Next steps in continuous improvement of ICANN dispute resolution and Board processes

ICANN is committed to ongoing review and improvement in all aspects of its operation. A strong set of dispute resolution mechanisms already exists. However, two areas of potential improvement have been identified during consultations on ICANN's accountability and transparency practices. As part of ICANN's continuing review program mandated by Section 4 of the ICANN bylaws, the following could be considered:

- Parties may be in dispute with ICANN because they believe that due process has not been followed in arriving at a Board decision or because they believe that they have not been treated fairly in an ICANN process. ICANN's three-part dispute resolution process, which includes the Board Reconsideration Committee, the Independent Review Panel, and the Ombudsman, is available to members of the community to resolve these types of disputes. The One World Trust in its review of ICANN accountability and transparency 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." They also identified some areas for improvement, particularly with regard to the accessibility of these mechanisms. As part of its ongoing practice of reviews of ICANN structures and processes, the Board Governance Committee could schedule a review of these mechanisms to identify ways in which they might provide even higher levels of accountability.

- Parties may be in dispute with ICANN because they disagree not with the process but with the outcome of an ICANN decision process. Based on feedback received from the community, the Board could recommend that the forthcoming Board Review consider a mechanism whereby the community can require the Board to reconsider a decision. This mechanism needs to be constructed with awareness that the Directors are legally accountable for the business dealings of the organization and have fiduciary obligations including (a) a duty of care; (b) a duty of inquiry; (c) a duty of loyalty; and (d) a duty of prudent investment. The proposed recommendation could consist:.

    - The community could require the Board to reconsider 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 GAC 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 reconsider. There would need to be a reasonable time limit on such a vote to ensure that contracting parties or other third parties could have certainty in the Board's decisions.

- There may be circumstances where it is appropriate for the ICANN community to be able to move for an extraordinary dissolution of the Board and its consequent reconstitution. The most obvious case for such an action would be where the Board has made clearly unethical decisions that constitute "misbehavior". The Board will be recommending that the forthcoming Board Review investigate and consider a "misbehavior" Board dissolution and reconstitution process. What constitutes "misbehavior" would need to be carefully studied and defined within the context and deliberations of the Board Review. The mechanism for dissolution could be a two-thirds majority vote of two-thirds of the Councils of Supporting Organizations and two-thirds of members of Advisory Committees (for the GAC it may be sufficient to have a consensus statement from all the members present at a physical meeting) to remove all Board members from their positions. There would need to be a reasonable time limit on such a vote to ensure

that contracting parties or other third parties could have certainty in the Board's decisions. A new election and appointment process would need to be undertaken immediately by the Supporting Organizations and Advisory Committees to put a new Board in place. Replacement Nominating Committee members would need to be nominated by a specially convened Nominating Committee. Some members who were removed may be re-elected or re-appointed. It is important that the whole Board is removed, rather than just the representatives of individual Supporting Organizations so that the individual Board members do not feel beholden to the Supporting Organization that elected them but rather are able to fulfill their duties to ICANN as a whole without fear of immediate individual recall because of disagreement with a decision by the particular Supporting Organization. The Board acting as a whole is accountable for its actions.

In considering the scope of the "misbehavior" dissolution, it would be important for the Board Review to recognize that the Board has a fiduciary obligation to the organization as a whole and to its mission for the users of the global Internet. In contrast, Councils of Supporting Organizations, and particularly their individual members, as well as the members of Advisory Committees, have specific business and other interests to defend. It is not sufficient to empower the dissolution power simply to a coalition of community interests who may disagree with a particular decision of the Board – this could result in institutionalizing a gaming incentive that may effectively hold the Board to blackmail. Another incentive that is not intended to be created is to give to one set of constituencies (namely, Councils of Supporting Organizations and the members of Advisory Committees,) the power of dissolving the Board, while the power of electing the Board comes from a different mix (Supporting Organizations and the NomCom). This could create (in theory) a deadlock by which a set of people appoints a Board that is dissolved by another group, just because the second group does not agree with the choices of the first group.

The focus of the Board Review's consideration of any dissolution power would need to be on "misbehaviour" in ethical terms.