

Summary and Analysis of Comments on Proposed Bylaws to Improve Accountability

Public Comment Period: 27 July 2009 – 27 November 2009

A total of 20 comments were received from 17 commenters

The public comments received can be viewed at: <http://www.icann.org/en/public-comment/#iic-bylaws>

Summary of comments received

Mike Roberts, former president and CEO of ICANN, urges ICANN to put the bylaws proposal on hold while reconsidering the changing context of ICANN's relationship with the governments around the world, and notes that the formation of accountability mechanisms have long been a struggle in ICANN. Mr. Roberts notes that: “[s]tatus quo is untenable, and a long term solution is not available, what options does the Board have?” ICANN should renegotiate oversight with more than one country. *See* <http://forum.icann.org/lists/iic-proposed-bylaws/msg00000.html>.

Danny Younger, <http://forum.icann.org/lists/iic-proposed-bylaws/msg00001.html>, states that the community threshold is set as an unreasonable set of hurdles to thwart the possibility of challenges. On the Independent Review Body (IRB), Mr. Younger notes that it is premature to create new bylaws to replace the current Independent Review Process (IRP) when the first IRP hasn't been concluded. ICANN needs to evaluate the outcomes of that first. Mr. Younger states that the Board no longer has the trust of the community.

Edward Hasbrouck, <http://forum.icann.org/lists/iic-proposed-bylaws/msg00002.html>, states that the problem with the current IRP Bylaws is that they have never been properly implemented. According to Me. Hasbrouck, ICANN has to give confidence that it will actually implement its accountability mechanisms. ICANN should implement its existing bylaws instead of revising them.

Hugh Dierker, at <http://forum.icann.org/lists/iic-proposed-bylaws/msg00007.html>; Joe Baptista, at <http://forum.icann.org/lists/iic-proposed-bylaws/msg00011.html>; and Jeffrey A. Williams, at <http://forum.icann.org/lists/iic-proposed-bylaws/msg00004.html> and <http://forum.icann.org/lists/iic-proposed-bylaws/msg00010.html>, each noted their support for Mr. Hasbrouck's statements. Jeffrey A. Williams also noted that he and others had previously made observations regarding the failure of checks on the ICANN Board, and raised concerns regarding constituency representation.

Tim Ruiz, Vice President, Corporate Development and Policy, GoDaddy.com, Inc., states that the proposed mechanisms do not go far enough. The threshold for

community reexamination is too high, and the changes to the IRP still leave the ultimate decision to the ICANN Board. Mr. Ruiz states that there should be an appeal panel. He indicates that the proposed changes do not represent the degree of change that the ICANN community is seeking, and calls for a private sector lead working group on these issues. See <http://forum.icann.org/lists/iic-proposed-bylaws/pdfRoGipbLU18.pdf>.

David W. Maher, provided comments on behalf of the Registries Constituency. Mr. Maher noted concerns about the substance of the proposal as well as the process by which it was developed. He states that ICANN should create and fund a truly independent commission to develop and present to the ICANN community: (i) an alternative proposal for an independent tribunal, and (ii) an alternative standard to be applied by that body in reviewing Board and staff action. The IRB as formed, notes Mr. Maher, sets too deferential a standard for the Board, and was not formed through a transparent process. He also states that ICANN needs an independent judiciary. See <http://forum.icann.org/lists/iic-proposed-bylaws/dockbkYUDWbRw.doc>

Martin Boyle, Senior Policy Advisor, Nominet wrote in support of the creation of a last resort appeals process within ICANN, and identified broader bases for appeal then were set forth in the IRB proposal, as well as the potential for groups to coordinate in initiating an IRB, and the use of the IRB to reach a conclusion on broad issues. Mr. Boyle also questioned the binding nature of the IRB findings on the ICANN Board. See <http://forum.icann.org/lists/iic-proposed-bylaws/doczTpf2cnHA7.doc>.

Becky Burr, at <http://forum.icann.org/lists/iic-proposed-bylaws/msg00009.html>, and reiterated at <http://forum.icann.org/lists/iic-proposed-bylaws/msg00014.html>, commented that the current proposal is a step backwards and does not address known deficiencies in the process, including cost and establishing expectations. In addition, she states that the process to create the recommendations was not transparent. Ms. Burr called for an independent commission to be appointed to study a tribunal, and to learn from the current IRP in forming further recommendations. Ms. Burr encouraged other community members to urge the Board to reject the staff proposal and implement the President Strategy Committee's recommendation for the formation of a committee of experts to evaluate changes to the accountability mechanisms.

Willie Currie, on behalf of the Association for Progressive Communications, wrote in support of the creation of the Community Re-examination Vote, but noted that the two-thirds majority threshold is too high, and recommended a simple majority vote threshold. Mr. Currie also voiced concerns regarding the lack of expert advice in forming the recommendations, and proceeding to recommendations during the pendency of the ICM Registry IRP. Mr. Currie also noted the concern that both bylaws provisions still allow for the Board to ignore the Community Re-Examination vote and the independent review body if those are "not in the best interests of

ICANN". Finally, Mr. Currie noted that the community still does not have the power to dismiss the Board. See <http://forum.icann.org/lists/iic-proposed-bylaws/msg00012.html>. John Dada noted his agreement with Mr. Currie's comment. See <http://forum.icann.org/lists/iic-proposed-bylaws/msg00013.html>.

The At-Large Advisory Committee submitted an Advisory, at <http://forum.icann.org/lists/iic-proposed-bylaws/msg00015.html>, adopted by the ALAC and incorporating the comments of the wider At-Large Community. The At-Large/ALAC support in principle the proposal to establish a community vote for reexamination of a Board decision, but requests the inclusion of a mechanism for weighing a motion, and a full picture of the Bylaws change. The ALAC does not make any recommendations on the Bylaws proposals on the IRB, but requests a better description of the role of the IRB provider and panel to make sure the process is set up by the Board, not by an external entity.

Arif Ali, Alexandre de Gramont, John Murino and Emily Alban, on behalf ICM Registry and the law firm of Crowell & Moring, wrote in opposition to the revisions to the Bylaws and to the alterations in the IRP, as the proposals will further insulate the Board from accountability. ICM Registry initiated the first IRP proceeding under ICANN's current processes, and objects to the timing of the proposals while the first IRP is still ongoing, without regard to the lessons to be learned or consultation with the panelists overseeing the proceeding. The commenters also suggest that ICANN should consult with ICM Registry and Crowell & Moring specifically for insight on reforms to the IRP, should consult more broadly with a panel of experts on further improvements, and conduct more community outreach earlier in the drafting effort. See <http://forum.icann.org/lists/iic-proposed-bylaws/msg00016.html>.

Jonathan Zuck, the President of the Association for Competitive Technology (ACT) writes that ICANN needs to follow through on the Improving Institutional Confidence (IIC) work. The proposals are encouraging, yet do not address the full range of concerns addressed in the IIC consultation. IIC issues should not be rolled into the Affirmation of Commitments reviews – community accountability is separate, states Mr. Zuck. He further notes that it is unclear what protections are offered through the community reexamination vote and the scope of the ability for the IRB to review Board decisions is unclear. Community involvement to create reform needs to continue. See <http://forum.icann.org/lists/iic-proposed-bylaws/msg00017.html>.

Steve DelBianco, NetChoice, at <http://forum.icann.org/lists/iic-proposed-bylaws/msg00018.html>, writes of the need to adopt the President's Strategy Committee recommendations to seek advice from experts prior to adopting the new IRB. The IRB should not make binding decisions, but should assist ICANN in avoiding making bad policy. Mr. DelBianco stated that ICANN should incorporate the reviews called for by the Affirmation of Commitments to review ICANN's follow through on IRB findings and decisions, and use that as an additional metric.

Jeff Brueggeman, ATT Vice President, Public Policy states that ICANN should not adopt the Bylaws as written and should re-evaluate and engage in community review to create new accountability mechanisms in light of the Affirmation of Commitments requirements. Mr. Brueggeman provides many suggestions on formation of new accountability mechanisms. See <http://forum.icann.org/lists/iic-proposed-bylaws/pdfRxlhsAPqR3.pdf>.

Analysis

While the commenters differed in rationale, most of the commenters were in agreement that ICANN should not proceed in adopting the proposed Bylaws as presented for public comment. Regarding the formation of the IRB, many commenters agreed that taking any action to alter the current Independent Review Process is premature in light of the pending ICM Registry Independent Review proceeding and the lessons that could be learned there. On the community reexamination vote, there were varying suggestions on how it could be improved, from adding more process, changing the voting threshold, and an evaluation of the binding nature of the process. Many commenters agreed that there needed to be more input to the creation of proposed accountability mechanisms, including expert review, more community input, and industry input, and the process for the creation of the proposed mechanisms should be more open and transparent. No commenters were in support of the adoption of the proposed Bylaws as presented.

Next steps

Since the posting of the proposed Bylaws revisions, ICANN entered into the Affirmation of Commitments document, which sets forth required reviews into ICANN's accountability and transparency. In addition, ICANN recently received the panel's Declaration in ICANN's first IRP proceeding and is still actively reviewing – with public input – the process options for consideration of the panel Declaration.

Based upon the comments received, the accountability and transparency work underway with Affirmation of Commitments review team, and the need to complete the follow-on work from the first IRP proceeding, the proposed bylaws are not recommended for implementation at this time, so that the recommendations and processes can be improved in light of the intervening events.

Comments received from

Arif Ali, Alexandre de Gramont, John Murino and Emily Alban, on behalf ICM Registry and the law firm of Crowell & Moring
At-Large Advisory Committee
Joe Baptista (2)
Martin Boyle, Nominet
Jeff Brueggeman, ATT
Becky Burr (2)

Willie Currie, Association for Progressive Communications
John Dada
Steve DelBianco, NetChoice
Hugh Dierker
Edward Hasbrouck
David W. Maher, Registries Constituency of the GNSO
Mike Roberts
Tim Ruiz, GoDaddy.com, Inc.
Jeffrey A. Williams (2)
Danny Younger
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