

4 June 2010

Mr. Peter Dengate Thrush, Chair
Members of the Board of Directors
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601
USA

Dear Mr. Chairman and Members of the Board:

As you know, under Section 9.1 of the Affirmation of Commitments (AoC) signed by ICANN and the Department of Commerce, the Accountability and Transparency Review Team (Review Team) is responsible for assessing ICANN's progress on its commitment to continually assess and improve:

- a. ICANN Board of Directors (Board) governance, including Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions;
- b. the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS;
- c. the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof);
- d. the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and
- e. the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.

The Review Team appreciates the opportunity to meet with the Board on Sunday, 20 June 2010, at 14:30 in Brussels to discuss the review process. While would welcome any formal input the Board or individual members of the Board would like to submit on the items listed above, the Review Team anticipates that the meeting in Brussels will provide an opportunity to receive informal input from members of the Board on these topics.

To facilitate our discussion, the Review Team has developed the following list of questions on which we would particularly appreciate input from members of the Board. We would, of course, welcome input on other questions you think useful to discuss.

Board Operations and Decision Making

1. Have any changes in the Board selection process been implemented since the AoC was signed? Are any changes in this process being planned? Please provide specific examples

and explain the ways in which these changes will improve the process and Board governance in general.

2. Have any significant changes in the way in which the Board functions been implemented, or are any such changes being planned?
3. Please describe the process by which members of the Board are briefed on issues before the Board. What kind of written material do Board members receive? Is the information you receive sufficient to evaluate the issues? Too much? How are the variety of community perspectives reflected in Board briefing materials?
4. Should briefing materials be publicly posted? Why or why not?
5. What changes in the Board selection process, Board operations, or Board decision making processes would you like to see implemented?
6. What progress has been made since the AoC was signed on improving ICANN's accountability mechanisms, including the role of the ombudsman, the Reconsideration process, and the Independent Review panel?
 - In February of 2009, the President's Strategy Committee issued a draft implementation plan for improving institutional confidence, calling (among many other things) for appointment of an experts committee to advise the Board on restructuring ICANN's independent review processes. Following the public comment period, on 1 June 2009, staff issued a paper called "Improving Institutional Confidence – the Way Forward," which did not reference the PSC proposal for an independent experts committee, and instead proposed bylaws changes intended to improve accountability. Based on negative input during the public comment period on those proposed Bylaws changes, staff recommended not moving forward with the proposed changes.
 - i. What reasons did the staff provide for developing its own proposal to restructure the independent review process rather than following the PSC recommendation to constitute an experts committee?
 - ii. Given the community sentiment regarding the inadequacy of the staff proposal, how does the Board plan to proceed on this issue?
7. How does the Board interact with the ombudsman, and how are his recommendations handled? Is the Board made aware of interactions between the ombudsman and ICANN staff?
8. Do you think that the standard for invoking Reconsideration (new information not previously known by the Board) is the right standard?

The Role and Effectiveness of the GAC

9. Have any changes in the manner in which the Board interacts with the GAC been implemented since the AoC was signed? Are any changes planned? Please provide specific

examples and explain the ways in which these changes will improve the process and Board governance in general. Are there any other changes you would like to see implemented?

10. Annex A summarizes the provisions of ICANN's Bylaws related to the role of the GAC in the ICANN process. The Bylaws also lay out a specific mechanism designed to ensure that ICANN fully take into account GAC advice on "*public policy matters in the formulation and adoption of ICANN policy.*"

- Is there a shared understanding between the GAC and Board on the circumstances in which ICANN is obligated to affirmatively notify the GAC of a pending matter raising public policy issues?
- Is there a shared understanding between the GAC and the Board about what is encompassed within the phrase "public policy matters in the formulation and adoption of ICANN policy"? Can you provide some examples of GAC statements that in your view constitute advice on public policy matters on the formulation and adoption of policy? Can you provide some examples of GAC input that falls outside this category?
- Is GAC advice on public policy matters actionable?
- Is a more formal means of demarcating GAC input that constitutes "advice" from more general GAC inputs and comments desirable?
- How well does this mechanism work? Can you provide specific examples of circumstances in which this advice-consideration-discussion-explanation mechanism has worked well and when it has not? In each case, why do you think the process worked or failed to work?
- Is there a "register" or similar mechanism whereby Board members can see what advice the GAC has given on any particular issue and what response the Board has decided upon in the past?
- Do you feel that the Board does an adequate job of explaining its decisions to the GAC? What kinds of issues constrain the Board from fully explaining its decisions, and how are those situations handled?
- What informal mechanisms have developed over time to improve the role and effectiveness of the GAC, particularly in its interactions with the Board and staff? For example, how effective has the Board and GAC Working Group been in this regard? What specific changes or improvements have been implemented as the result of Working Group recommendations?

11. Annex A also lists Bylaws provisions designed to ensure that the GAC is in a position to flag issues that raise public policy considerations in the early stages of policy development. For example, the GAC has a non-voting Board liaison, and has the right to appoint non-voting liaisons to the ICANN supporting organizations and other advisory committees.

- Considering these mechanisms, do you think the GAC has or should have any obligation to proactively identify issues that may raise public policy concerns in the early stages of discussion?

Receipt and Consideration of Community Input

12. What kind of community input (e.g., in open forums, workshops, comments, correspondence, etc.) on issues do you find most and least useful? Are there ways in which this input could be more useful?
13. Do you feel that the Board does an adequate job of explaining its decisions to the community? What kinds of issues constrain the Board from fully explaining its decisions, and how are those situations handled?
14. In your view, to what extent are ICANN's decisions embraced, supported and accepted by the public and the Internet community? Please explain why.

Policy Development Process

15. What steps have been taken to modify the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development?

The Accountability and Transparency Review Team appreciates your willingness to meet in Brussels, and your consideration of these questions in advance of that discussion. As noted above, we would welcome formal as the GAC deems appropriate on these and any other issues relevant to the work of the Review Team.

Sincerely,

(signed)

Brian Cute, Chair

Sincerely,

(signed)

Manal Ismail, Vice Chair

Annex A

ICANN Bylaw Provisions Relating to the Government Advisory Committee

16. The role of the Governmental Advisory Committee is to: “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.” Bylaws Article XI, Section 2
17. In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with its Bylaws, and with due regard for the core values in the Bylaws, including the core value which requires ICANN, “[w]hile remaining rooted in the private sector,” to recognize “that governments and public authorities are responsible for public policy and duly taking into account governments’ or public authorities’ recommendations.” Bylaws Article IV. Section 1
18. The mechanisms designed to ensure that ICANN complies with its obligation to take into account the recommendations of governments and public authorities include:
 - Appointment by the GAC of a non-voting liaison to the ICANN Board of Directors;
 - Timely notification to the GAC via its chair of any proposal raising public policy issues on which it or any of ICANN’s supporting organizations or advisory committees seeks public comment, and due consideration by the Board of any timely response by the GAC prior to taking action;
 - The ability of the GAC to 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.
 - A specific procedure for consideration of GAC advice on public policy matters, both in the formulation and adoption of policies, which requires the Board to (i) determine whether or not an action it proposes to take is consistent with GAC advice; (ii) inform the GAC of, and explain any decision to take an action that is inconsistent with GAC advice on public policy matters; (iii) negotiate in good faith with the GAC to identify a mutually acceptable solution; and (iv) where no such solution can be found, state in its final decision the reasons why the Governmental Advisory Committee advice was not followed.
 - In addition, the GAC is authorized to appoint a non-voting liaison to ICANN supporting organizations and advisory committees if it so chooses.