

**Comments of the Registries Stakeholder Group**  
**Improving Institutional Confidence: The Way Forward**  
**September 25, 2009**

The Registries Constituency of the GNSO (RyC) appreciates the opportunity to provide these Comments on the ICANN paper, *Improving Institutional Confidence: The Way Forward*, and the proposed bylaw changes to improve accountability. The comments that follow represent a consensus position of the RySG as further detailed at the end of the document.

On 31 May 2009, ICANN staff issued a paper entitled *Improving Institutional Confidence: The Way Forward* (the “Staff Proposal”). Responding to community calls to improve ICANN’s accountability mechanisms, the staff proposed amendments to the Bylaws to create two new mechanisms: first, a procedure whereby the community could vote to request that the Board re-examine a Board decision; and second, an “independent review tribunal.”

The Registry Constituency welcomes this opportunity to comment on the proposal of a new independent review tribunal described in the Staff Proposal, and commends the staff for its efforts to identify an approach to enhance ICANN’s accountability. That said, the Constituency has significant concerns about both the substance of the Staff Proposal, as well as the process by which the Staff Proposal was developed. Given the nature of these concerns, which are described below, the Registry Constituency calls on the ICANN Board not to move forward with the Staff Proposal, but rather to create and fund a truly independent commission to develop and present to the ICANN community for consideration (i) an alternative proposal for an independent tribunal, and (2) an alternative standard to be applied by that body in reviewing Board and staff action.

We use the word “tribunal” because that is the term used in the Staff Proposal. But we want to be clear: ICANN needs a truly independent judiciary that is responsive to the ICANN community as a whole as well as to individual stakeholders affected by the acts or omissions of the Board and ICANN and responsible for reviewing and ruling on claims alleging harm resulting from a failure by the Board and/or staff to comply with ICANN’s fundamental obligations to members of the ICANN community.

**What is an independent judiciary and why does ICANN need one?**

Simply put, a judiciary is the impartial branch of government responsible for interpreting the law and resolving disputes. It does not make law, nor does it enforce law. Rather, it interprets and applies the law to the facts of each case.

ICANN’s Board makes rules for the community – referred to as policies. The Board and the staff together apply and enforce those rules. Members of the community have agreed to be bound by properly enacted and applied rules, in exchange for ICANN’s commitment to develop policies and faithfully implement those policies in compliance with clearly articulated procedural and substantive safeguards, currently contained in the ICANN Bylaws. Absent those safeguards, stakeholders would be reluctant to agree to be bound by ICANN’s future actions. Those

commitments, and meaningful tools to hold ICANN accountable for any failure to honor those commitments, are the sum and substance of ICANN's legitimacy.

From time to time disputes have arisen, and will continue to arise about whether in fact ICANN is living up to its end of the bargain, and an independent judiciary is needed to help resolve them. An independent judiciary would not create ICANN policies, but it could resolve disputes by reviewing Board and staff actions to determine whether policies are consistent with the substantive safeguards set out in the Bylaws, are developed in accordance with the procedural safeguards laid out in the Bylaws, and are faithfully implemented and administered in light of those safeguards.

Currently, ICANN maintains that the Board is responsible for determining whether its policy development and execution activities comply with the Bylaws. In other words, ICANN already has a judiciary – the Board passing judgment on itself and its staff. That's obviously problematic, and the antithesis of an independent judiciary. It is not surprising that ICANN's legitimacy has repeatedly been questioned on the grounds that it lacks meaningful judicial oversight.<sup>1</sup>

According to the World Bank, "judicial independence is widely considered to be a foundation for the rule of law,"

[M]ost agree that a truly independent judiciary has three characteristics. First, it is impartial. Judicial decisions are not influenced by a judge's personal interest in the outcome of the case... Second, judicial decisions, once rendered, are respected... The third characteristic of judicial independence is that the judiciary is free from interference. Parties to a case, or others with an interest in its outcome, cannot influence the judge's decision."<sup>2</sup>

There is international consensus on the importance of an independent judiciary to ensure the rule of laws. The Universal Declaration of Human Rights, for example, enshrines the principle of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. To promote judicial independence, the United Nations has endorsed a set of Basic Principles on the Independence of the Judiciary.<sup>3</sup> There is a wealth of very recent scholarship and hands on experience in creating independent judiciaries in places as diverse as the UK, Eastern Europe, and Africa.

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<sup>1</sup> Michael Fromkin argued in 2000 that ICANN's decisions should be subject to judicial review by U.S. Courts. See, A. Michael Fromkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 Duke L.J. 17, 51-52 (2000). Jonathan Weinberg also articulated the legitimacy issues that arise in the absence of judicial review, but questioned the wisdom of resorting to U.S. courts on the grounds that review of agency rulemaking by generalist and often uninformed courts is too slow and acts as a powerful barrier to change. See Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 Duke L.J. 187, 234 (2000).

<sup>2</sup>Excerpt from: The World Bank Group – Legal Institutions of the Market Economy. Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs.  
<http://www1.worldbank.org/publicsector/legal/judicialindependence.htm> 2001

<sup>3</sup> General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

### What standard should an independent judiciary enforce?

ICANN's bylaws include both procedural and substantive protections that govern the manner in which the organization adopts, implements, and enforces its policies, and the way in which it fulfills its obligations to stakeholders. Specifically, the provisions in the Bylaws relating to ICANN's Mission and Core Values, Transparency, and Non-discriminatory treatment set out the circumstances under which stakeholders have agreed in advance to be governed by policies (rules) adopted by the ICANN Board. This kind of standard is referred to variously as a constitution, charter, or compact. These Bylaws provisions were developed by the ICANN community in the Evolution and Reform process, and should serve as the starting point for any articulation of the commitments made by ICANN in exchange for the authority granted to ICANN by the community in general, and by individual stakeholders. Because it best expresses the contractual/agreement-based delegation of authority to ICANN, we refer to this bundle of commitments as the "ICANN Compact."

### What has staff proposed?

The Staff Proposal would create a tribunal to replace the existing Independent Review Process ("IRP"). Staff proposes to amend the bylaws to create a mechanism that affected stakeholders can invoke to evaluate Board decisions on three grounds:

- First, was the Board's decision procedurally fair – in other words, did affected parties have the opportunity to make their case?
- Second, was the Board's decision within the scope of its authority, based on appropriate considerations, and made in good faith?
- Third, was the Board's decision rational?

Under the staff proposal, the "judges" in any particular situation would be selected from a pool of internationally recognized technical experts and jurists, who would be appointed to serve a five year term.

### What's wrong with the staff proposal substantively?

The Registry Constituency has a number of substantive concerns with the staff proposal, only a few of which are provided below by way of example:

- While the Staff Proposal would leave ICANN's existing commitments in the Bylaws, it creates a wholly new – and potentially very narrow – yardstick for evaluating Board action. The Proposal claims to expand the scope of permissible review, but makes that case by simply ignoring the substantive protections set out in the Bylaws. . The existing Bylaws on Mission, Core Values, and Non-discriminatory treatment are both substantive and procedural. For example, the Bylaws obligate ICANN to make decisions guided by respect for "the creativity, innovation, and flow of information." Likewise, the Bylaws prohibition on applying its policies inequitably or in a manner that singles out a party for disparate treatment covers both substantive and procedural discrimination.

We are not saying that the bundle of commitments that make up the ICANN Compact should never change. We are saying, however, that any proposed change deserves careful consideration, thoughtful review, input from experts and the community, and a robust discussion.

Neither are we saying that the commitments contained in the Bylaws are perfect. For example, any discussion of the standard to be applied needs to address and clarify the ways in which the Board may use authority described in the Bylaws Core Values section “to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.” We do not believe that provision creates the extraordinary level of deference ICANN claims for Board decisions.

Even if the Staff Proposal included or went beyond existing protections, the Proposal ultimately narrows the impact of any review by mandating that a reviewing court accord enormous deference to Board decisions not shown to have been taken in bad faith. This standard, which does not appear in the current Bylaws, is a formulation of the “business judgment rule” used in corporate, commercial settings to determine the liability of officers and directors to shareholders for business decisions. In such situations, courts generally defer to business decisions reached by reasonably informed directors acting in good faith. The business judgment rule may be an appropriate standard for fixing director liability, but it is awkward in the association setting, and irrelevant in the policy setting. Simply put, it stacks the deck in favor of the Board. To successfully challenge a Board decision, an affected stakeholder would need to show, for example, that:

- The Board decision was predominantly based on an ulterior purpose “foreign to the objects of the power being exercised by ICANN;” or
- That the decision was “wholly outside the scope of a reasonable exercise of ICANN’s power;” or
- That it based its decision of facts “for which there was no support.”

This standard is wholly inappropriate, particularly when ICANN is applying its policies to specific individuals or entities. Typically, the standard of review under modern administrative procedures laws depends first on whether an agency is involved in policy development or in applying developed policy. The standard also varies depending on whether the issue being resolved is a question of law, a question of fact, or a question of the application of a law to fact. In the United States, while greater deference is afforded in the policy development or rulemaking context, courts defer far less when the review involves issues of fact. In those cases, a reviewing court would determine whether or not an agency’s findings are supported by “substantial evidence” on the record as a whole. Finally, where judicial review involves a claim of abuse of discretion, courts in the United States consider whether an agency’s actions were arbitrary and capricious using a flexible standard.

The Staff Proposal embodies a single, one size fits all, highly deferential standard of review. Given the variety of contexts in which members of the ICANN community may be affected by ICANN's actions or inactions, the unitary standard embodied in the Staff Proposal is inadequate and unlikely to address the community's current lack of confidence in the institution.

- The Staff Proposal maintains the IRP's reliance on third party commercial arbitration providers, which has proven to be entirely inaccessible to members of the stakeholder community in any context other than a high stakes commercial dispute. As is the case today, in disputes where the disparity between ICANN's resources and those of the affected stakeholder are great, or where the cost of the process exceeds the value of the dispute, ICANN will continue to hold all of the cards.
- The Staff Proposal calls for a standing pool of jurists to be called upon as necessary. This ensures that the learning curve for reviewers will remain very steep, which in turn raises the cost of the proceeding and the likelihood that cases will be wrongly decided based on confusion or misunderstanding.

#### What's wrong with the process?

Ironically, the Staff Proposal is the product of a process utterly lacking in transparency. Who drafted this proposal? Who was consulted? What degree of relevant expertise did the drafters possess? What level of independence from ICANN did they have, what were their marching orders, and where did these marching orders come from? The only thing that is clear is that the Staff Proposal's appearance, a few days before a Congressional hearing, seems to have been a surprise to the Board, most of the staff, and the community. It may have been undertaken with the very best of intentions and good faith, but it has the appearance of an 11<sup>th</sup> hour effort designed to make ICANN look responsive to the community without actually altering the status quo.

#### What should ICANN do?

Models for independent judiciaries are many and varied, and in every country in which independent judiciaries exist there are both judges and constitutional scholars with relevant expertise and experience. In many cases, these individuals are also experts in the law of cyberspace. There are, in the ICANN community, highly regarded individuals with appropriate skills and a detailed understanding of the institution. These resources should be commissioned to identify appropriate models for independent tribunals that reflect ICANN's unique role, and report back to their community on their findings and their recommendations.

Accordingly, the Registry Constituency calls upon the ICANN Board to charter and fund an independent commission consisting in the main of internationally recognized and geographically diverse jurists and scholars but also including some number of experts from the ICANN community as well. Procedures should be in place to safeguard the integrity of the selection process and the independence of the commission. The commission should be charged with crafting one or more proposed models for ICANN's independent tribunal, along with one or

more models for the ICANN Compact, which would be presented to the community for review and input and ultimately consideration by the ICANN Board.

In this transition period, all eyes are focused on ICANN. ICANN's leadership must resist the temptation to attempt control the outcome of this process, support a fully open process, acknowledge the ways in which its decisions affect both individual stakeholders as well as the Internet community as a whole, and embrace the kind of accountability mechanism it must have to secure its legitimacy over the long term.

### RyC Information with regard to These Comments

A supermajority of 12 RyC members supported this statement:

- Total # of eligible RyC Members<sup>4</sup>: 14
- Total # of RyC Members: 14
- Total # of Active RyC Members<sup>5</sup>: 14
- Minimum requirement for supermajority of Active Members: 10
- Minimum requirement for majority of Active Members: 8
- # of Members that participated in this process: 14
- Names of Members that participated in this process:
  1. Afilias (.info)
  2. DotAsia Organisation (.asia)
  3. Dot Cooperation LLC (.coop)
  4. Employ Media (.jobs)
  5. Fundació puntCAT (.cat)
  6. mTLD Top Level Domain (.mobi)
  7. Museum Domain Management Association – MuseDoma (.museum)
  8. NeuStar (.biz)
  9. Public Interest Registry - PIR (.org)
  10. RegistryPro (.pro)
  11. Societe Internationale de Telecommunication Aeronautiques – SITA (.aero)
  12. Telnic, Limited (.tel)
  13. Tralliance Corporation (.travel)
  14. VeriSign (.com, .name & .net)

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<sup>4</sup> All top-level domain sponsors or registry operators that have agreements with ICANN to provide Registry Services in support of one or more gTLDs are eligible for membership upon the “effective date” set forth in the operator’s or sponsor’s agreement (Article III, Membership, ¶ 1). The RyC Articles of Operations can be found at [http://www.gtldregistries.org/about\\_us/articles](http://www.gtldregistries.org/about_us/articles) .

<sup>5</sup> Per the RyC Articles of Operations, Article III, Membership, ¶ 4: Members shall be classified as “Active” or “Inactive”. A member shall be classified as “Active” unless it is classified as “Inactive” pursuant to the provisions of this paragraph. Members become Inactive by failing to participate in a Constituency meeting or voting process for a total of three consecutive meetings or voting processes or both, or by failing to participate in meetings or voting processes, or both, for six weeks, whichever is shorter. An Inactive member shall have all rights and duties of membership other than being counted as present or absent in the determination of a quorum. An Inactive member may resume Active status at any time by participating in a Constituency meeting or by voting.

Regarding the issue noted above, the level of support in the RyC for the Constituency statement is summarized below.

1. Level of Support of Active Members:

1.1. # of Members in Favor: 12

1.2. # of Members Opposed: 0

1.3. # of Members that Abstained: 0

1.4. # of Members that did not vote: 2