



COMMENTS ON ICANN'S DRAFT PROPOSAL "AFFIRMATION REVIEWS REQUIREMENTS AND IMPLEMENTATION PROCESSES"

10 February 2010

Introduction

The Internet Society (ISOC) appreciates having the opportunity to comment on the requirements and implementation processes being proposed for the four reviews provided for in the Affirmation of Commitments (Affirmation) between the United States Department of Commerce and ICANN.

ISOC believes that the Affirmation represents a turning point in how the Internet's addressing system is managed. ISOC was especially pleased to see that the Affirmation picked up several of the recommendations made in our submission to the Department of Commerce's Notice of Inquiry on the Joint Project Agreement. Key among those was ISOC's view that ICANN needs to recommit to acting as a steward of a vital and shared global resource. In the AoC the public interest aspect of ICANN's functions is a repeated theme, as are accountability, transparency, stakeholder participation, inclusive dialog, evidence-based decision making processes, and the need for robust complaint/response/dispute resolution mechanisms. The implementation of these principles in the immediate future will be critical, and ISOC believes that ICANN and the participants in its processes now have the tools and incentives to make it an effective and trusted organization. One of the most important of those tools is the series of four reviews called for in the Affirmation. The way those reviews are carried out are particularly important, as their outcome will significantly assist all stakeholders to understand the progress ICANN is making toward achieving its commitments.

The following comments identify some issues related generally to the review process in the context of the Affirmation, followed by some specific comments on the review of Accountability and Transparency, proposed to be the first Affirmation review.

Definition of Public Interest

It is essential to develop clear and accepted definitions of terms if the review process is to help ICANN continue its positive development. Perhaps the most important task will be to define what is understood as “public interest” in the ICANN context. As it is treated in the consultation document, "public interest" seems similar to "client satisfaction." From an ISOC perspective, that is too narrow a conception, because it misses the concept of ICANN's stewardship role over a vital and shared global resource.

While the stakeholders and participants in ICANN processes are the ones to be involved in the reviews, they must look always at what is best for the Internet and for the broad community of Internet users worldwide. But using a definition of the “public interest” as being what is good for the entire population is not useful either. Since the term “public interest” is often used in legislation, a body of legal work has been done that can be useful in this case.¹ Specifically, “the public interest” does not have the same meaning in all contexts; its content depends on the particular set of circumstances. It often refers to a determination of the appropriate balance between private or individual interests and the interest of a broader public that could be affected by those private interests. To further complicate the issue, the broader public may not have a homogeneous interest, in which case the balance becomes even more difficult to achieve. And the broader public may not be as well organized to explain or defend its interests as are private or individual interests.

The difficulty that even legal scholars have in defining the public interest suggests that the ICANN community, including the Board, need to spend some time developing its understanding of its steward responsibilities and of the appropriate conception of “the public interest” before it can conduct effective reviews. Doing that work through appropriate consultative mechanisms may mean that it is necessary to look closely at the demanding timelines proposed in the consultation documents, to ensure that the reviews are able to be useful.

Composition of Review Teams

A second area of interest is the proposal for the makeup of the review teams. The consultation paper proposes that the teams be kept small and formed from "representatives" of various ACs and SOs. From ISOC's perspective, it does not seem likely that restricting the teams to representatives of ACs and SOs (even with the potential addition of single "independent experts") will enable the views of the Internet Community to be reflected. It will probably prove difficult to find reviewers from within these groups who will necessarily possess all the required

¹ See for example: Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 (2 August 2005)

skills. As recently seen in the comments on the gTLD proposals, a wide range of skills and perspectives are necessary to ensure that important aspects (such as trademark implications) are not overlooked when thinking about complicated issues.

While ISOC agrees that the teams need to be kept small, the review teams may need to form sub-committees to bring in additional members if they are to be able to do their work in a reasonable length of time. In addition, and consistent with the eventual definition of the public interest, the review teams should include more independent experts.

For the reviews to be effective, volunteers will be asked to commit extensively, whether by serving on the teams or by engaging in the public processes around them. It is likely that in some cases funding may be needed to permit effective participation. And, particularly if resources become available, it will be necessary to take steps to avoid forming a clique of “review regulars.” Perhaps setting reasonable limits on number of times an individual can serve on a review team would be a solution.

Transparency will be needed in the selection of independent experts and consultants: care to be transparent. There must be an open tendering process when consultants are being hired. There also needs to be full disclosure of the rationale for selecting independent experts. And “expert” is an important concept to keep separate from “representative.” ICANN will be able to draw from a rich pool of experts from other organizations working in the space, academics, and also from organizations like the RALOs in some circumstances. Transparency will be a key element in the selection process.

Consultants can be useful from a methodological perspective, but should not be confused with experts, who understand the ICANN’s operations and the DNS. The roles of interested participants, experts and consultants need to be clearly understood and separated.

Finally, the discussion of the review methodology does not emphasize enough the need to describe the element being reviewed and to build a theoretical framework for the review. Getting internal buy-in on what elements of the four topics are being evaluated and the criteria for assessing performance against well-understood criteria is vital to the success of an evaluative process. That buy-in must be at the highest level of the organization, but in keeping with ICANN’s traditions and working methods, it is important that the participants understand and accept the underpinnings of the review before it begins.

Referring to the Draft Terms of Reference for the Review of Accountability & Transparency

Turning to the Draft Terms of Reference, ISOC strongly recommends that more work is needed to get agreement on terms, as well as community agreement on what ICANN is accountable for and to whom. ICANN has had lengthy discussions of these terms in recent years. The record should be revisited and affirmed as a first step in the process. The definition of public interest also is obviously important to this first review.

As we approach this first review, it is important to remember that ICANN's work to develop accountability and transparency mechanisms is not yet done: it should be in evolution. In past, ICANN has been assessed as having a high level of accountability and transparency, when compared with other organizations of its type. But there remain open questions coming from the PSC work and public discussion, and it seems likely additional measures could be put in place. Thus, ICANN's participants should agree in advance to regard this first AoC Review as having two purposes. It can assess existing mechanisms, but it should also establish a baseline for future reviews. Realistically, it cannot be an assessment of a completed task.

This review can be helpful too in clarifying ICANN's relatively narrow technical role as the global coordinator of Internet names and numbers. By keeping that in mind in defining the "what," the "how" and the "to whom" of accountability and transparency, it can help to dispel the misconception that ICANN is somehow the only or the premiere Internet governance organization, which will help keep expectations reasonable.

The review team proposed probably needs further thought. One success factor of ICANN's overall accountability and transparency is to have a clear process inside the AC/SOs to select participants in the review team. It is not clear that there is sufficient homogeneity within individual ACs or SOs to allow them to select a single "representative" of the breadth of reviews they contain. This could be an opportunity to experiment with appointing sub-teams to work on particular tasks of the review that are of concern to sub-AC/SO interests.

Finally, with respect to accountability and transparency, the Affirmation of Commitments states that:

"3. This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; "

One way to evaluate accountability and transparency is to look at the process by which proposals were documented and made available for public comment, as well as the degree to which the subsequent comments were addressed and the eventual decisions were implemented as advertised in the final documents and plans. The review team should take this on as a key task, as the documentation should be readily available, and there are clear models in the community that can be used for comparison, for example, the process that the IESG uses in evaluating the outcome of an IETF last call.

Conclusion

The Internet Society is pleased to see ICANN's timely action to implement this important component of the Affirmation of Commitments by launching the review process outlined in the AoC. ISOC is committed to playing its part in support of ICANN, and looks forward to contributing to this process as it moves forward.

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About the Internet Society

The Internet Society (ISOC) is a non-profit organization founded in 1992 to provide leadership in Internet related standards, education, and policy. ISOC is the organizational home of the Internet Engineering Task Force (IETF), the Internet's premier technical standards body. With offices in Washington, D.C., and Geneva, Switzerland, it is dedicated to ensuring the open development, evolution, and use of the Internet for the benefit of people throughout the world. For more information see <http://InternetSociety.org>