

# IMPROVING INSTITUTIONAL CONFIDENCE CONSULTATION DRAFT IMPLEMENTATION PLAN

## SUMMARY OF PUBLIC COMMENT PERIOD (12 March 2009 to 11 May 2009)

ICANN initiated a public comment period from 12 March 2009 to 11 May 2009 seeking public input regarding the *Improving Institutional Confidence* Draft Implementation Plan posted on 26 February 2009. Fifteen parties submitted responses; the full text of these comments is available at <http://forum.icann.org/lists/iic-implementation-plan/>. A list of the respondents appears at the end of this document.

This document organizes sections into the categories of general and process issues, as well as the five key requirements outlined in the *Transition Action Plan* as essential to fulfillment of ICANN's mandate: freedom from capture; accountability; globalization; financial and operational security; and security and stability.

### SUMMARY OF INPUT

#### In General/Process

##### ***Support for ICANN Transition***

ICC remains fully committed to the continued transition of ICANN towards becoming an independent, private sector-led consensus-building organization and supports the goal of strengthening ICANN as the private sector-led multistakeholder body responsible for coordinating the global Internet's system of unique identifiers. *ICC (4 May 2009)*. ETNO renews its support for the transition of ICANN towards an independent organization which enjoys improved institutional confidence. *ETNO (11 May 2009)*.

##### ***Transition Process***

The draft plan falls short in proposing the type of comprehensive and fully formed plan needed to complete the ICANN transition process. In particular, developing and implementing a holistic plan for a stable organizational structure for ICANN that meets the needs of stakeholders is important to the success of the transition process. Other significant work remains to be done (e.g., the creation of a detailed Charter setting forth the boundaries of ICANN's authority and its responsibilities to its stakeholders). ICANN will not be able to complete these tasks prior to September 30, 2009. The transition process should continue without being driven by the looming September 30, 2009, deadline. The stakes are too high to rush into declaring ICANN fully independent without having in place a comprehensive structure that safeguards ICANN from internal and external capture, maintains important legal protections, and ensures meaningful accountability to replace existing oversight structures. *AT&T (11 May 2009)*.

The expiration of the JPA cannot be treated as its own benchmark. Instead, the benchmark should be a set of milestones related to particular objectives and metrics for ICANN that should then begin the discussion of "transition." ACT members support the objective of private sector leadership, but are worried that this "bullet train process" based on an arbitrary deadline potentially threatens the success that ICANN has enjoyed. *ACT (11 May 2009)*.

If the draft plan is the PSC's proposed framework for the continuation of ICANN's work following the conclusion of the JPA, COA reiterates its July 2008 comment that the premise that the JPA

should conclude in September 2009 should be re-evaluated. In addition, COA believes that the statement that “by and large, the Internet community recognizes that the goals of the MoU’s and the JPA had been largely met” is inconsistent with what was really stated during the mid-term review of the JPA. See COA’s July 2008 comments. *COA (11 May 2009)*.

Nominet has serious concerns about the lack of any clear vision of what a post-JPA ICANN should look like. *Nominet (11 May 2009)*.

ICANN today does not have the mechanisms to ensure that it remains accountable to the principles articulated by the U.S. at ICANN’s formation. Absent those mechanisms it is not in the interest of anyone to effect a full transition of DNS management roles. *NetChoice (11 May 2009)*.

### ***Bottom-Up Transparent Process***

The draft plan does not address certain key transparency and accountability measures needed to actually instill confidence into ICANN and its processes and decisionmaking. Network Solutions has called for ICANN to establish a community-based task force to address the accountability and transparency issues from the bottom up. The PSC plan is yet another top-down process that has not adequately addressed community concerns. In addition, recently ICANN’s Board missed an opportunity to show its transparency by failing to consult with its stakeholders on the search criteria for a new CEO. *Network Solutions (11 May 2009)*.

### ***Changes in Bylaws***

While ICANN has made some improvements in transparency, none of those changes are codified in ICANN’s bylaws, which means that any of those improvements could be reversed. *Network Solutions (11 May 2009)*.

### ***Focus on Needs of Constituencies***

The PSC’s stated goals regarding its recommendations wrongly assume that ICANN is operating tolerably well. There is rampant abuse in the domain name space, little deterrent or retribution for infringing behavior, and ICANN continues to impose superficial deadlines on policy decisions that lead to rushed results. CADNA disagrees with the PSC report’s proclamation of ICANN’s relative success. Stakeholders have vocally expressed their dissatisfaction with ICANN’s performance at numerous meetings and in comments. They have expressed concern about the conclusion of the JPA. CADNA urges ICANN to be driven by the needs of its constituencies rather than by its own agenda. *CADNA (11 May 2009)*.

Information needs to be tailored to its audience. In addition, priorities need to be considered more carefully. There are currently too many priorities being actioned at the same time. This can lead to participant overload via too many simultaneous proceedings with a risk of “capture” by small groups of highly motivated participants. *Nominet (11 May 2009)*.

### ***Open Meetings***

It is surprising that the concept of open meetings as a measure to maintain and strengthen transparency in constituent parts of ICANN did not make the list of the PSC’s considered options. ICANN would be well-advised to take note of sunshine laws adopted in several political jurisdictions which enable the open meeting concept. *C. Samuels (21 April 2009)*.

### ***General Lack of Transparency***

ICANN is at times anything but transparent and it needs to address this. Lack of openness simply leads to rumor and conspiracy theories, none of which serves ICANN well. *A. Greenberg (12 May 2009)*.

### ***IIC Consultation--Proposal Details***

The draft implementation plan has a set of high level recommendations but does not set out how those recommendations would be implemented. ICC requests that the details of the recommendations be posted as soon as possible with a full opportunity for review and public comment. This is essential for ICANN stakeholders to fully assess the effectiveness of the proposals. *ICC (4 May 2009)*. CADNA would like to see a proposed implementation plan for the recommendations in the PSC report; only then can the public provide constructive comments on how to move forward. *CADNA (11 May 2009)*. ETNO requests that detailed information about the implementation of the PSC recommendations be published as soon as possible to allow for public comment. *ETNO (11 May 2009)*.

Nominet welcomes the general approach outlined by the PSC plan, but would like to understand more clearly what the concrete proposals are for a post-transition ICANN to address the concerns raised during the NTIA's mid-term review in 2008. This is a necessary first step towards ending the JPA. *Nominet (11 May 2009)*.

The plan does not include adequate proposals or sufficient implementation details in at least two critical areas – accountability and capture. *NetChoice (11 May 2009)*.

The plan falls short in identifying specific measures of confidence, goals for particular initiatives and consequences for failing to meet those objectives. *ACT (11 May 2009)*.

### ***ICANN Policy Development Process***

ICANN's present processes are increasingly overwhelming. The array of issues in play makes it difficult to substantively engage on particular matters which can thus hinder general participation. Incohesive or unsuitably structured policy development processes are a pressing concern. The current frenetic pace of sometimes competing and confusing policy development processes, as well as ICANN Review and restructuring, prevent meaningful participation by even the most dedicated of ICANN supporters. There is a need for increased certainty of the processes and balanced outcomes, both in policy development and overall decision-making. *ICC (4 May 2009)*.

### ***Global Business Community Concerns***

Business continues to be concerned over the need to ensure it is adequately represented within ICANN in order to protect broader business interests. *ICC (4 May 2009)*. ICANN should address the issues of business uncertainty regarding representation and voting rights within ICANN. *AT&T (11 May 2009)*.

## **Capture**

### ***Specific Tool Against Capture***

An adequate protection from capture would be a structure or tool designed for and dedicated to that specific purpose. What the plan refers to as strong protection against capture (e.g. existing accountability frameworks, broadened participation, etc.) are all excellent goals but none of them individually or as a group can serve as a guarantee against capture. They are part of structures that undergo periodic review and are subject to change. *GoDaddy (11 May 2009)*.

### ***Government Capture and Private Sector Confidence***

The IIC plan does not address the growing risk that ICANN could be captured by governments and multi-governmental organizations. Private sector innovation and investment is the reason why more than a billion people have access to the Internet. It will take more private sector investment to reach the next billion people, so ICANN needs to maintain the confidence of the private sector. *NetChoice (11 May 2009)*.

### **Consensus and Minority Views**

Achieving true consensus is a vital guarantee against capture. Where there is any indication that consensus does not exist, the Board has a responsibility—before final decisions are made—to consider points of view of significant minority groups and look at possible safeguards for legitimate interests. *Nominet (11 May 2009)*.

### **External Outreach**

In addition to participation within ICANN there is a real need for outreach to those communities likely to be affected by ICANN decisions and to use this to improve understanding of the issues and how interests need to be safeguarded. *Nominet (11 May 2009)*.

### **Use of Super-Majority**

Decisions made by super-majority should always be properly justified and reasons for overriding a specific community voice need to be made very clear. The views of communities representing views of organizations from outside the domain name industry need to be considered with particular attention. *Nominet (11 May 2009)*.

### **Lack of Diversity in ICANN Staff**

The proposal to address the risk of inappropriate or inadequate ICANN staff conduct through review and enhancement of the professional code of conduct might not be good enough. The lack of diversity in staff at the policy level in ICANN is a de facto measure of capture, at least of a certain kind. ICANN's employment policy and procedures discriminate against qualified candidates for senior policy posts in ICANN who are nationals from countries other than the EU and the United States or who lack a legal right to work in places where ICANN has established offices (i.e., the U.S., Belgium and Australia). ICANN would burnish its case for capture avoidance and transparency by ensuring diversity of all kinds in its senior staff, which is not now the case. *C. Samuels (21 April 2009)*.

### **Code of Conduct for ICANN Staff**

ICC supports strengthening the code of professional conduct for ICANN staff. As ICANN evolves, the code of conduct is an essential tool and safeguard for staff, the community, and the Board to ensure the broader ICANN community's respect and certainty that all staff activities are underpinned by impartiality and independence. *ICC (4 May 2009)*.

### **Supporting Organizations Role and Processes**

Caution is urged over the opinion that large and diverse interest groups within the Supporting Organizations in and of themselves prevent capture. There is already experience with the GNSO that allowing easy creation of numerous interest groups can actually dilute and weaken the organization's structure while enabling strong allegiances to form that can be just as threatening when it comes to organization capture. ICANN should be cognizant of how participants interact within processes in ways that might undermine goals to prevent capture, and if necessary consider adequate safeguards. *ICC (4 May 2009)*.

### **Cross-Participation Framework and Voting**

ETNO welcomes the proposal to create a framework allowing cross-participation in Supporting Organizations, Advisory Committees and/or constituencies. Regarding voting by the same individual or organization in more than one ICANN entity, ETNO recognizes the need for mechanisms to avoid unfair or undue influence. ETNO still considers the prohibition on voting in different SOs and/or constituencies as extreme and unnecessary. A more balanced and detailed approach should be sufficient. ETNO would support the ability of stakeholders to participate in more than one constituency. Flexible safety nets can be established, and ICANN also should provide more implementation proposals in this area. *ETNO (11 May 2009)*.

Regarding 1.13.4, COA does not believe that prohibiting the same individual or organization from voting in more than one Supporting Organization or Advisory Committee will have a significant impact in safeguarding ICANN against “capture.” The same is true on the constituency level. ICANN continues to employ a notion of “capture” that is too narrowly conceived. *COA (11 May 2009)*.

Fundamental to the ICANN process should be listening to voices, not to vote them out. The underlying message in paragraph 1.13.4 should still be towards building consensus, rather than relying on votes. The more important point is that a single person or organization should not be allowed to dominate ICANN's decisionmaking function. *Nominet (11 May 2009)*.

#### ***Restriction on Voting Rights***

There should be one vote per person for each structure in which the person participates. If a person is a participant in more than one ICANN structure, that person would remain eligible to vote once in each of the structures; or there should be one vote per person within the whole of ICANN, irrespective of the number of ICANN bodies the person participates in. If a person is a participant in more than one ICANN structure, that person would have to elect which structure to vote in. *ALAC (15 May 2009)*.

#### ***Restriction on Multiple Roles***

A person cannot be elected or appointed to more than one ICANN body with voting rights. *ALAC (15 May 2009)*.

#### ***Role of Governments and Governmental Advisory Committee (GAC)***

Continued efforts to broaden participation with the GAC are critical to deflect criticism of the ICANN process particularly from those who do not engage, and to prevent capture by any group of governments or inter-governmental entities. It is also important to ensure that the views of governments are taken into account in ICANN's policy development and other processes. ICC commends the recommendations to provide more resources for translations and to initiate a travel support program for GAC representatives from the 50 least developed countries (LDCs). ICC commends and supports the GAC's continued discussions with the ICANN Board and other parts of ICANN with the aim of further improving efficiency and responsiveness. ICC recognizes and appreciates the important role that governments play within the multistakeholder environment; efforts to strengthen and improve governments' participation within the GAC can only bring additional benefits to the whole community. *ICC (4 May 2009)*.

Strengthening participation in the GAC is needed to avoid capture. There have been improvements in the GAC process, but further interaction and involvement of the GAC with other organizations is needed. ETNO welcomes GAC participation and functioning improvements, but ETNO does not see much value in holding meetings or workshops in cities where most governments have representation. As full involvement of all stakeholders in ICANN functioning and issues is essential, a typical and not meaningful involvement of a government just because it happens to have offices in a city where most governments have representation, is not the optimal way forward for the GAC. *ETNO (11 May 2009)*.

AT&T supports expanding the level and effectiveness of government participation in ICANN through the GAC as a way to safeguard against external capture. This goal is not served by holding meetings in New York or Geneva. A better alternative would be to hold a GAC meeting in conjunction with the annual Internet Governance Forum (IGF) meeting. ICANN should also continue to investigate additional remote participation and travel support options targeting developing countries such as the 50 LDCs. *AT&T (11 May 2009)*.

Nominet strongly agrees that formally declared advice from the GAC, including its communiqué, should receive a formal response from ICANN. *Nominet (11 May 2009)*.

ACT members would like to know what happens if ICANN does not succeed in gaining the confidence of governments. How is that confidence measured and demonstrated? What are the objectives vis-a-vis governments and what is the “plan B” if the current recommendations do not achieve institutional confidence in that arena? *ACT (11 May 2009)*.

Governments should continue to play a role in the work of ICANN but should not direct ICANN’s functions or decisions. No government should capture ICANN. ICANN should move in a direction such that U.S. influence in ICANN’s work and decisions, whether real or just perceived, diminishes. At the same time ICANN needs to stay vigilant regarding the danger of capture by others. *ALAC (15 May 2009)*.

### ***GAC Restructure in Accordance with Tunis Agenda***

Setting international public policy on Internet-related issues is the sovereign right of states, as affirmed in the Tunis agenda. Saudi Arabia cannot accept any ICANN structure that is not obligated to adhere to international public policy as established in accordance with the Tunis Agenda. Neither the ICANN bylaws nor the constraints voluntarily accepted by the GAC that it is merely an advisory body are consistent with the Tunis Agenda. An option worthy of study would be: to restructure the bylaws and the GAC so that the restructured GAC under a new name would have the authority to establish international public policy related to those issues within the operational role of ICANN; and to ensure that the ICANN Board could not implement decisions contrary to this public policy. The role of the “new GAC” would be subject to the approval of states through an appropriate forum such as the plenipotentiary conference of the ITU. Such public policy is established by states in consultation with all stakeholders in their respective roles, so the ICANN Board would have an input. *CITC Saudi Arabia (11 May 2009)*.

### ***Least Developed Countries—Private Sector Participation***

The recommendation (1.6) for travel support to enable GAC representatives from LDCs may be helpful, but what about the possibility of increasing the ability of private sector representatives outside of the OECD? To create real confidence in ICANN it is necessary to reach out well beyond an audience of governments which seem to be most of the focus of this document. Real confidence lies in ICANN’s ability to address the needs of users, developers and service providers, especially those working to address the future of the Internet in emerging markets. While focus on LDCs is pleasing, nearly all of the Internet’s past growth and by nearly all estimates its future growth will result from private sector-led investment and innovation. If the goal of recommendation 1.6 is to hear more LDC voices, then ICANN can and should be looking to support the participation of more LDC private sector voices, not just governments. *A. Mack (11 May 2009)*.

### ***Solution to Capture Concerns***

The concept of capture is not fully fleshed out in the plan; it focuses on open and visible capture with insufficient focus on capture due to lack of attention. The plan treats capture by staff as purely an issue of inappropriate or inadequate staff conduct with the solution being a better code of conduct. This ignores the more insidious forms of capture by staff—e.g. capture by staff who truly believe that they are doing the right thing. The solution involves: increased transparency with increased management oversight so that individuals or small groups do not have unreasonable and unseen power; and increased Board oversight of senior management to ensure that the Board drives management and not the other way around. *A. Greenberg (12 May 2009)*.

### ***Safeguards Against Capture***

ALAC suggests a number of actions as safeguards against capture:

- maintain easily accessible open public forums for all meetings;
- retain the multi-stakeholder model;

- broaden participation of all stakeholders;
- give special attention to end-user participation;
- broader involvement by all communities;
- solicit, maintain and address the concerns of all constituencies;
- stakeholder education regarding ICANN and its structures and policy making process;
- better facilitation of participation in multiple languages;
- creation of simple documents (translated) and/or document summaries and abstracts to facilitate greater participation;
- allow sufficient time for outreach and community feedback and comment;
- protocol for reporting and investigating claims of capture or attempted capture;
- regular performance review process, to include risk analysis and consideration of complaints and investigations, to ensure the safeguards are actually working.

*ALAC (15 May 2009).*

## **Accountability**

### ***ICANN “Charter”***

ICANN needs a detailed “charter” as the foundation for ensuring and enhancing accountability to the multistakeholder community. It should articulate the parameters of ICANN’s “narrow, technically oriented mission” of managing the operation of unique Internet identifiers, and make clear that ICANN is not responsible for broader Internet governance or policy issues. The Charter should encompass and build on the mission and core value provisions in the ICANN bylaws. *AT&T (11 May 2009).*

### ***Sufficiency of Proposals***

ICC had expected to see further progress in accountability mechanisms. ICC supports the PSC recommendation that a group of independent experts be convened to undertake improvements and development of further enhanced accountability mechanisms, including consideration of super-majority voting requirements, the potential for the community to veto a Board decision, and amending the mechanisms to remove Board members. ICANN still needs to answer this question: what other accountability mechanisms has ICANN considered? ICC is concerned that further accountability mechanisms have not been offered at this late stage of the IIC process. For ICC members the goal of establishing appropriate accountability mechanisms remains an open question where ICC members would like to see clearer decisions. *ICC (4 May 2009).*

ETNO generally supports the recommendations for accountability to stakeholders, especially those that call for making documents accessible, understandable and made available well in advance allowing sufficient time for comments. *ETNO (11 May 2009).*

### ***Improving Public Consultation***

Many of the PSC’s recommendations seem to be efforts to strengthen the present level of functioning. ICC welcomes the recommendations to strengthen the consultation process by providing detailed analysis of comments and to make responses to GAC advice or statement of principles publicly available. ICC would also welcome production by ICANN of executive summaries for documents and established timelines for dealing with them. ICC urges ICANN to substantiate its commitment to these approaches by incorporating relevant changes in the ICANN Bylaws. *ICC (4 May 2009).*

Simple measures to facilitate involvement in the policy development process--like posting documents well in advance of any meeting, comprehensive executive summaries and periodical synthesis on the status of work --are essential. *ETNO (11 May 2009).*

Executive summaries are needed for all substantive documents and this should be supplemented by a key-facts sheet and indexing that allows interested parties to find more information easily. *Nominet (11 May 2009)*.

ICANN should codify in its bylaws a requirement that the Board employ methodical decisionmaking processes subject to meaningful community review. Network Solutions supports recommendation 2.4.1 in the plan requiring ICANN to improve its decisionmaking processes with transparent and analytical components; this will promote a sense of due process and fairness in Board actions. *Network Solutions (11 May 2009)*.

COA supports bringing greater rationality and transparency to how ICANN responds to comments received. ICANN should have a consistent policy on receipt of post-deadline comments. *COA (11 May 2009)*.

#### **Formal “APA” Notice and Comment Procedures**

ICANN should implement full “Administrative Procedure Act” notice and comment procedures for public consultation and decisionmaking. The IIC proceeding provides an opportunity for ICANN to follow this APA model; accordingly, ICANN should incorporate the public comments that have been received into its recommendations and explain the rationale for not including specific input and proposals from the community in the draft IIC plan. *AT&T (11 May 2009)*.

#### **Process and Timing Concerns; New TLD Process**

CADNA is pleased with what recommendation 2.4 calls for to strengthen and improve ICANN analysis of comments and decisionmaking processes; currently ICANN treats comment periods as a mere formality. ICANN continually imposes superficial deadlines on policy decisions that move forward despite concerns voiced in the comment periods. For example with respect to its decision to open up the domain name space and the process that this expansion is to follow, ICANN must take the expressed concerns of its stakeholders seriously and reevaluate matters, rather than merely moving on to execute an agenda item. If ICANN were truly accountable to its stakeholders it would halt the new TLD launch until a more suitable process was in place. Unfortunately ICANN’s proposed deadlines for the launch are dictating the pace of the policy development, rather than the relative success of the policy development process dictating the launch deadline. ICANN’s handling of the new TLD process demonstrates its shortcomings as a responsive organization. ICANN continually sets short timetables for comments and fails to adequately address major concerns of its stakeholders. *CADNA (11 May 2009)*.

The recommendations on timelines as they stand are inadequately vague and should be changed to ensure that documents are publicized at least one week before the start of an ICANN meeting. This is key if ICANN is serious about its claim to want more non-English speaking comment. *A. Mack (11 May 2009)*.

#### **Board Decisions**

Network Solutions continues to support proposals requiring a super-majority Board vote on key decisions. Issues of paramount importance should not be decided by mere simple majority of only eight Board members, which would protect ICANN from capture by a slim majority of the Board. *Network Solutions (11 May 2009)*.

#### **Board Role in Accountability**

In recommendations 1.14 and 1.15 Nominet sees an important role for the Board to hold the executive and the different communities to account. The role of the Board in providing accountability to the “wider community” (not just those who show up at ICANN meetings) should also should be reassessed. *Nominet (11 May 2009)*.



### ***Challenge to Board Decisions and Board Removal***

The proposed threshold for a challenge to a Board decision is unnecessarily cumbersome. ICC suggests that a 2/3 majority vote of 2 of the 3 Councils of the 3 Supporting Organizations would be sufficient, and, perhaps with agreement, a mechanism for support by at least one policy orientated Advisory Committee. It is not necessary to add 2/3 of the members of all Advisory Committees. *ICC (4 May 2009)*.

The two new ways set forth in the plan for ensuring Board accountability seem ineffective: (1) The onerous thresholds proposed for allowing the community to require the Board to re-examine a decision is not likely ever to be met and in any event the Board reserves the right to any final decision; (2) the threshold for the “no confidence” vote mechanism and whether pre-designated resignations of the Directors would be voluntary or not are unclear; if resignations are mandated then it provides a nuclear option unlikely to find wide support. These proposals would need to be refined to be useful. Go Daddy believes that an adequate mechanism that ensures accountability would be encapsulated in one that also guarantees against capture. *GoDaddy (11 May 2009)*.

It is of concern that the proposed Board re-examination process would only be launched by a 2/3 majority of 2/3 of the Supporting Organizations’ councils. If this lead to a single community or interest group being excluded from re-examination by special interests, this could cause alienation. Nominet also questions whether the “nuclear option’ in recommendation 2.9 really is effective. There probably need to be more measured and hence more acceptable responses for dealing with issues short of a full breakdown in confidence. *Nominet (11 May 2009)*.

The choices between asking for a review and dissolving the Board seem to run the extremes between ineffective and improbable. Without some structure for true appeal, the current structure does not offer real accountability. The best approach to addressing this deficiency is to take the time to develop a private sector mechanism. *ACT (11 May 2009)*.

On the mechanism for the community to require the Board to reexamine a Board decision, this mechanism must only involve supporting organizations and the GAC. On a decision relating to policy approval, ETNO has some doubts on the possibility for a council to take any vote on an issue which is not related to that council’s area of expertise. *ETNO (11 May 2009)*.

There must be an effective way to challenge and review Board decisions. The PSC plan fails to address this core deficiency. ICANN needs to continue to work with the community on this, whether it is allowing a super-majority vote of Supporting Organizations to veto a Board decision or instituting binding independent review. Currently the ICANN Board answers to no one. Current processes for reconsideration, independent review and ombudsman complaints are advisory to the same Board that made the decision in the first place. As such there is no binding oversight of ICANN Board decisions. ICANN needs to adopt measures to ensure that the Board is accountable and subject to sufficient oversight mechanisms. *Network Solutions (11 May 2009)*.

While an extraordinary mechanism for removal of the Board may be worth considering, there is still a need to state clearly what circumstances would trigger it. Until that clarification is provided ICC would not offer support for this recommendation. *ICC (4 May 2009)*.

The extraordinary measure of board removal is so extreme it raises the concern that it will not be effective as an accountability mechanism. *AT&T (11 May 2009)*. The extraordinary mechanism regarding the Board would be too difficult to invoke and create unacceptable and uncontrollable risks if it were ever actually used. *NetChoice (11 May 2009)*.

The mechanism for the community to remove and replace the Board in special circumstances is

attractive, but how could that be accomplished without significant risk of capture by those put in interim power while the process is being carried out? *A. Greenberg (12 May 2009)*.

### ***Appeals Process Outside Direct Board Control***

It may be useful to consider an appeals process outside of direct Board control to provide stakeholders a means to seek redress in the instance of Board decisions that cause significant harm to one or more stakeholder groups. ICANN should investigate whether other organizations have any such provisions in place that could be assessed and adapted to ICANN. *ICC (4 May 2009)*.

### ***Oversight Board***

The concept of an Oversight Board merits further exploration and if properly constituted could serve as a protection against capture and a mechanism for true accountability of the ICANN Board. ICANN should facilitate community discussion on this concept starting with the meeting in Sydney. *GoDaddy (11 May 2009)*.

### ***Reconsideration Process***

The reconsideration process should be improved by formalizing and expanding the grounds for seeking reconsideration beyond violations of ICANN bylaws. *AT&T (11 May 2009)*.

### ***“Independent Judiciary” Proposal and Ombudsman***

AT&T urges ICANN to create an independent judiciary responsible for holding ICANN, including the Board and staff, accountable for its decision and actions. There needs to be—in addition to effective internal decisionmaking and reconsideration mechanisms—a robust external accountability mechanism that is practically available to enforce duties and protections embodied in the ICANN “charter” which AT&T has recommended. Meaningful access to an independent judiciary funded by ICANN can substitute for direct governmental or intergovernmental oversight. ICANN should also maintain an ombudsman with adequate independence and who is responsive to the community. *AT&T (11 May 2009)*.

The PSC should explore the possibility of an ad-hoc or standing “judiciary” that could hear appeals, perhaps through arbitration or something akin to what ICANN proposed for hearing objections to new gTLD applications. The PSC could also explore the principles and foundational documents that would form the basis to evaluate appeals of ICANN decisions. *NetChoice (11 May 2009)*.

### ***Contract Processes***

ICANN must develop consistent review mechanisms for its contract approval process. For example, ICANN was justly criticized for never publishing for public comment important changes to the .net Registry Agreement prior to ICANN’s execution of that agreement. Although ICANN since then has published most important contracts for review, it has never amended its bylaws to make clear that all material contracts must be published for review and comment. *Network Solutions (11 May 2009)*.

Contract compliance and enforcement is an area of concern; no metrics are available publicly in this area. *ACT (11 May 2009)*.

### ***GAC Consensus***

ICC believes that the proposal that a consensus statement from all GAC members at a physical meeting would suffice appears to be a sound approach, noting that consensus does not require total support of all members. *ICC (4 May 2009)*. As for the consensus statement for the GAC, that must take place during only a scheduled ICANN meeting. *ETNO (11 May 2009)*.

### **Statements of Interest and Conflicts**

ICANN should continue and expand affiliation and interest disclosure requirements for ICANN Board members, staff and organization representatives, as well as a detailed code of conduct for avoiding conflicts of interest. *AT&T (11 May 2009)*.

ICANN should clarify the meaning of recommendation 1.13.1 regarding “members” of Supporting Organizations and the provision of statements of conflicts of interests by them. COA assumes that it is intended to refer to the governing bodies of the SOs, as far as the GNSO is concerned. *COA (11 May 2009)*.

Nominet agrees with the recommendations (1.13) on disclosure of interests and the importance of clear guidelines for handling conflicts of interest. *Nominet (11 May 2009)*.

Participants should be required to (1) disclose all (non-personal) affiliations and (2) state, fully and without reservation, on whose behalf the participant is acting. The ICANNWiki would be a good tool for facilitating affiliation disclosures. *ALAC (15 May 2009)*.

### **Board and ALAC**

A mechanism should be put in place, similar to that in place for the GAC, requiring the Board to provide some kind of response or feedback to issues raised by ALAC. There should also be a more substantial way for ALAC to influence Board discussion and decisions – e.g. through direct elections of Board members. This would be in line with the final draft of the Independent ALAC Review document. *ALAC (15 May 2009)*.

## **Globalization**

### ***In General***

Maintaining global diversity is an essential element of the bottom-up process. A number of changes proposed within other ICANN reviews (e.g. where the size of the Board or Supporting Organizations is being discussed) make this challenging. Having offices in other parts of the world does not negate this requirement. *ICC (4 May 2009)*.

Nominet strongly supports the underlying principles of paragraphs 3.1 and 3.2. ICANN and the community should give the highest priority to making the DNS more accessible to those who use non-Latin scripts, and more work is needed to improve developing countries’ participation in ICANN processes. *Nominet (11 May 2009)*.

The process of internationalization of ICANN must: safeguard the global/worldwide role of ICANN regarding domain names and number identifiers; and promote larger participation from all stakeholders globally. ALAC’s experience operating in a very international environment could be useful to the larger ICANN community. Internationalization also must address, respect and accommodate not only language issues but also cultural diversity issues. During the internationalization process, ICANN should avoid developing a burdensome bureaucracy of the type encountered among U.N. organizations, and should remain flexible. *ALAC (15 May 2009)*.

### ***Emerging Markets***

The plan does not go far enough to build confidence and especially fails to focus adequately on the concerns of emerging markets. For example, so far efforts to provide a more language-neutral environment have been fairly ineffective and this has limited participation by representatives from emerging markets. *A. Mack (11 May 2009)*.

### ***Document Translations***

ICANN should go further to make a summary of all the ICANN documents available in English and in all the UN languages. Having more summary documents translated is better than having more full documents translated. ICANN should also encourage preparation of original document in languages other than English and arrange for their translation. Translations must be prepared in a timely manner with the goal of having the same document available in all languages at the same time. *ALAC (15 May 2009)*.

### ***Additional Legal Presences***

Establishing a separate legal ICANN presence under another/other jurisdictions raises many questions. A key factor is whether any such scheme facilitates “contract shopping” or potential exploitation through a less onerous jurisdiction. Maintaining ICANN’s headquarters and presence in California has to be the way forward for the time being. Before any decisions can be made on establishing additional subsidiary legal presence full public consultation is essential and must occur and the results must be carefully considered. The current information provided is not sufficient for full legal assessment of the risks and benefits. *ICC (4 May 2009)*.

AT&T supports the plan’s proposal for maintaining the U.S. headquarters of ICANN to ensure certainty for its contracts and other stakeholder agreements. AT&T strongly opposes the proposal that ICANN explore establishing subsidiary legal presences in other jurisdictions. The many implications (e.g. risks to contracts, antitrust and tax issues, “forum shopping” opportunities) of such an expansion are not at all clear. *AT&T (11 May 2009)*.

COA supports keeping ICANN’s headquarters in the U.S. Any decision on ICANN acquiring international not for profit organization status should be deferred until after further fact gathering and after full public consultation on a specific proposal to do so. *COA (11 May 2009)*.

CADNA is concerned that establishing a legal presence in other countries may result in evasion of legal requirements or regulations that would ultimately be detrimental to the Internet community. Any steps to establish a legal presence abroad must begin with a thorough and transparent examination on the effects and possible exploitation of such a move. If there is absolutely any risk of destabilizing Internet governance or the DNS, the plan should not move forward. *CADNA (11 May 2009)*.

ETNO understands that in the short term ICANN’s headquarters will remain in the United States, but for the foreseeable future all options must remain open. ETNO asks that initial discussions with authorities in selected jurisdictions that recognize international not for profit organization status start without lingering and that the community is informed about the results of those discussions as soon as possible. A few ICANN subsidiaries in selected locations may be positive, but adequate safeguards would need to be in place to prevent “contract shopping.” Adequate dialog with ICANN stakeholders about this is essential. ETNO also seeks clarification and more details on the rationale for prioritizing presence in south, central and northern Asia and in Africa. *ETNO (11 May 2009)*.

The PSC report does not justify a major expansion of ICANN’s geographical presence. The idea of developing ICANN’s international presence on the grounds that it could be used for formalizing agreements raises concern. Location should not be an objective per se. There should be clear justification that such expansion would bring long term benefits not otherwise available. *Nominet (11 May 2009)*.

ICANN must become truly internationalized in the manner of the Red Cross or ITU such that it is not subject to the laws of any one jurisdiction insofar as decisions with international consequences are concerned. If that is the case the location of the headquarters is of no great concern other than it should facilitate the mission of the organization. Common headquarters for

internationalized organizations are New York and Geneva, and these should be considered. *CITC Saudi Arabia (11 May 2009)*.

Regarding a suggestion that ICANN be comprised of a number of sub-entities or affiliates each being a national of or having presence in a nation state within one of the five ICANN regions: This would cause ICANN to become the subject of multiple and likely conflicting national laws and regulations, which would burden ICANN and hamper its work. *ALAC (15 May 2009)*.

### ***Geographical Diversity***

ICANN should make a greater effort to geographically diversify its organs, staff and activities—e.g. by having responsibilities split among various regions, languages and cultures, provided that it would not result in inefficiencies or duplication of effort. *ALAC (15 May 2009)*.

### ***Internationalized Domain Names (IDNs)***

ICANN should devote more attention to deliver on the promise of and to address the issues associated with IDNs which have a key role to play in internationalizing the Internet. *AT&T (11 May 2009)*.

## **Financial and Operational Security**

### ***Global economic environment***

ICANN must give special regard to the effects of the economic recession on ICANN constituents and the potential impact that could have on the policy development process. *ICC (4 May 2009)*.

### ***Alternative Funding Sources***

Further information is needed about alternate sources of revenue, including the approval process. *ICC (4 May 2009)*. ETNO highlights again that considering registries and registrars as the main contributors to ICANN sources of revenue is not strictly correct. In reality they are more collectors rather than direct contributors: it is the users or registrants who effectively fund ICANN. Consideration should be given to alternative sources of revenues--e.g., from Regional Internet Registries managing IP addresses and ccTLD registries--and other options. *ETNO (11 May 2009)*.

The 4.6.2 recommendation for a community consultation on “sources of revenue” overlooks that given ICANN's near-total dependence on payments made by accredited registrars and gTLD registries (the ultimate source being gTLD registrants) ICANN's higher priority should be to adopt stronger safeguards in its structure and processes that reduce the risk that “he who pays the piper calls the tune.” *COA (11 May 2009)*.

Any new sources of funding should be without condition, express or implied. ICANN should have unfettered discretion in the manner it determines to use funds, for example, to subsidize improvements to infrastructure in areas that are economically disadvantaged. *ALAC (15 May 2009)*.

### ***Transparency***

With regard to discussions about the use of surplus funds as well as operating plan and budget discussions, full transparency and accountability are of paramount importance. It is unclear to ICC what impact “surplus funds” may have on the not for profit status of ICANN; this issue needs further examination. *ICC (4 May 2009)*. Financial process matters, including management of ICANN's future revenue growth and surplus, must proceed with full public discussion and consultation. *ETNO (11 May 2009)*.

Nominet recognizes the importance (recommendation 1.9) of ICANN maintaining sufficient independence from its sources of funding. Much of the process of improving institutional confidence should be focused on guaranteeing this arm's length relationship. Nominet recognizes the danger of single source funding and ICANN needs to ensure that its decisions are not influenced by its sources (or potential future sources) of funding. In addition, given ICANN's growth, Nominet agrees with the PSC that focus on audit and spending controls, and performance-measuring metrics needs to be maintained and processes continually enhanced. Transparent financial planning and reporting are important, and further development is needed regarding project budgeting and costing which should be used in prioritizing projects. *Nominet (11 May 2009)*.

ICANN must develop regular financial reporting standards and processes. Network Solutions supports recommendation 4.3 of the plan as long as it requires ICANN to implement improvements in financial practices and reporting to the community. Also, relevant stakeholders should be involved in the budget process at more meaningful levels to directly impact budgeting issues (e.g. an expanded Finance Committee or a reformed Budget Advisory Group). This will instill confidence that resources are being used in a manner that promotes ICANN's core mission. *Network Solutions (11 May 2009)*.

The new TLD program raises substantial financial and operations concerns. As part of the IIC, ICANN should provide more details about anticipated funding requirements and the actual funding sources, as well as address budgeting requirements for full implementation of the IIC plan itself. ICANN should also avoid taking any economic interest in DNS policies and related decisions in order to avoid any actual or potential conflicts of interest. *AT&T (11 May 2009)*.

One of ALAC's main concerns is how is ICANN allocating and monitoring resources and funding sources. ICANN should use its resources more efficiently and implement a system that measures the effectiveness of its use of resources. *ALAC (15 May 2009)*.

### ***Operational Efficiency Dialog***

ICC supports measures that will improve operational efficiency in a qualitative manner. Earlier discussions between ICANN, VeriSign and the NTIA regarding the IANA procurement agreement appear to offer such improvements, and ICC encourages ICANN and the U.S. Department of Commerce to engage in further dialog. *ICC (4 May 2009)*.

## **Security and Stability**

### ***DNS Priority***

ICANN should continue to refine how it provides for the security and stability of the DNS. *ICC (4 May 2009)*. Though listed as the fifth area for PSC recommendations, maintaining safe and stable operations relating to the unique identifiers of the Internet is ICANN's most important task. CADNA is pleased that the PSC report identified growing concerns about the Internet's vulnerability but would like specific remedies to be developed for public review. *CADNA (11 May 2009)*.

ICANN should publish the long awaited white paper on its proposed role on security and stability. ICANN must ensure DNS stability remains the primary and overriding priority in all its decisions and activities. ICANN should consider adding more technical experts to its staff (especially for focus on identifying and responding to emerging security threats related to the DNS and unique Internet identifiers). It should also find ways to engage with the community more regularly on security and stability issues. ICANN should also maintain a cost-based fee structure as a safeguard against conflicts and possible mission creep that would destabilize ICANN. *AT&T (11 May 2009)*.

ICANN does have role to play in working with other organizations and stakeholders on issues of stability and security (an example of successful cooperation was in the e-crime dialog at the Mexico meeting). *Nominet (11 May 2009)*.

It is impossible to discuss what ICANN's discussion leader and awareness raiser role would be on security and stability issues since ICANN has not yet released a plan that specifies ICANN's role and that proposes concrete actions in this area per ICANN's draft operating plan for FY2010. *COA (11 May 2009)*.

### **ARPA TLD and Root Zone System**

ETNO continues to believe that the transition of the coordination and management of the ARPA TLD and the root zone system to ICANN, in particular to enable ICANN to edit, sign and publish the root and ARPA zones, is essential. ICANN cannot be considered as an international independent body responsible to its stakeholders before this transition is fully completed. ICANN needs to continue to work with the community to resolve the outstanding issues to facilitate this transition. *ETNO (11 May 2009)*.

### **IANA Function**

ICANN carries out the IANA function under contract from NTIA and this work is of a different nature than ICANN's other activities. This difference should be made more explicit in the PSC report. Nominet looks forward to continued improvements in the speed of the IANA function. *Nominet (11 May 2009)*.

Since IANA is effectively a function of ICANN and not a distinct body, the IANA function should not be treated as separate from the rest of ICANN. Changes related to internationalization and public policy setting would apply equally to the IANA function. *CITC Saudi Arabia (11 May 2009)*.

## **RESPONDENTS**

At-Large Advisory Committee (ALAC)  
Association for Competitive Technology (ACT)  
AT&T  
Coalition Against Domain Name Abuse (CADNA)  
Coalition for Online Accountability (COA)  
Communication and Information Technology Commission, Kingdom of Saudi Arabia (CITC Saudi Arabia)  
European Telecommunications Network Operators' Association (ETNO)  
GoDaddy.com, Inc. (GoDaddy)  
Alan Greenberg (A. Greenberg)  
International Chamber of Commerce (ICC)  
Andrew Mack (A. Mack)  
NetChoice  
Network Solutions  
Nominet  
Carlton Samuels, The University of the West Indies (C. Samuels)