN's status and continued improved responsiveness to an evolving global environment, capacity development and participation and role of stakeholders. The Final Report was discussed at a public workshop⁸ during ICANN's Lisbon meeting in March 2007. Prior to the workshop, an online consultation⁹ was held. The PSC presented its Final Report to the Board, which accepted the report and asked the PSC to *"provide further detail on aspects arising from the recommendations and conduct in consultation with the community an evaluation and analysis of their implementation and related implications"*.¹⁰

The PSC published its Update to the Final Report¹¹ ahead of the ICANN meeting in Los Angeles, November 2007. The updated report was summarized by Paul Twomey during the Public Forum at that meeting.¹²

In ICANN's submission to the Midterm Review by the National Telecommunications and Information Administration in February 2008 of the Joint Project Agreement between ICANN and the United States government, ICANN's chairman, Peter Dengate Thrush, identified the PSC as the group to facilitate discussions with the community about issues raised regarding ICANN's transition to the private sector. The PSC was asked to outline a plan for developing such a transition framework.

⁴ June-July 2006 consultation documents and details, and full transcript and audio recordings published at <http://www.icann.org/en/announcements/psc-consultation-en.htm>

⁵ Draft Report of the President's Strategy Committee, <http://www.icann.org/psc/psc-draft-29nov06.pdf>

⁶ Full transcript of 4 December 2006 public discussions: <http://www.icann.org/meetings/saopaulo/captioning-icannpublicforumpt1-04dec06.htm>

⁷ Final Report of the President's Strategy Committee: <http://www.icann.org/psc/psc-report-final-25mar07.pdf>

⁸ March 2007 workshop transcript: <http://www.icann.org/psc/psc-transcript-19mar07.html>, audio recording: <http://media1.icann.org/ramgen/2007/psc/psc-meeting-031907.rm>

⁹ Online consultation, comments received from July 2006 to March 2007: <http://forum.icann.org/lists/psc/>

¹⁰ 30 March 2007, adopted resolutions of the ICANN Board of Directors: http://www.icann.org/en/minutes/resolutions-30mar07.htm#_Toc36876527

¹¹ Update to the Final Report of the President's Strategy Committee, <http://www.icann.org/psc/report-2007.pdf>

¹² Public forum transcript, November 2007: <http://losangeles2007.icann.org/files/losangeles/LA-PublicForum2-1NOV07.txt>

This document represents the outcome of the PSC's work through 2008. It is the PSC's proposed framework for the continuation of ICANN's work following the conclusion of the Joint Project Agreement.

4 PROCESS

The PSC has undertaken research on various options, conducted community consultations, published periodic reports, and taken specialist advice on the steps necessary for ICANN to continue to fulfill its mandate at the expiry of the JPA.

Prior to the June 2008 ICANN meeting in Paris, the PSC produced three documents for discussion as part of a public consultation titled *Improving Institutional Confidence in ICANN*:

- *Improving Institutional Confidence* (setting out the requirements of a post-JPA ICANN)
- *Transition Action Plan* (steps needed to consult the community and then implement the plan)
- *Frequently Asked Questions*¹³

These documents asked for public input on five key objectives:

- I. ICANN has to be safeguarded against capture.
- II. ICANN has to be accountable and responsive to its multi-stakeholder communities.
- III. ICANN has to meet the needs of the global Internet community of the future.
- IV. ICANN has to be a financially and operationally secure organization.
- V. ICANN has to maintain its focus on ensuring safe and stable operations relating to the unique identifiers of the Internet.

These objectives were identified by the PSC following analysis of the main areas of interest or concern raised by those responding to the National Telecommunications and Information Administration's mid-term review of the Joint Project Agreement in February 2008¹⁴. Input on the role of governments and ICANN (i.e. the role of the Governmental Advisory Committee) was also sought in the *Improving Institutional Confidence* consultations.

The PSC then set about a defined process of consultation on these documents. This has already included two online consultations and a series of face-to-face consultative meetings around the world, from June to December 2008.

¹³ <http://www.icann.org/en/jpa/iic/paris-summary.htm>

¹⁴ <http://www.ntia.doc.gov/ntiahome/domainname/jpamidtermreview.html>

Public Consultation Meetings on Improving Institutional Confidence

ICANN meeting, Paris, June 2008 Uruguay, LACNIC meeting, August 2008 Christchurch, New Zealand, APNIC meeting, August 2008 Geneva, IGF preparatory meeting, September 2008 Paris, High Level Group on Internet Governance (European Commission and member states), September 2008	Washington D.C. ICANN consultation meeting, National Press Center, 1 st October 2008 ICANN meeting, Cairo, November 2008 League of Arab States, Cairo, November 2008 Hyderabad, India, IGF meeting, December 2008
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Online Consultations on Improving Institutional Confidence

First public comment period: 16 June - 31 July 2008¹⁵

22 responses were received from a range of individuals and organizations.

Summary and analysis of comments available here: <http://www.icann.org/en/jpa/iic/first-comment-period-summary.htm>

Second public comments period: 19 September – 20 October 2008¹⁶.

14 responses were received from a range of individuals and organizations.

Summary and analysis of comments available here:

<http://www.icann.org/en/jpa/iic/second-comment-period-summary.htm>

See Appendix 1 for full lists of commenters.

¹⁵ Summary and analysis of comments available here: <http://www.icann.org/en/jpa/iic/first-comment-period-summary.htm>

¹⁶ Summary and analysis of comments available here: <http://comment.icann.org/.ee7bca7>; <http://comment.icann.org/.ee7bace>; <http://comment.icann.org/.ee7bbd1>; and <http://comment.icann.org/?14@@.ee7bbd2/1>.

5 FINDINGS AND RECOMMENDATIONS

0.1 Ten years after its founding, ICANN is widely recognized as fulfilling its original mission to coordinate, at the overall level, the global Internet’s systems of unique identifiers. ICANN has reached this position thanks to the continuous participation of the stakeholder communities that have consistently supported ICANN in achieving the development goals set out in various versions of a Memorandum of Understanding (MoU)¹⁷ with the US Government from 1998 until 2006, and in the Joint Project Agreement (JPA) since then.

0.2 The PSC was formed in December 2005, following a resolution¹⁸ by the Board at ICANN’s international public meeting in Vancouver. The ICANN community, it was noted, “could benefit from the advice of a group responsible for making observations and recommendations concerning strategic issues facing ICANN”¹⁹.

0.3 The JPA Mid-Term review process²⁰ in February 2008 further demonstrated that, by and large, the Internet community recognizes that the goals of the MoU’s and the JPA had been largely met, and supports ICANN as the multi-stakeholder, private sector-led²¹ organization responsible for the global coordination of the Internet’s unique identifier systems. The JPA Mid-Term review process also identified the remaining steps necessary to be initiated by ICANN, before the JPA expires in September 2009.

0.4 During the JPA Midterm Review, the PSC was identified²² by ICANN’s chairman as the group to facilitate discussions with the community about issues raised with respect to ICANN completing the organizational steps necessary for concluding the JPA. The PSC was asked to outline a plan for developing such a transition framework.

¹⁷ See a complete list of all versions of the MoU and the JPA under the heading “Memorandum of Understanding/Joint Project Agreement with U.S. Department of Commerce” at <http://www.icann.org/en/general/agreements.htm>

¹⁸ <http://www.icann.org/en/minutes/minutes-04dec05.htm#psc>

¹⁹ Before its 2008/2009 work focused on Improving Institutional Confidence, the PSC had produced three documents: a Draft Report during ICANN’s São Paulo meeting (Dec 06) <http://www.icann.org/psc/psc-draft-29nov06.pdf>, a Final Report and recommendations voted on by Board at ICANN’s Lisbon meeting (Mar 07) <http://www.icann.org/psc/psc-report-final-25mar07.pdf>, and an Update on Final Report released at the Los Angeles meeting (Nov 07) <http://www.icann.org/psc/report-2007.pdf>.

²⁰ Summary of review process, see: <http://www.icann.org/jpa/index.htm#submission>

²¹ Since the inception of ICANN, “private-sector led”, as distinct from “public-sector led”, means that ICANN is not led by governments or their public authorities, nor by an international treaty organization

²² “Address by ICANN Chairman to Public Meeting on the Midterm Review of the JPA”: <http://www.icann.org/en/jpa/chairman-address.html>

0.5 From earlier consultations by the PSC and the responses to the mid-term review of the Joint Project Agreement (JPA) between the United States Department of Commerce (National Telecommunications and Information Administration) and ICANN²³, the PSC identified the key areas of concern raised in the global Internet community. While suggesting possible measures to address these areas, the PSC has also asked members of the global Internet community for their advice during a series of consultations, both online and at meetings in various parts of the world. The PSC is very grateful for the global community input upon which it has been able to draw.

0.6 This paper outlines the key areas and recommends to the ICANN Board a plan to address them. This paper has been prepared on the basis of previous versions of the Transition Action Plan and Improving Institutional Confidence documents²⁴, and using the public comments received.

0.7 ICANN shall continue to be the secure, global coordinator of the Internet's unique identifier system. It shall continue to operate as a multi-stakeholder organization, in which the private sector²⁵ plays a leadership role, with informed participation by a wide and diverse stakeholder community including governments providing support and advice. This will allow the Internet to expand its reach and scope, ultimately to serve all the people of the world.

0.8 Of the concerns raised by respondents in the Midterm Review process conducted by the National Telecommunications and Information Administration, and during ICANN's consultations on Improving Institutional Confidence, the following principles are directly related to the prospect of ICANN's transition:

- I. ICANN has to be safeguarded against capture.
- II. ICANN has to be accountable and responsive to its multi-stakeholder communities.
- III. ICANN has to meet the needs of the global Internet community of the future.
- IV. ICANN has to be a financially and operationally secure organization.
- V. ICANN has to maintain its focus on ensuring safe and stable operations relating to the unique identifiers of the Internet.

²³ Notice of Inquiry published at <http://www.ntia.doc.gov/ntiahome/domainname/jpamidtermreview.html>

²⁴ <http://www.icann.org/en/jpa/iic/>

²⁵ Since the inception of ICANN, "private-sector led", as distinct from "public-sector led" means that ICANN is not led by governments or their public authorities, nor by an international treaty organization.

0.9 The public responses suggested ICANN continue to make progress in several operational areas, including increasing accountability and transparency, strengthening contractual compliance, encouraging competition and streamlining policy processes.

0.10 The PSC also recognizes the very clear message that ICANN needs to strengthen its relationships with all communities and constituencies that ten years ago were still growing in their dependence on the Internet. This applies especially to the business community with its growing reliance on the Internet as an “operating system” and an economic driver, but also to non-commercial Internet users at large.

0.11 These issues can be improved immediately through better outreach, both at ICANN meetings and outside them. A long-term solution can be found in the improvement of ICANN’s participation mechanisms as a whole so that all stakeholders, including business entities without a contractual relationship with ICANN, may engage fully in ICANN policy processes.

Detailed Proposals to Address the Key Areas

1. Safeguarding Against Capture

Capture by any party, whether a government, an international organization, a business or any other entity, must be discouraged and, if attempted, prevented. Safeguards against capture by any entity should prevent both external and internal capture, and apply to ICANN as an organization and to its processes. The PSC notes ICANN's existing Accountability Frameworks and Management Operating Principles²⁶ and considers these a strong protection against capture.

RECOMMENDATION 1.1

Safeguards must address all types of capture.

1.1 Broad participation and engagement on issues reduces the risk of capture. Public outreach by all ICANN structures should ensure that voices of all stakeholders - even those not directly engaged in ICANN - are heard. It is essential to maintain the fully multi-stakeholder nature of ICANN's processes in order to achieve true consensus and to engage the whole community in the pursuit of the common interest of all users of the Internet. The in-depth interaction between the component parts of ICANN must be encouraged as early as possible and throughout the ICANN processes in order to create better awareness and understanding of underlying issuers and drivers.

1.2 Deepening and strengthening participation and appropriate support of all Supporting Organizations and Advisory Committees will strengthen the safeguards against capture.

1.3 The Governmental Advisory Committee (GAC), under ICANN's bylaws and the GAC's operating principles, is an effective mechanism for forestalling or averting capture by any government or group of governments. The present GAC working methods ensure that no single government dominates the GAC. The bylaw provisions for communications from the GAC to the Board, and for special consideration of GAC input, provide a strong voice for governments within ICANN, while not leaving the ICANN decision-making process vulnerable to final capture by governments.

²⁶ <http://www.icann.org/en/transparency/>

1.4 Active participation by governments as GAC members provides a further protection against capture. The GAC, in its input to the consultation on Improving Institutional Confidence, said the GAC should “engage in further discussion with the Board and other constituencies with a view towards its (the GAC’s) evolution into a more efficient, responsive and well-equipped organization, capable to advise the Board on the public policy aspects of the issues falling within ICANN’s mission and to more fully interact and work together with other constituencies within ICANN”.²⁷

1.5 The Bylaws provide a balanced role for the GAC, under which the GAC cannot capture ICANN. The following specific recommendations are proposed to strengthen the GAC and make it more difficult to capture. Further recommendations regarding the GAC are also listed below in recommendations 1.13, 2.3 and 2.4.3.

RECOMMENDATION 1.6

Strengthen participation in the Governmental Advisory Committee to avoid capture:

- 1.6.1 Provide simultaneous interpretation in official UN languages as needed for GAC meetings
- 1.6.2 Hold a scheduled meeting or workshop of the Board at least once a year in a city where all or most governments have representation, e.g. New York or Geneva.
- 1.6.3 Provide a travel support programme for a GAC representative from each of the United Nations list of 50 Least Developed Countries (LDCs).¹

1.7 The White Paper²⁸, ICANN’s Bylaws and other basic documents already contain procedures and structural safeguards to ensure ICANN’s fairness and its protection against capture by groups with narrow representation or a single stakeholder grouping. These safeguards are very effective in protecting against capture and have been proven over ten years of ICANN’s operation.

1.8 Consensus or super-majority requirements will continue to be the main device to protect against capture by a self-interested group. ICANN also needs to avoid ‘apathetic’ capture, a scenario in which participation by certain groups may decline, leaving more power

²⁷ Letter from Government Advisory Committee Chairman, Ambassador Janis Karklins, to Peter Dengate Thrush, Chairman of ICANN Board of Directors, 22 December, 2008:

<http://comment.icann.org/?233@@.ee7bca7/11!enclosure=.ee7bf80>

²⁸ <http://www.icann.org/en/general/white-paper-05jun98.htm>

within the organization to narrow interests. To prevent this, large and diverse interest groups need to be maintained within the Supporting Organization and Advisory Committee structures.

1.9 ICANN's current funding is highly dependent on registries and registrars. This situation comprises a potential risk as a single source of funding.

1.10 Anti-trust and competition laws are a fundamental protection against capture.

ICANN needs to remain in jurisdictions that have strong anti-trust laws so that there is recourse to continued and comprehensive legal overview of decisions made, to ensure they are not biased or preferential to any particular group or organization.

1.11 ICANN manages its relationships with the registries, registrars and other stakeholders in the unique identifier system by agreements. It is very important to maintain certainty about the contractual and agreement frameworks.

RECOMMENDATION 1.11

Maintain presences in jurisdictions with strong anti-trust and competition law.

1.11.1 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.

1.12 Voting rights and representational participation in the constituencies are a main area for influence and a possible opportunity for capture. However, many participants have interests and experience in more than one supporting organization or advisory committee; this diversity of experience should be preserved by allowing participation, but not voting, in more than one component part of ICANN.

1.13 ICANN needs to maintain and strengthen transparency about the participants' interests in the Advisory Committees and Supporting Organizations. Rules for cross-participation in Councils and constituencies by single or related entities should be clarified. Statements to clearly identify potential conflicts of interest should be required from participants according to guidelines.

RECOMMENDATION 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 Nominating Committee, Advisory Committees and Supporting organizations.
- 1.13.2 Develop clear guidance for Nominating Committee, Supporting Organizations and Advisory Committees on disclosing and handling conflicts.
- 1.13.3 Enhance existing conflict and other rules for the Nominating Committee in order to ensure the appointment of independent directors.
- 1.13.4 Create a framework which allows cross-participation in supporting organizations, advisory groups and/or constituencies, but which prohibits and considers sanctions for voting by the same individual or organization in more than one ICANN entity.

1.14 While not being critical of actual staff performance, the Committee notes that another possibility for capture is by inappropriate or inadequate staff conduct. The PSC notes ICANN's existing Accountability Frameworks and Management Operating Principles²⁹ and considers these a protection against capture. ICANN staff should continue to provide, in the interests of the organization and its mission and values; frank, honest, comprehensive, accurate and timely advice to ICANN decision makers, and deliver service to the component parts of ICANN, fairly, effectively, impartially and courteously.

RECOMMENDATION 1.14

Safeguard against capture by inappropriate or inadequate staff 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.

1.15 ICANN's principles and practices on Transparency and Accountability³⁰ are themselves a protection against capture. In addition to continuing this work, adherence to best corporate practice is a further safeguard.

²⁹ <http://www.icann.org/en/transparency/>

³⁰ Finalized and implemented, January 2008: <http://www.icann.org/transparency/acct-trans-frameworks-principles-10jan08.pdf>

2. Accountability to the Multi-Stakeholder Community

2.1 While the Board has final decision-making responsibility, its legitimacy directly derives from the degree to which its decisions reflect consensus articulated by the community, as well as from the perceived certainty of decision-making processes and the balance of their outcomes. Respect for due process at every stage of policy development processes, including due consideration of GAC's advice on matters of public policy, lies at the very core of ICANN's legitimacy as a multi-stakeholder organization. It is the primary basis for institutional confidence and the strongest guarantee of ICANN's independence.

2.2 The mechanisms by which the Board receives public policy advice from the GAC, and other interactions with the GAC, should be made more effective in accordance with ICANN's obligation to "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 the public policy aspects of the technical coordination of the Internet"³¹.

2.3 The PSC recognizes the interest of the GAC to engage in discussions with the Board and other parts of ICANN to help it evolve into a more efficient, responsive and well equipped organization, capable to advise the Board on the public policy aspects of the issues falling within ICANN's mission and to more fully interact and work together with other constituencies within ICANN.

RECOMMENDATION 2.3

ICANN and the GAC shall set up a joint mechanism to review performance of the ICANN Board's Affirmation, annex A, paragraph 7 of the JPA: "Role of Governments: 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 the public policy aspects of the technical coordination of the Internet."

2.4 Public input on ICANN's policy proposals and decisions needs to be carefully considered and a comprehensive analysis and synthesis provided. This analysis is crucial to the community's understanding of how comments were considered and how they had an impact on shaping decisions. In conducting consultations, it should be made clear at every stage how public comments are to be considered and taken into account in the development of the next version

³¹ JPA, Annex A, "Affirmation of Responsibilities for ICANN's Private Sector Management", <http://www.icann.org/general/JPA-29sep06.pdf>

of the document. Reasons should be given when certain stakeholder views have not been accepted.

RECOMMENDATION 2.4

- 2.4.1 ICANN shall enhance its public consultation process, including strengthening the steps of providing detailed analysis of all comments received, acknowledging, synthesizing, and implementing them in decision-making as appropriate, and explaining the decision.
- 2.4.2 Formally declared advice or statements of principles by the GAC shall be formally responded to and made publicly available.
- 2.4.3 The GAC should work through a process to determine what constitutes formal advice to the Board of Directors (as referenced in Article 11, section 2, paragraph 1(j) of the ICANN Bylaws: *“The Governmental Advisory Committee may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.”*¹).

2.5. Accountability builds on transparency, which has clearly improved in recent years. However, there is stillroom for improvement on transparency, particularly in the documentation of decision-making processes. Efforts to increase transparency should not lead to information overload, frustrating the efforts of the community to follow and effectively contribute to processes. Documents need to be easily understood even by those not closely involved, and should be released in time before the meetings so that participants can examine them and carry out internal consultations as appropriate.

RECOMMENDATION 2.5

Make consultation documents easily accessible and understandable.

- 2.5.1 Executive summaries shall be attached to all substantive documents.
- 2.5.2 Standardized formatting and timelines shall be used for dealing with all published documents.

2.6 In 2007, ICANN’s Board approved a set of Frameworks and Principles on Accountability and Transparency that outline the organization’s existing legal and corporate responsibilities. 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.” The reviews of all ICANN structures and of the three aforementioned functions should continue. ICANN should keep the Transparency and Accountability Frameworks kept up to date, abide by the principles and be regularly reviewed against them by an independent party.

2.7 ICANN has a three-part dispute resolution process that includes the Board Reconsideration Committee, the Independent Review Panel, and the Ombudsman.

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 below.

2.8 The PSC believes that two new mechanisms set forth below, directed to improving accountability to the ICANN community, should be adopted.

2.8.1 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 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 the awareness that 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.

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.

2.8.2 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.

2.9 Second, if the Board does not change its decision after the re-examination mechanism has been invoked, 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. 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 comparable organizations.

RECOMMENDATION 2.9

Establish an extraordinary mechanism for the community to remove and replace the Board in special circumstances.

2.10. Dissolving the Board might further destabilize ICANN in an already difficult situation. In formulating the operation of this mechanism, additional provisions would be needed to guarantee continuity of operations if the dissolution procedure is used.

2.11 In addition, 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 entities³². These laws explicitly permit oversight of criminal actions by the California court system and the California Attorney General. In recent years California’s Attorney General has been very active in non-profit reform measures³³.

³² http://www.ss.ca.gov/business/corp/corp_artsnpinf.htm

³³ <http://www.charitynavigator.org/index.cfm/bay/content.view/catid/38/cpid /191.htm>

3. Meeting the Needs of the Global Internet Community of the Future (Internationalization)

3.1. Today, the Internet reaches more than 1.5 billion users³⁴. The next billions will mostly come from those regions of the world where the Internet penetration rates are still comparatively low: Africa, Latin America, Asia and Eastern Europe.

3.2. ICANN acts in a global role as the trusted steward of the stable and secure operation of the Internet's system of unique identifiers, giving the opportunity for effective participation to all stakeholders from all countries in ICANN's processes.

3.3. ICANN is already addressing some of these challenges. Its bylaws establish geographical diversity for the composition of its board and other structures. As ICANN has expanded its staff, it has taken steps to ensure and increase its global diversity. Translation and interpretation services are being expanded. ICANN is also on the verge of introducing internationalized domain names.

RECOMMENDATION 3.3

Produce a review of translation and interpretation policies and expenditure to assess the need for further improvements.

3.4 ICANN's offices in different geographical locations are an important contribution to outreach and communication. ICANN presently has its head office in Marina del Rey California, an office Washington DC, and hub offices, servicing time zones, in Brussels, Belgium and Sydney, Australia (the hub offices are "registered overseas business" offices). Further, ICANN has small regional relations manager presences in the Middle East, Africa, the Pacific Islands, the Caribbean and Latin America. Priority should be given to the establishment of presences, or where justified, offices in regions of the world where Internet penetration is growing rapidly, in particular south, central and northern Asia and further in Africa.

RECOMMENDATION 3.4

Continue to improve 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

³⁴ <http://www.internetworldstats.com/stats.htm>, last checked: 21 February, 2009.

establishment in south, central and northern Asia and further in Africa.

3.5 The PSC has investigated a number of areas in which an additional international non-profit legal presence, in contrast to registered overseas business status, might improve ICANN's efficiency. The comparative structure evaluation has been focused around reviews of different national legal regimes relating to the following areas:

- (a) specific legislation applicable to reorganization;
- (b) parent-subsidiary issues;
- (c) labour costs
- (d) tax advantages;
- (e) "best practices" corporate governance rules; and
- (f) national legislation allowing some privileges, balanced against ICANN remaining accountable to its community (i.e. not immunity from legal actions, but privileges in selection of personnel and terms of engagement in some circumstances).

3.6 A key recommendation is that ICANN will continue to maintain its current headquarters and maintain an operational presence in California, regardless of any change in its corporate organizational structure. While ICANN is also likely to maintain or expand its presence, through branch offices or otherwise, elsewhere in the world, legal research indicated that maintaining a United States headquarters would be permitted in a number of key jurisdictions, including Belgium and Switzerland. Other jurisdictions were excluded where they would not permit this relationship to exist.

RECOMMENDATION 3.6

Maintain ICANN's current headquarters and operational presence in California, regardless of any change in its corporate organizational structure.

3.7 In opening an additional legal international not for profit presence overseas, consideration needs to be given to the requirements of maintaining the current US tax status enjoyed by ICANN.

3.8 The benefits of establishing an additional legal international not for profit presence overseas include:

- 3.8.1 Improved recognition of ICANN’s international status in the perceptions of some entities, governments and organizations, including in relation to formalizing agreements such as international governmental organization applications for top level domains and some potential IDN ccTLD accountability frameworks;
 - 3.8.2 Improved access for some members of the international ICANN community;
 - 3.8.3 Working visa and immigration arrangements for staff from some parts of the world; and,
 - 3.8.4 Improved health care and other benefits for staff from some parts of the world.
- 3.9 In order to further strengthen ICANN’s multi-stakeholder model on a world-wide scale, to underline the element of global public trust that is a key element of its mission, and to gain universal acceptance of its technical coordination role, ICANN should investigate the issues involved in the establishment of an additional legal presence in a jurisdiction where it would be granted the status of an international, not-for-profit, non-governmental organization. At the same time, the corporate headquarters and operations would remain in the United States.³⁵

RECOMMENDATION 3.9

For the purposes of information gathering, hold initial discussions with authorities in selected jurisdictions that recognize international not-for-profit organization status to determine whether such jurisdictions would offer a status that would confer the advantages described above. Only after such fact gathering is completed should ICANN consider establishing an additional subsidiary legal presence as an international non-governmental entity whose corporate headquarters remain in the United States. Any proposal would be subject to full public consultation.

4. Financial and Operational Security

4.1. ICANN must continue to be financially and operationally secure. The Strategic, Operating and Budget planning processes, including measures such as the current Investment Policy³⁶, provide confidence that ICANN is a stable and well functioning organization. The ICANN Board has recently created a new committee focusing on risk assessment, which is a further mechanism to enhance financial and operational security. In addition, the PSC notes there is

³⁵ For more detail on this issue, please consult Appendix 2 to the current document: “INTERNATIONALIZATION OF ICANN – MEETING THE NEEDS OF THE GLOBAL INTERNET COMMUNITY OF THE FUTURE”.

³⁶ ICANN’s Investment Policy is published here: <http://www.icann.org/en/financials/icann-investment-policy-nov2007.htm>

continued focus on audit and spending controls, performance measuring metrics and new policies on investment and proper management of foreign exchange risk. The current detailed, results-based and transparent budgeting process also provides security.

4.2. These processes should be maintained and enhanced.

4.3 We recognize that institutional confidence is enhanced by disclosure of financial information in a timely and comprehensible manner. Systematic disclosure on the allocation and spending of resources shall be continued and enhanced.

RECOMMENDATION 4.3

Maintain and enhance detailed, results-based and transparent planning and reporting processes.

4.3.1 Continue to 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.

4.4. In view of the rapid widening of ICANN's revenue base due to the expansion of the Internet, and notwithstanding the possible effects of the present economic recession, consideration should be given to the management of ICANN's future revenue growth in line with ICANN's not-for-profit status and its core mission and mandate. Broad community discussion on possible uses of any surplus is needed.

4.5. Safeguards might be needed to ensure that the policy making process does not favour revenue-generating options above those that reflect the broader public interest and community consensus on what is needed for ICANN's technical coordination role.

4.6. ICANN's current funding is highly dependent on fees derived from gTLD registrants, which comprises a potential risk.

RECOMMENDATION 4.6

Consideration how to manage ICANN's future revenue growth in line with ICANN's not-for-profit status and its core mission and mandate.

4.6.1 Include a public discussion and comment period on any surplus as part of the FY10

draft Operating Plan and Budget consultations.

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.

4.7. In view of ICANN's security and stability role, its operations should be based in stable environments with a strong history of freedom of expression and legal structures that favour competition and private sector leadership.

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

5.1. ICANN should remain focused on its core mission which includes the security and stability of the Internet's unique identifiers and which is fundamental and critical to the secure and stable operation of the Internet.

5.2. Concern about the Internet's vulnerability is growing worldwide due to the increase of incidents and attacks targeting the DNS, some of which exploit existing flaws in the Internet's main protocols. In addition, there are security concerns involving IP addresses and autonomous numbers. Consistent with its core values, ICANN should increase its attention to issues of the security and stability of the naming and addressing systems that fall within its existing mandate, and emphasize them further in its strategic and operational planning.

5.3 ICANN has a responsibility to be a discussion leader and to raise awareness of issues linked to stability and security of the Internet. Greater interaction between ICANN and the main bodies responsible for generating security-related standards and protocols would be valuable in providing for a more integrated approach at the global level.

RECOMMENDATION 5.3

ICANN should be a discussion leader and raise awareness of issues linked to stability and security of the Internet

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.

5.3.2 ICANN's strategic and operational planning should involve the organization in interaction with key organizations responsible for security related protocols and standards.

5.4 The current IANA functions work well, but many members of the community believe that they can be improved and that more effective and efficient operation of the IANA function is needed to maintain confidence in a coordinated, not controlled, Internet addressing system.

5.5 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. That process suggested improvements to streamline the IANA function and is presently subject to discussion between ICANN and the United States Department of Commerce. The PSC welcomes the National Telecommunications and Information Administration's 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"³⁷.

5.6 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. The automation of these processes reduces the capacity for human error and will increase confidence in the process as objective and efficient.

5.7 The PSC understands that ICANN, VeriSign and NTIA are already engaged in discussions about automation and that these are proceeding.

RECOMMENDATION 5.7

ICANN shall pursue operational efficiency measures under the IANA procurement agreement with the United States Department of Commerce.

6. The Role of Governments

6.1 The PSC welcomes the readiness of the GAC to engage in discussions with the Board and other parts of ICANN to help it evolve into a more efficient, responsive and well equipped organization, capable to advise the Board on the public policy aspects of the issues falling within ICANN's mission and to more fully interact and work together with other constituencies within ICANN.

³⁷ Letter from Meredith A. Baker, Acting Assistant Secretary for Communications and Information, United States Department of Commerce National Telecommunications and Information Administration, to Peter Dengate Thrush, 30 July, 2008, <http://forum.icann.org/lists/iic-consultation/pdfcaAKNdcNVx.pdf>

Please see RECOMMENDATIONS 1.6, 1.13, 2.3 and 2.4.3 above regarding the GAC and overall accountability to the multi-stakeholder community.

APPENDIX 1 PUBLIC INPUT ON IMPROVING INSTITUTIONAL CONFIDENCE

1st public comments period: 16 June - 31 July 2008

22 responses were received from a range of individuals and organizations:

- AMGlobal Consulting,
- AT&T
- Bertrand de la Chapelle, Special Representative to the French government
- Christopher Martin, United States Council for International Business (USCIB)
- Evan Leibovitch, North America Regional At Large Organization (NARALO)
- ETNO: European Telecommunications Network Operators' Association
- Fernando G. Guerrero, CEO, SolidQ.com
- Frederic Riehl, Director of International Relations, Federal Department of the Environment, Transport, Energy and Communication, Switzerland
- George Kirikos
- George Sadowsky
- International Chamber of Commerce
- Internet Society
- Jaser Elmorsy, CEO, Bluebridge Technologies
- Jonathan Zuck, President, Association of Competitive Technology (ACT)
- Meredith A. Baker, Acting Assistant Secretary for Communications and Information, United States Department of Commerce, National Telecommunications and Information Administration
- Michael K Kirk, Executive Director, American Intellectual Property Law Association (AIPLA)
- Mike Sax
- Michael Setton, CEO, Cyberfab
- Mathieu Weill, General Manager, AFNIC
- Robert C. Hutchinson, Internet Product Architect
- Steve Delbianco, Net Choice Coalition
- Steve Metalitz, Counsel, Coalition for Online Accountability (COA)
- Vittorio Bertola, ISOC Italy

Summary and analysis of comments available here: <http://www.icann.org/en/jpa/iic/first-comment-period-summary.htm>

2nd public comments period: 19 September – 20 October 2008

13 responses were received from a range of individuals and organizations:

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

Summary and analysis of comments available here: <http://www.icann.org/en/jpa/iic/second-comment-period-summary.htm>

Information about 2009 developments on Improving Institutional Confidence is available here:

<http://www.icann.org/en/jpa/iic/index.htm>

APPENDIX 2 INTERNATIONALIZATION OF ICANN – MEETING THE NEEDS OF THE GLOBAL INTERNET COMMUNITY OF THE FUTURE

Input paper considered by the PSC in coming to its recommendations

Memorandum to the President’s Strategy Committee

Date: 25 February 2009
From: John O. Jeffrey
General Counsel and Secretary
ICANN



EXECUTIVE SUMMARY

ICANN recently passed its tenth anniversary in serving a global community while set up solely as a California-based non-profit corporation. Throughout ICANN's history questions have been raised about how ICANN could be improved and could further its international presence. Over recent years, ICANN has added affiliated corporate offices in Belgium and Australia and established a global partnerships function with representatives in many other regions of the world. In an effort to further improve ICANN's effectiveness the President's Strategy Committee (PSC) has reviewed ICANN and sought to consider additional ways to internationalize ICANN and further improve its mechanisms for global, multi-stakeholder bottom up coordination of the Internet's system of unique identifiers. Following on from this review, PSC asked ICANN General Counsel's office to research the potential benefits of establishing an additional legal presence in a jurisdiction where ICANN can be recognized from more than one jurisdiction, as an international, not-for-profit, non-governmental organization. Part of this work included mapping out the primary functions of ICANN and how those functions may be impacted or improved by expanding ICANN's jurisdictional presence.

Initial research indicates that although not required for ICANN to continue to perform its core role, ICANN's functions might be further enhanced through an expanded international presence. After an extensive review, as outlined in this memorandum, Switzerland and Belgium were both identified as offering forms of international not-for-profit organizational structures that may enhance ICANN's needs. Although further research is required prior to staff preparing a final recommendation on how to proceed, PSC should consider recommending to the Board additional consideration of this matter.

STAFF RECOMMENDATION

The Staff recommendation relating to this review is that the PSC consider recommending that the ICANN Board authorize staff to proceed with further research and into and consultation on (1) the benefits and potential liabilities to enhancing ICANN's global presence and efficacy through forming a subsidiary organization in either Switzerland or Belgium and (2) ICANN's ability to form a subsidiary organization in either jurisdiction.

DETAILED ANALYSIS

Introduction and Background

Initial research indicates that although not required for ICANN to continue to perform its core role, ICANN's functions might be further enhanced through an expanded international presence. After the detailed review of ICANN's functions it is believed that an additional presence beyond the parent entity in the United States might provide additional operational, perceptual, and political benefits toward the fulfilment of its global mandate.

Foundationally, any business entity must operate under the laws of the jurisdiction under which it is incorporated. Therefore, any review of the potential to enhance ICANN's global presence and create efficiencies in ICANN's internal administrative functions must account not only for the benefits (or detractors) to ICANN for moving those singular operational functions, in whole or in part, outside of the United States, but also must carefully examine the potential limitations imposed under the laws of the target jurisdiction.

Some of the main challenges ICANN currently faces under its current form, which might be enhanced by an international presence by ICANN are:

- The perceptual lack of recognition by some of a US-based not-for-profit organizations to function as a truly international organization, and hence;

potential resistance from various relevant governments, IGOs and NGOs to form direct relationships with ICANN;

- Perceptions by some parties outside of the US and resulting hesitance to participate in ICANN's policy setting and coordination functions for fear of becoming subjected to California law and jurisdiction, and becoming subject to Californian or US federal litigation;
- Impediment and delay of contracting negotiations with some parties fearing entering into contractual arrangements with a California public-benefit non-profit corporation and the concerns that such contracting party would need to avail themselves of California law or be faced with the application of law on them for entering into an agreement with a California-based entity;
- The difficulties posed to Internet organizations in various countries wishing to enter into agreements and participation with ICANN where their home country political situation reflects tensions or potential tensions with the United States; and
- The application of US sanctions and immigration laws.

Many of the challenges are interconnected, and it is believed that the creation of a related party entity outside of the US might assist ICANN in achieving a more recognized international status. While the achievement of a more international status is not likely to significantly reduce some of the challenges, it might move the discussion away from ICANN's US presence as an explanation for more complicated issues.

Demonstrations of the Current Issues and Limitations on ICANN's Operations.

US Sanctions Laws

In the operation of the IANA function, ICANN has to conform with US sanctions laws as they apply to countries, institutions and individuals. While all countries have sanctions laws (at minimum to implement particular decisions of the UN Security Council), the US, with its unique role in the international system, has a more extensive range of sanctions in application than many countries.

Immigration and Employment/Human Resource Challenges

ICANN must have the ability to recruit a diverse range of employees and to be able to organize visas with multiple entry capacity to assure access to ICANN offices. ICANN has not undertaken a detailed study of these impacts but there is evidence that this has had an impact on ICANN's operations. While every country poses immigration rules, in the wake of September 11, 2001, the US has made entry and exit requirements stricter, and has particularly stringent requirements for citizens of some developing countries. Recruiting staff from other countries has resulted in significant delays, often because of the limited number of H1B1 visas issued by the United States each year. Indeed, ICANN has likely lost the opportunity to hire candidates because of the perceived and actual difficulties of obtaining visas for entry into the US. ICANN has also spent significant legal fees and has lost productive staffing hours, on an administrative and functions standpoint, while dealing with these issues during ICANN's existence.

While ICANN will maintain its corporate and operational headquarters in the US, establishing a significant presence in a separate jurisdiction could assist ICANN in the facilitation of diversified hiring by allowing ICANN to avail itself of the visa and immigration requirements of the target jurisdiction. This could create enhanced opportunities for hiring of those that we currently have issues bringing into the US, and allow them the ability to work at an ICANN office as required.

Having a significant presence in a separate jurisdiction will also assist ICANN in maintaining employees within – or closer to – the regions where they work, which increases the public perception of ICANN as an international organization. This could also assist in recruiting.

Other immigration concerns.

The US immigration/visa issue also impacts the ability of members of the ICANN community to visit ICANN's offices and attend events in the United States. Over the last

6 years, ICANN management has received a number of complaints from people regarding difficulties or inability to obtain visas to visit the US for meetings with ICANN staff. Some have reported that they simply don't bother applying for US visas.

In fulfilling its global mandate, ICANN will never be able to fully avoid visa/entry issues for every future ICANN office or meeting location, but has the opportunity to select a target jurisdiction with different and potentially less stringent laws than those in the US.

Lack of Recognition of US-Based Not-for-Profit Organizations to Function as Truly International Organizations.

There exists a distinction in worldviews regarding the ability of a US non-profit organization to be recognized as a truly international organization. In countries following the common law, ICANN's work to create a globally focused and accountable servant of the Internet community allows ICANN to gain easy acceptance as an international non-profit organization. These countries look beyond the place of organization to instead define the international focus of an organization on the breadth of its activities.

Other countries do not afford core legitimacy to the international reach of ICANN or other US non-profits solely based on the international breadth of activities. Particularly in countries with a Civil Code system, such as countries in Central Europe, Eastern Europe, and Latin America, there is a belief that the scope and the legitimacy of an organization is defined narrowly by the founding legal instrument, normally the head of state power or law under which the institution was founded. Some civil society and governmental representatives in those countries (and others) do not accept the proposition that ICANN is an international non-profit organization, but instead see it as a Californian corporation. To that end, ICANN's executives and the President's Strategy Committee have been counselled by some respondents to find a way to include the word "international" into the supporting legal structure of ICANN.

This question of international legitimacy arising from ICANN's status as a California-based non-profit also impacts ICANN's ability to enter into discussions and form direct relationships with IGOs, NGOs and other International Organizations that answer to constituencies with these legitimacy concerns. ICANN continues to learn of this resistance through public comments and discussions at other fora, including discussion surrounding, and following, the World Summit on the Information Society (WSIS).

Impediments to ICANN's Contracting Abilities.

Apart from the doubts in some quarters about ICANN's legitimacy in calling itself 'international' as a result of its foundational legal framework issues, ICANN's current US corporate status impedes ICANN's ability to enter into arrangements with some stakeholders outside of the US. In a number of significant contracts, including contracts for registry services, ICANN has entered into discussions that have been significantly delayed by the other party's fear of entering into contractual arrangements with a California public-benefit non-profit corporation and the concerns that such contracting party would need to avail themselves of California law or be faced with the application of California/US law on them for entering into an agreement with a California-based entity.³⁸

In addition to the fear of being subjected to the American legal system, the challenges to contracting also arise from the core legitimacy issue addressed at Section 0 above. Some stakeholders are hesitant to enter into arrangements and agreements with an entity founded under the California Corporations Code for functions that the stakeholder's home community believes should rest in an internationally founded organization.

³⁸ ICANN typically requires contracting parties to agree to submit any contractual disputes to a court in California and have those disputes determined under California law. ICANN has also met with resistance even when offering international arbitration as a means of dispute resolution perhaps indicating that the issues run beyond the specifically stated concerns or rationale in some instances.

The fear of being subjected to the American legal system also chills participation in ICANN's policy setting and coordination functions, even for those Stakeholders for whom no contract or agreement is necessary. As an example, during discussions related to the formation of ICANN's ccNSO and during other discussions surrounding ICANN's At-Large Advisory Committee (ALAC), it has been cited that some parties are concerned about being involved with ICANN for fear of becoming subjected to California law and jurisdiction.

Summary of PSC's Process to Date

The PSC asked ICANN Staff to perform research on how ICANN may address these issues and improve the efficiencies in performing ICANN's functions. The following items of research were delivered:

- A functions chart mapping the primary functions performed by the organization and supporting documents identifying the functions most impacted or improved by changes to the organizational structure;
- An initial review of the emerging area of international non-profit law and an evaluation of jurisdictions that may support the formation of an international organization; and
- An initial charting of the potential organizational and legal hurdles requiring further research and evaluation prior to the creation of an additional entity.

Review of ICANN's Current Functions

To assist in a review of how ICANN's organization could be restructured to allow for increased efficiencies in fulfilling ICANN's functions, ICANN Staff prepared documentation classifying ICANN's functions into three categories: (1) functions that must remain in the US; (2) functions that could be facilitated by transferring some responsibility to a subsidiary entity outside of the US; and (3) functions that could easily be transitioned to a subsidiary entity.³⁹ Summaries of those categories are as follows:

³⁹ Appendix A, a list of functions or management roles, was included in the materials for the PSC meeting on 5 February 2009. A more thorough discussion can be found there.

Functions that must remain in the US

The following functions representative of those that should remain under the operation and control of ICANN and should not be transitioned to or performed by subsidiary or related entity:

- Corporate Legal Compliance Issues such as: Taxation, US Non-Profit Taxation Compliance, US based payroll and human resource taxation, US corporate filings, US litigation defense and management, review of competition issues, US based contractual compliance, and document preservation requirements;
- Website maintenance;
- Security and stability coordination;
- Board of Directors activities, including: meetings, workshops, trainings, implementation of conflict of interest policies, committee governance and decision process support;
- Policy structure organization and support for supporting organizations and advisory committees, stakeholder participation, etc.;
- Organizational administration of ICANN;
- Human resources for US-based employees of ICANN;
- Certain contracts, such as: DNS structure relationships, legacy gTLDs and sTLDs, and Registrar issues (including secondary marketplace issues, registrant protection and contractual compliance);
- IANA functions;
- Operation of the L Root;
- Root Server relationships; and
- Management of relationship with US Government, including the Joint Project Agreement.

Functions that might be enhanced through a subsidiary or a related entity

The following are functions that potentially could be evaluated for sharing between ICANN and a related subsidiary entity, after assuring proper coordination:

- Facilitation of payroll and human resource compliance for non-US based employees, particularly if shared employment is possible;

- Coordination of defence of non-US litigation, assuring that no competing positions or conflicts arise between the new entity and US ICANN;
- Enforcement of non-US contracts and resort to non-US arbitral forums;
- Facilitation of public participation and maintenance of ICANN's transparent process;
- Organization of Public and Regional Meetings;
- Communications functions assistance, to enhance relations with non-US businesses/entities and operations and non-US stakeholder relations;
- Policy development and support of advisory and sponsoring organizations such as ccNSO, GAC, and ALAC, if legal research determines that policy development can be coordinated with US ICANN policy process and support mechanisms;
- Policy implementation;
- Oversight of non-US human resource needs, such as healthcare, pensions, etc;
- Recruiting;
- Coordination of certain contracts, such as: registry agreements (particularly for new gTLDs), independent and third party contractors, management and employee contracts, and technology and licensing contracts;
- ccTLDs and IDN ccTLDs;
- Registrar issues, such as: oversight of existing registrar relations, registrar application processing and possibly entering into registrar agreements; and
- GAC operation.

Functions that might be performed by subsidiary or related entity outside of ICANN

The following functions could be evaluated to be transferred to an outside entity and might be performed more efficiently in a related international entity rather than under ICANN's current US form:

- Global relationships and regional liaison coordination, so long as this work continues in a fashion consistent with US ICANN's core values;
- Interpretation and translation services;
- TLDs with non-US governments and IGOs;

- Accountability Frameworks and Exchange of Letters for ccTLDs;
- Advocating to and providing advice to interested Governments; and
- Entering into Global Partnership arrangements with Governments.

For each of the functions that could be enhanced by the efforts of a non-US entity or could be transitioned to a non-US entity, research still needs to be done to determine a variety of legal issues, such as whether the transition of functions will compromise US ICANN's responsibilities, whether local laws assist in the perpetuation of the functions, and also how to operationally assure that all actions are taken consistent with ICANN's core values and mission. More of these issues are identified 0 below.

Summary of legal research presented

The research towards finding an international solution for ICANN started with two basic assumptions: (1) ICANN will be benefited by a globalized approach; and (2) ICANN will maintain an operational headquarters in the US, as well as expand and maintain its presence, through branch offices or otherwise, around the world.⁴⁰

ICANN's corporate form in the US

The General Counsel's Office reviewed ICANN's current status as a US-Based non-profit organization under US Federal Tax Code Section 501(c)(3), which in part originated from the grounds that ICANN "lessen[s] the burdens of government" by performing a function previously undertaken by the United States government. The United States Internal Revenue Service has stated that in order for an organization to satisfy the requirements of the "lessening the burdens of government" basis for 501(c)(3) status, it must lessen the burdens of the federal government for United States taxpayers. It was

⁴⁰ The legal structures research, Schematic Overview of Possible Legal Structures and Jurisdictions for ICANN, was included in the materials provided to the PSC for the 6 February 2009 meeting. It is a 115-page document, therefore only the most relevant portions are summarized here.

determined that other options for organization within the United States were insufficient to meet ICANN's needs at this time, but it should be reviewed in the future.

Under ICANN's current structure, ICANN may be able to obtain status as a "public international organization". Under this statutorily-recognized organizational status, for example, an entity like ICANN could be both a California non-profit public benefit corporation and a designated public international organization eligible for legal privileges, exemptions and immunities bestowed by the President of the United States. This is unique as it is the only structural form that is not mutually exclusive; for example, an entity cannot simultaneously be incorporated under the laws of California and Belgium. Though an evaluation of the likelihood of success of achieving the "public international status" is outside of the scope of this paper, it was determined that it is extraordinary to obtain such a status, and the process is sufficiently burdensome as to be unlikely to be successful.

Belgium and Switzerland offer corporate forms warranting further research.

Both Switzerland and Belgium have international non-profit type organizations that could be formed as related entities to the U.S. parent corporation and carry out ICANN's functions, and seem to be the best fit based upon the assumptions that went into the research.⁴¹ Preliminarily, the Swiss Foundation appears to be the best possible available option, but detailed research and consultation is required prior to finalizing the recommendation.

⁴¹ Of the 13 national law regimes located in various regimes throughout the world that were evaluated, most of these regimes had issues which required counsel and the PSC to eliminate them from consideration based on consideration of several factors, as certain options in particular jurisdictions were not optimal for ICANN to continuing pursuing. Such disqualifying factors include, but are not limited to, the fact that the structure and/or jurisdiction would: (i) require a membership structure; (ii) not provide for tax-exempt status; (iii) require stock issuance and development of a shareholder model; (iv) not permit continued presence or headquarters in the US; (v) be subject to governmental oversight and authority; (vi) require a significant number of Board members to reside in the jurisdiction and be of local nationality; (vii) require the organization to operate solely on donations; (viii) only support a temporary presence; and/or (ix) have limited ability to recruit and hire foreign employees.

Summary of Belgian Options

Belgium has three relevant potential structures, with the best possible option as the Private Foundation, likely the most similar to ICANN’s current structure.⁴² A Private Foundation must be not-for-profit and dedicated to achieve a disinterested purpose. A Private Foundation does not have members, and is run by a Board of Directors. While all three Belgian structures allow the maintenance of an entity as a subsidiary of a United States corporation, the Private Foundation is unique in that it is the only Belgian structure allowing for a change in its purpose clause or change in activities to meet its purpose without Royal Decree.

In the past, Belgium has entered into agreements granting privileges to international organizations. While this benefit is generally offered to treaty-based organizations, Belgium afforded this status to the International Committee of the Red Cross, a private organization. ICANN may qualify for this “privileges ” status, subject to a governmental review of its mission, structure, and competence to perform its mission. The Belgian Ministry of Foreign Affairs and Belgian Parliament would make this decision. In further assessing the Belgian Private Foundation, ICANN may benefit by locating and retaining consultants or experts who can further assess the hurdles to obtaining a “privileges ” agreement and provide an opinion on ICANN’s ability to do so as a private organization.

Review of Swiss Options

Switzerland has a corporate structure called a Foundation, an entity run by a Board of Directors and without members. The Foundation must be dedicated to achieve a public or private benefit specified in its Articles of Association. If a Swiss Foundation is non-profit and acting for the public benefit, its activities are tax-exempt; however, those activities must at least partially be in the interest of Switzerland. Furthermore, amendments to Foundation’s articles and bylaws are subject to approval by Swiss supervising authorities. The Swiss Supervisory Board of Foundations recommends

⁴² The other two Belgian forms of organizational structure are the International Non Profit Organization and the Foundation for the Public Benefit.

certain accounting and governance principles to be used by Foundations, and several Foundations have voluntarily embraced a corporate governance code for non-profit organizations.

The Foundation cannot be directly held as a subsidiary of a United States corporation; however, if a U.S. corporation were the founder of a Foundation, it could control the foundation through election of all of the Foundation's board members. Conversely, the Foundation can maintain, as assets, shares or parts of other legal entities, if appropriate to its mission.

Extending privileges and immunities to international organizations is decided on a case-by-case basis. The requirements for attaining such benefits are the subject of proposed legislation known as the Swiss Host State Act (the "HSA"), which took effect in 2008. Under the HSA, privileges may be granted to (1) groups created by international treaty or state agreements; (2) quasi-governmental institutions, i.e., those that exercise public duties, with structures similar to international organizations; or (3) other international organizations that play an important role in international relations, are widely recognized internationally, and whose mandate will likely benefit from privileges and immunities. ICANN may potentially fall within one of these categories. The specific privileges available to qualifying institutions are similar to those that are available to public international organizations in the United States, including corporate tax exemption and favourable treatment for foreign work permits.

Summary of Potential Organizational and Legal Hurdles Requiring Research Prior to Creating Additional Entity.

Prior to making any decision on where ICANN should incorporate an additional entity or the organizational structure that should be created, substantial research is required. As cautioned under the section discussing the separation and coordination of ICANN's functions, issues of coordination with the core values and mission of ICANN are essential, and substantial work needs to be done to properly define the relationship

between the US non-profit and the subsidiary. These questions include a clear definition of the purpose of the subsidiary entity, how to allocate or final decision-making, how the entity will be funded, etc. Other main topics of consideration and research⁴³ include:

Board of directors:

- How will the Board of Directors be configured?
- What role will supporting organizations and board committees such as those existing in ICANN today have in the new Board?
- Who will have signatory powers? Who is required to have signatory powers?
- Do the jurisdictions impose differing standards of conduct and fiduciary duties of directors that may impede dual membership?

Contractual relationships:

- Do the target jurisdictions have sufficiently strong laws and legal systems to facilitate contract enforcement?
- Do the laws of the target jurisdiction create inherent conflict with the corresponding US laws?
- Will the separation of contracts relating to, for example, registrars create a “forum shopping” issue for those seeking accreditation? How can ICANN assure consistency and neutrality among contracts for persons similarly situated?

Transparency, Accountability of Review:

- Will the new entity be required to follow the same review cycle and accountability frameworks?
- How can ICANN enforce this without impeding on the new entities autonomy?

Employment:

- Will independent contractors be allowed to be used, as they are in the US?
- Can US ICANN share employees with the subsidiary?

⁴³ A more detailed listing of the issues requiring review is located in a document entitled “PSC Discussion – Potential Organizational and Legal Hurdles to Research Prior to Creating Additional Entity”, provided to the PSC for discussion at the 6 February 2009 meeting.

Various other issues:

- How will the creation of a new entity, or any action taken by that entity, effect ICANN's US Tax Exempt status?
- How active are the competition authorities and are the target jurisdiction's competition laws strong enough?
- Are there laws addressing trademark protection, security and privacy initiatives?
- Where will tensions exist with the current provisions of ICANN's articles of incorporation or bylaws?

Proposed PSC Recommendations

Based upon the PSC discussions, the review of ICANN's functions and the review of the material considering the various national law regimes, the PSC's recommendation should be that although ICANN is working well in its current form, the establishment of an international non-profit organization in Belgium or Switzerland may offer some opportunities for ICANN to enhance its global functions and profile, while sufficiently alleviate some of the current challenges.

The PSC should recommend to the ICANN Board that it review the details of the work of the PSC and supporting staff in this area, and direct the President/CEO and General Counsel to commence discussions regarding potential structural changes within both countries, in order to provide the Board with full information which would allow the Board to fully evaluate potential limited structural changes at ICANN. The PSC should further note that any such action should only be done in a careful step-by-step process with no commitment being made by the organization, without full community consultation and Board approval. Finally, as the PSC has already expressed, it should reiterate that for the certainty of antitrust, contract, and corporate governance accountability, it is important that all considerations start with the basis, that ICANN should maintain its headquarters in the United States.