

DRAFT PROPOSED RECOMMENDATIONS FROM ATRT WORKING GROUPS

October 11, 2010

Reorganized for Side by Side Review

Sessions 1 and 2: Board Governance

Working Group 1: Area 1

The composition of the Board, skill-set requirements for the Board and the roles of the SOs and ACs and The Nominating Committee in respect to Board composition and skill-set requirements (Area 1).

DRAFT PROPOSED RECOMMENDATIONS

ICANN should:

1. Pursuant to the advice of both the 2007 Nominating Committee Review and 2008 Board review, establish formal mechanisms for identifying the collective skill-set required by the ICANN Board and for consulting with stakeholders on this issue. Emphasis should be placed upon ensuring the Board has the skills and experience to represent constituents' interests and general public interest, and deliver best practice in corporate governance and oversight of ICANN's operations.

This should build upon the initial work undertaken in the independent reviews and involve:

- a. Benchmarking Board skill-sets against similar corporate structures;
- b. Tailoring the required skills to suit ICANN's unique structure and mission, through an open consultation process, including direct consultation with Chairs of the SOs and ACs;
- c. Review these requirements annually, delivering a formalised starting point for the NomCom each year; and

Comment [C1]: I STRESS that these recommendations are very much a first cut and need to be considered in detail.

- d. Publish the outcomes and requirements as part of the NomCom's call-for-nominations.
2. Review and re-enforce the existing Board training and skill-building program.
3. Ensure that Nominating Committee Procedures are publicly available at the earliest possible stage of each year's NomCom process.
4. To the greatest extent possible, maximise the transparency of the NomCom's deliberations and decision-making processes. The only caveat should be the need to maintaining appropriate candidate confidentiality.
5. Initiate a dedicated, specific, open review into Board composition and structure to ensure goals of representation and effectiveness are met. ICANN should adopt a top-down policy of corporate evolution and resist the inclination to assume current arrangements deliver best practice governance outcomes.
6. Expedite reforms to Board meeting and work practices, improving efficiency through a stronger focus on typical Board-level issues and less direct involvement in operational matters.

Working Group 4: Independent Review of Board Decisions

DRAFT PROPOSED RECOMMENDATIONS

Office of the Ombudsman

WG4 finds that the Ombudsman is not an independent mechanism for accountability of the ICANN board. The budget for the Ombudsman is controlled by ICANN. Its decisions are not binding. Furthermore, the nature of Ombudsman cases tends to focus on interactions between the complainant and ICANN Staff and/or other members of the community.

Recommendations: None.

Reconsideration Request

WG4 finds that this is not an independent mechanism for accountability of the ICANN Board. The Board Governance Committee (BCG) is the body that reviews and decides Reconsideration Requests, and it is comprised entirely of current members of the ICANN Board. Its decisions are not binding.

Recommendations:

- Continue to improve transparency: Requests and outcomes are published on the Reconsideration Request web page, and the BCG issues regular reports to the Board. More information, including the status of deliberations and the rationale used to form decisions would improve transparency.
- Clarify language that establishes eligibility to invoke the mechanism. The by-laws describe eligible parties as “materially affected” or “adversely affected.” Recommend that the by-laws be modified in Article IV, Sec. 2.1 and Sec. 2.2 to strike “materially” and “adversely” and simply describe eligible parties as “affected.”
- Reconsideration decisions should be binding on the Board. Decisions of the BCG, which is comprised entirely of Board members, should be binding on the ICANN Board. The BCG cannot issue alternative decisions through this mechanism, but it should have the authority to vacate or stay the implementation of an existing decision prior to implementation.

Community Re-Vote (Proposed)

WG4 finds that this proposed mechanism had some merit, but was unlikely to be effective as an independent mechanism for accountability. Because it did not involve members of the ICANN Board, the mechanism is sufficiently independent. But Community Re-Vote by Supporting Organizations and Advisory Committees (SOs/ACs) requires an extraordinarily high level of consensus in order to be invoked.

Recommendations: None.

Independent Review Panel

WG4 finds that the IRP is sufficiently independent. But questions remain on its effectiveness as a mechanism for accountability, as its decisions and recommendations are not binding on the ICANN Board. Additionally, the WG4 finds that in the singular instance the IRP was invoked, the time and resource costs incurred make this mechanism inaccessible to a large segment of the community.

Adding to the complexity is ICANN Legal’s stated position that California law prohibits it from delegating decision-making authority to an independent body. Resolution of this issue is critical to establishing an appeals mechanism that is both binding and independent, and essential to the viability of the ICANN model itself.

Recommendation(s) Options:

- Accept ICANN’s interpretation of California corporate governance law as applicable to ICANN policy development. No new external appeals mechanisms. The California and US court system are the final appeals mechanism for ICANN decisions.

- Accept ICANN’s interpretation of California law for corporate governance, but not as applied to ICANN / Internet policy development. Recommend a new structure within ICANN that replaces the Board as the final approval of policy decisions, since such policy has regulatory weight and force.
- Accept ICANN’s interpretation of California law for corporate governance, but not as applied to ICANN / Internet policy development. Require all matters brought before the Board to be designated as “governance” or “policy,” with the latter being eligible for appeal by an Independent body or the Board itself.
- Challenge ICANN’s interpretation of California corporate governance law as it applies to ICANN policy development. *{Tentative Recommendation, pending further research}*.
- {For all options:} WG4 requests that ICANN provide examples where it has claimed or defended its position with regard to California law.

Sessions 3: The Role of the GAC

Working Group 2

Working Group 2 is evaluating whether ICANN is adequately assessing the role and effectiveness of the Governmental Advisory Committee (GAC) and its interaction with the Board “and making recommendations for improvements to ensure effective consideration of ICANN GAC input on the public policy aspects of the technical coordination of the DNS.”¹ As part of this evaluation, the working group is conducting an independent evaluation of the interaction between the GAC and the Board

DRAFT PROPOSED RECOMMENDATIONS

The current Board-GAC relationship is dysfunctional and has been so for several years. While the Bylaws limit the Board’s ability to evaluate the performance and operation of the GAC, the Board should have acted long before now to engage the GAC to resolve the ambiguities in the Bylaws and to build a more productive working relationship with the GAC. The joint Board-GAC working group established in 2009 offers an appropriate vehicle for these issues to be considered and recommendations developed. But for this process to produce a result that demonstrates that the ICANN is adequately assessing the GAC, the Review Team strongly recommends that the following issues be resolved by the conclusion of the working group effort.

First, both the Board and the GAC need to clarify what constitutes a GAC “opinion” under the Bylaws and the Board needs to exercise more discipline in asking for GAC opinions on public policy issues. The GAC notion that any communication it has with the Board constitutes a GAC opinion that triggers the Board obligation to follow it is an unworkable and untenable position. Similarly, the Board position that it does not need to formally request a GAC opinion because the GAC is “on notice” as to all matters before the Board is equally frivolous.

A reasonable outcome would be for ICANN to establish a more formal, documented process by which it notifies the GAC of matters that affect public policy concerns. As a key element of this process, the Board should be proactive in requesting GAC input in writing and in documenting, also in writing, the Board’s consideration of and response to such advice. At the same time, the GAC should agree that only a “consensus” view of its members constitutes an opinion that triggers the Board’s obligation to follow the advice or work with the GAC to find a mutually acceptable solution. The GAC can continue to provide informal views but these would not trigger any obligation on the Board to follow such input.

¹ Affirmation of Commitments, paragraph 9.1 (b).

Second, both the Board and the GAC need to work together to have the GAC advice provided and considered on a more timely basis. Instituting a more formal process for requesting opinions should help in this regard by making it clearer when the Board is seeking a GAC opinion but given that the GAC meets face-to-face only three times a year, it will need to establish other mechanisms for preparing and reaching agreement on consensus opinions in a more timely manner.

Third, the Board, working with the GAC, needs to develop and implement a process to engage the GAC earlier in the policy development process. All parties would benefit if the supporting organizations and other constituencies could receive public policy input as early in the policy development process as possible. Such a process would also reduce the delay associated with requesting GAC input only after an issue has been submitted to the Board for its consideration and approval and should reduce the back-and-forth between the Board and the GAC that has not served either party well in the specific cases of .xxx and gTLDs. As a related matter, the Board should consider providing secretariat support to the GAC to ensure that it is fully informed as to the policy agenda at ICANN and that ICANN policy staff is aware of and sensitive to GAC concerns.

Fourth, the GAC, working with the Board, needs to consider how to ensure that member countries and organizations are participating in GAC deliberations at a sufficiently senior level. To the extent member representatives attending GAC meetings are authorized to speak on behalf of their countries and organizations without having to seek approval from senior officials not present at the meetings, the process by which GAC develops and submits consensus opinions to the Board should take less time and should lead to a more authoritative work product.

Session 4: Public Participation

Working Group 3

DRAFT PROPOSED RECOMMENDATIONS

1. The Board should direct the adoption of public Notice and Comment processes that are stratified (e.g. Notice of Inquiry, Notice of Policy Making) and prioritized. Prioritization and stratification should be established based on coordinated Community input and consultation with Staff.
2. Public notice and comment processes should provide for both distinct “Comment” cycle and a “Reply Comment” comment cycle that allows Community respondents to address and rebut arguments raised in opposing parties’ Comments. [This provides the Board the argumentative bases on which it can found its decisions and to articulate the rationale thereof.]
3. Timelines for public Notice and Comment should be reviewed and adjusted to provide adequate opportunity for meaningful and timely comment. Comment and Reply Comment periods should be of a fixed duration.
4. The Board should, in publishing decisions, adopt the practice of articulating the basis for its decision and identify the public comment that was persuasive in reaching its decision.
5. The Board should identify the relevant basis and public comment that was not accepted in making its decision. The Board should articulate the rationale for rejecting relevant public comment in reaching its decision.
6. The Board should ensure that access to and documentation within the PDP processes and the public input processes are, to the maximum extent feasible, provided in multi-lingual manner.
7. The Board should publish its decisions in a multi-lingual manner to the maximum extent feasible.
8. The Board should direct the creation of a mechanism and/or support role at the Staff level the purpose of which is to ensure that all policy making processes within ICANN are run in accordance with ICANN bylaws and respective PDP procedures.
9. The mechanism and/or support role should ensure that all necessary inputs to the respective policy making processes are accounted for and included for consideration to ensure effective and timely policy development.
10. The Board should request the ACs and SOs, in coordination with the Staff, to develop cross community deliberation processes. Mechanisms to initiate cross community

deliberation processes as well as the potential role of ad hoc and “fast track” procedures should be given due consideration.

Session 5: Transparency

Working Group 1: Area 2.

The transparency of the Board's decision making process and the explanation of its decision to the ICANN community (Area 2).

DRAFT PROPOSED RECOMMENDATIONS

ICANN should:

1. Through an open, consultative process, develop clear, codified procedures for determining which issues should be considered at Board level.
2. Develop complementary mechanisms for consultation with SOs and ACs on policy issues that will be addressed at Board level. This includes a refinement of consultation mechanisms with the GAC on matters of public policy.
3. Promptly publish all appropriate materials related to decision-making processes – including preliminary announcements, briefing provided by staff, Board meeting recordings and detailed Minutes, and Director's statements relating to significant decisions or votes.
4. Also publish a concise summary at the conclusion of each decision-making process, including:
 - a. why the matter was escalated for Board consideration;
 - b. what consultation occurred;
 - c. what input was received from the ICANN community; and
 - d. how this input was considered and how and why it was adopted or discarded.

Comment [C2]: I STRESS that these recommendations are very much a first cut and need to be considered in detail.

