

Working Group 1

Purpose of Working Group 1:

WG 1 is analysing, reviewing and reporting on ICANN's efforts to meet its commitments, set out inter alia in paragraph 9.1.(a) of the AoC, to continually assess and improve ICANN Board of Directors (Board) governance including an ongoing evaluation of Board performance, the Board selection process and the extent to which the Board's composition meets ICANN's present and future needs.

The purpose of ICANN committing to 9.1.(a) is set out in the opening to 9.1 which states "ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency ...to ensure the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders...".

Specific Areas to be considered:

WG 1 has taken stock of community feedback received as part of the ATRT process to-date – most notably input from consultations at the ICANN Brussels meeting and responses the public comments period opened on 9 July, and has concluded that its purpose is best served by focussing its deliberations on 2 broad areas:

1. The composition of the Board, skill-set requirements for the Board and the roles of the SOs and ACs and The Nominating Committee in respect to Board composition and skill-set requirements (Area 1).
2. The transparency of the Board's decision making process and the explanation of its decision to the ICANN community (Area 2).

Area 1

Background research undertaken:

Relevant bylaws:

1. Article VII (<http://www.icann.org/en/general/bylaws.htm#VII>) establishes the Nominating Committee and deals with its structure. The only sections of VII relevant to its work in selecting Board members are Sections 5 and 7:
 - a. Section 5 refers to the geographic diversity requirement expressed in Article 1 Section 2 Core Value 4 (<http://www.icann.org/en/general/bylaws.htm#1-2>)

and somewhat confusingly, in the context of Board selection, also refers to the Section 4 of VII which actually deals with the selection of Nominating Committee members.

b. Section 7 simply states that the Nominating Committee shall adopt such operating procedures as it deems necessary

2. Article VI (<http://www.icann.org/en/general/bylaws.htm#VI>) deals with the composition of the Board. Sections 2 and 3 are relevant:

a. Section 2 requires the Nominating Committee to seek to ensure that the ICANN Board is composed of members who in the aggregate display diversity in geography, culture, skills, experience, and perspective, by applying the criteria in Section 3.

b. Section 3 sets out the criteria for the selection of Directors (by Supporting Organisations and Advisory Committees as well as the Nominating Committee). Those criteria are:

i. Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;

ii. Persons with an understanding of ICANN's mission and the potential impact of ICANN decisions on the global Internet community, and committed to the success of ICANN;

iii. Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria in Section 3;

iv. Persons who, in the aggregate, have personal familiarity with the operation of gTLD registries and registrars; with ccTLD registries; with IP address registries; with Internet technical standards and protocols; with policy-development procedures, legal traditions, and the public interest; and with the broad range of business, individual, academic, and non-commercial users of the Internet;

- v. Persons who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses;
- vi. Persons who are able to work and communicate in written and spoken English.

There do not appear to be any other relevant bylaws.

Relevant Published Policies:

There do not appear to be any relevant published policies.

Relevant Published Procedures:

The Nominating Committee commenced in 2003 and each year its documents are archived on the ICANN web site.

The relevant document is generally referred to as "Nominating Committee Procedures".

1. The 2003 Nominating Committee Procedures (<http://nomcom.icann.org/procedures-10apr03.htm#B>) contain 2 sections of relevance:
 - a. Section B 1 deals with the committee's role and objectives stating that "the objective of ICANN's new nominating process is to balance the Supporting Organization-based and constituency-based selection of Directors and individuals for other positions to ensure that ICANN can benefit from participants of the highest integrity and capability who place the public interest ahead of any particular interests, but who are nevertheless knowledgeable about the environment in which ICANN operates."
 - b. Section C 8 deals with selection criteria and states inter alia:
 - i. the NomCom will apply the criteria for selection and terms of eligibility, defined in the applicable ICANN Bylaws, to identify a pool of qualified Candidates;
 - ii. To select from this pool of qualified Candidates, NomCom will take into account additional considerations, related to the roles to be filled, that it finds important as progress in the selection process is made.

2. The 2004 Nominating Committee Procedures (<http://nomcom.icann.org/procedures-18jun04.htm>):

- a. Section B 1 now reads

“NomCom is responsible for the selection of portions of the members of the ICANN Board of Directors, GNSO Council, Interim ALAC, and ccNSO Council, filling these leadership positions in a way that complements the selections made for such positions by the Supporting Organizations and Interim ALAC.

The central rationale for using a nominating committee to select a portion of the ICANN leadership bodies is to balance those who can represent particular areas of knowledge and interests with those who place the broad public interest of the global Internet community ahead of any particular interests. NomCom’s role is to select individuals of the highest integrity and capability who place the broad public interest of the global Internet community ahead of any particular interests, and who are nevertheless knowledgeable about ICANN’s mission and environment”.

- b. Section C 8 has not materially changed.

3. The 2008 Nominating Committee Procedures (<http://nomcom.icann.org/procedures-2008.html>) are the most up to date available as the 2009 and 2010 procedures although referred to on the relevant pages are not linked:

- a. Section B 1 has not changed.

- b. Section C 8 has changed slightly and now states, inter alia (emphasis added):

- i. the NomCom will apply the criteria for selection and terms of eligibility, defined in the applicable ICANN Bylaws, to identify a **strong** pool of qualified Candidates;
- ii. To select from this pool of qualified Candidates, NomCom will take into account **relevant and** additional considerations, related to the roles to be filled, related to the roles to be filled as the selection process progresses.

Community feedback to the ATRT:

The ATRT received a large number of comments concerning the composition and skills of the Board. They can be grouped in three categories:

- a. Some comments raise concerns about the relative weight of the stakeholder groups in the Board, i.e. " broader business expertise is essential for the ICANN Board in meeting current and future challenges"¹; "business interests (in particular the trademark and domain name industries) are over-represented at ICANN"²;
- b. Some criticize the NomCom for lack of transparency³ and some suggest it to be suppressed⁴;
- c. Some comments raise concerns about the skill set of the Board, suggesting that it "continue to work towards ensuring expertise, independence and diversity on the Board of Directors"⁵; others suggest that "more consideration be given to identifying and recruiting highly competent people"⁶

ICANN activities already underway that help to meet the AoC objectives:

Staff have provided the ATRT with a matrix entitled Affirmation of Responsibilities Tracking and Brainstorming (ARTB).

In respect to the Board selection process, the ARTB states that the ongoing implementation of the NomCom and Board review are activities underway to meet AoC objectives.

In respect to the extent to which Board composition meets ICANN's present and future needs, the ARTB states that all multi-stakeholders groups being involved in Board elections and NomCom delegate selections helps to meet the AoC objectives.

¹ Comments of ICC

² Comments of IPJ

³ Comments of CNNIC

⁴ Comments of Milton Mueller and LFFS

⁵ Comments of CIRA

⁶ Comments of ISOC

Other Input

The Nominating Committee Review:

1. In 2007, Interisle Consulting Group conducted an independent review of the Nominating Committee. Their Final Report was published on 23 October 2007 (the Report) (<http://www.icann.org/en/reviews/nomcom/report-23oct07.pdf>). It made a number of findings and recommendations that are relevant to the work of WG1.

a. Findings:

- i. Finding 1 - The central purpose of the NomCom is to find genuinely independent and unaffiliated Board....members (page 15 of the Report);
- ii. Finding 25 - The NomCom lacks specific requirements for its annual Board....appointments and it is not clear how those requirements should be established (or by whom) (page 28 of the Report).

b. Recommendations:

- i. Recommendation 3 – Recruit and select based on requirements. The Report suggests that a formal procedure is developed for discovering and understanding the requirements of the Board (page 36 of the Report);

2. After a number of public and Board committee processes, the final report of the NomCom Review Finalisation Working Group was released in January 2010 (<http://www.icann.org/en/reviews/nomcom/nomcom-review-finalization-wg-final-report-29jan10-en.pdf>). In respect to recommendation 3 the working group states:

“The WG remarks that similar recommendations are also contained in the report issued by the external reviewers of the Board of Directors which is presently under consideration by the Board Review WG.

Even if not explicitly required by Bylaws, the most recent NomComs adopted the practice to consult informally with Members of the Board and Chairs of SO/ACs on skill gaps to be filled.

Regarding the communication between the NomCom and the Board, the NomCom

review finalization WG supports the recommendation of the Board review WG for a formal dialogue between the Nominating Committee and the Board about gaps and needs that have been identified in the Board's skill-set. That dialogue could consist in a regular consultation between the respective chairs."

The Board Review

1. In 2008 Boston Consulting Group/Colin Carter & Associates conducted an independent review of the Board. Their Final Report was published in November 2008 (the Report) (<http://www.icann.org/en/reviews/board/report-02nov08-en.pdf>). The main finding relevance to WG1 is Section C 4 'Broaden the Skills of the Board' commencing on page 37 of the Report and the recommendation which states inter alia:

- a. Formally define the skill and experience and independence mix required for the board to operate effectively – in the short and longer terms;
- b. Form a view about the main gaps in skills that should be met;
- c. Formally define the participation of the ICANN chairman and the chairman of the Governance Committee as part of the Nominating Committee's process for choosing new board directors;
- d. Develop a process for engaging the Supporting Organisations and Advisory Committee in a discussion about the mix of skills required.

2. After a number of public and Board committee processes, the final report of the Board review Working Group was released in January 2010 (<http://www.icann.org/en/reviews/board/board-review-final-26jan10-en.pdf>). In respect to the relevant parts of recommendation 4 the working group states:

"This recommendation, and in particular the options 4a and 4b, is also being considered by the Board Governance Committee.

With regard to 4c, the WG is of the view that it is appropriate and useful for the Chairman of the Board to have a formal meeting with the Chairman of the Nominating Committee to discuss the skill needs of the Board, and notes that informal contact already occurs.

A formal discussion between the Chairs should take place after a full Board discussion about necessary Board skills, and the Chairman of the Board should represent the Board position on this. If this process is followed, there is no need for the Chairman of the Board Governance Committee to meet with the Chair of the Nominating Committee.

With regard to 4d, the WG recognizes the value in having input from the SOs and ACs into the Nominating Committee process. However, the WG sees little value in creating an extra formal process to capture this input. SOs and ACs are encouraged to develop proposals for ways in which their input might most effectively be incorporated into the considerations of the Nominating Committee. Any such proposals should be submitted to the BGC for consideration."

Questions for consideration:

Do current mechanisms for determining ICANN Board composition ensure that, collectively, the Board possesses an appropriate, diverse set of skills and experience?

- Would changes in selection, composition and compensation improve results?
- Are the desired skills, background and experience adequately defined?
 - For representing constituency interests
 - For reflecting the public interest
 - For overseeing ICANN's mission and operations
 - For best practice in governance
- Could the collective skill-set of directors be improved through the use of alternative selection mechanisms?

Are current mechanisms for determining ICANN Board composition effective in ensuring the Board is representative of the stakeholder community?

- Are Board selection mechanisms sufficiently transparent and accessible to stakeholders?
- Is the current Board of optimal structure and size to ensure both effective representation of stakeholder interests and organisational decision-making?
- At Board level, is there an appropriate balance in the representation of ICANN's various stakeholder groups?

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Area 2

Background research undertaken:

Relevant bylaws:

1. Article I, Section 2 (<http://www.icann.org/en/general/bylaws.htm#I>) enshrines decision making transparency within a number of ICANN's core values, with a focus on the informed participation of stakeholders:

In performing its mission, the following core values should guide the decisions and actions of ICANN:

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
 7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
 9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
2. Article III (<http://www.icann.org/en/general/bylaws.htm#III>) is dedicated to transparency and Section 6 specifically outlines mechanisms for solicitation of notice and comment on policy actions.
 1. With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:

- a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
- b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and
- c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.

2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 6(1)(b) of this Article, prior to any final Board action.

3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

There do not appear to be any other relevant bylaws.

Relevant Published Policies:

The ICANN Board's Code of Conduct (<http://www.icann.org/en/committees/board-governance/bod-code-of-conduct-01oct08-en.pdf>) makes a broad reference to public reporting:

B. Integrity of Records and Public Reporting

Board members should promote the accurate and reliable preparation and maintenance of ICANN's financial and other records. Diligence in accurately preparing and maintaining ICANN's records allows ICANN to fulfil its reporting obligations and to provide stakeholders, governmental authorities and the general public with full, fair, accurate, timely, understandable, open and transparent disclosure.

There do not appear to be any other relevant published policies.

Relevant Published Procedures:

According to its Charter (<http://www.icann.org/en/committees/board-governance/charter.htm>), ICANN's Board Governance Committee is responsible for, among other things:

- A. Assisting the Board to enhance its performance;

- H. Recommending to the Board corporate governance guidelines applicable to ICANN as a global, private sector corporation serving in the public interest

Within its Scope of Responsibilities, the BCG can assist the Board to enhance its performance by encouraging the development of effective tools, strategies, and styles for the Board's discussions. The BCG will also review the existing corporate governance guidelines developed by ICANN staff, be attentive to developments in corporate governance in the global context, and bring ideas and recommendations for adjustments in these guidelines to the Board for its consideration.

However, none of the publicly available Minutes of BGC meetings, dating back to 2008, record any discussion or decision regarding potential improvements to the transparency of Board decision making processes.

Community feedback to the ATRT:

The ATRT received a large number of comments concerning the decision-making of the Board and the explanation of its decisions to the community.

Most of these comments consider that "Board's decisions should be better justified and explained to the community"⁷. They consider that "ICANN could improve the process of analyzing the input it and explaining the reasoning behind its decision-making"⁸:

- a. Some comments raise concerns about the summary of public comments and the briefings produced by the staff: they suggest "making transparent how

⁷ Comments of ICC

⁸ Comments of ATT

the community inputs received are considered"⁹ and publish all briefing materials; some noted that "on a few occasions when those reports have become known, they appeared to contain false statements"¹⁰.

- b. Examples of occasions where the explanation of decisions was judged insufficient are the EOI process¹¹ and redelegation decisions¹²;
- c. Some ask for more transparency of the Board meetings: they suggest all meetings should be public¹³ or that transcripts and recordings be made available to the Community¹⁴;
- d. Some recommend a more formalised decision-making process and explanation of decisions: "ICANN should institutionalise transparency by establishing clear written guidelines for conducting its business. These guidelines should include full "Administrative Procedure Act" notice and comment procedures for public consultation and decision-making¹⁵"; and the Board "should provide an analytical component of its decisions that clearly explains how stakeholders, staff, and experts' comments were taken into consideration, and how and why such inputs were or were not followed in a final decision"¹⁶.

ICANN activities already underway that help to meet the AoC objectives:

Staff have provided the ATRT with a matrix entitled Affirmation of Responsibilities Tracking and Brainstorming (ARTB).

⁹ Comments of ETNO

¹⁰ Comments of Avri Doria

¹¹ Comments made at the Brussels meeting with the Commercial Stakeholder Group of the GNSO

¹² Comments made at the Brussels meeting with the ccNSO

¹³ Comments of KMC

¹⁴ Comments of CADNA and LFFS

¹⁵ Comments of ATT

¹⁶ Comments of Network Solutions

One of the core commitments (Section 3.a.) in the AoC is to transparency and openness of decision making:

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;

The ARTB document advises that changes to Board processes are being explored by the Board Governance Committee, however BCG meeting [Minutes from 2010](#) do not record specific discussions or decisions on transparency of Board decision making.

Some of the preliminary ideas being considered by staff include:

- Provide Board statements with each vote on reasons for decisions and address concerns raised by community.
- Create metrics to track impact of Board & SO decisions on the public interest.

Section 4 of the AoC states:

To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.

The ARTB document advises that only two of the ideas being considered by staff could broadly relate to Board decision-making transparency:

- Enhance public comment periods and translations on all PDPs and Board actions.
- Provide statement of impact before and after Board decisions.

In Section 7 of the AoC ICANN commits to adhere to:

responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration. . . . In addition, ICANN commits to provide a thorough and reasoned

explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

The ARTB document advises that efforts underway include:

- All Board, SO and AC statements and decisions are publicly posted.
- Background currently is provided publicly on all decisions; several new gTLD processes considered a model by the community.
- Background currently is provided publicly on all decisions.

Ideas under consideration by staff include:

- Consider publicly posting recordings of Board meetings.
- Provide Board members with template explanation to complete for each decision, collate and publicly post.
- Improvements to the web site to provide better access to posted information
- Consider development of template or matrix on how comments have been considered and where / how these have influenced the final outcome.
- Ensure comments are summarized in a timely fashion and note which influenced the development of a policy and how.
- Consider Board statements to accompany each vote.
- Develop indicators of success in each area that are qualitative, rather than quantitative, and publish evaluation regularly
- Develop more metrics to track against bylaws, responsibilities, strategic and operating plans.

In Section 9.1 of the AoC ICANN commits:

to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders

The ARTB document advises that efforts underway include:

- Conducting bottom-up policy, planning, and budget efforts, and carrying out management actions with extensive public input and visibility.
- Ongoing BGC work, with second Board performance assessment underway

Other Input

The Board Review:

3. In 2008 Boston Consulting Group/Colin Carter & Associates conducted an independent review of the Board. Their Final Report was published in November 2008 (the Report) (<http://www.icann.org/en/reviews/board/report-02nov08-en.pdf>). Despite the fact Recommendation #8 related to clarifying the Board's accountability, no mention was made of procedures for transparency in decision making.
4. Building upon this independent advice, the Board Review Working Group released its own report in January 2010 (<http://www.icann.org/en/reviews/board/board-review-final-26jan10-en.pdf>). This document also fails to address decision making.
5. However, one of the submissions to the BRWG, from the [International Chamber of Commerce](#), addressed accountability procedures for the Board and specifically commented upon the need for methodical decision making processes:

The Board must continue efforts to enhance the transparency of its deliberations. These should include:

- Transparency of the agendas and comprehensive minutes of the Board are important for the community. The comprehensive minutes should be maintained.
- Board decisions should be based on methodical decision-making processes in order to promote a sense of due process and fairness in Board actions. They should include an analytical component of decisions that explains how stakeholders', staff's, and experts' comments were taken into consideration and how and why such inputs were or were not followed in a final decision.
- The Board input documents [except for those dealing with personnel matters] should routinely be posted to the fuller ICANN community, including staff briefing materials.
- Outputs and delegation of work or authority to different constituencies or groups in the community are essential
- Further discussion is needed in the context of the Improving Institutional Confidence consultation process on this matter as well

ICC urges ICANN to substantiate its commitment to transparency by incorporating all relevant changes within its Bylaws.

Questions for consideration:

Do current ICANN processes deliver transparency and accountability with regards to:

- How issues are chosen for Board consideration;
- How decisions are taken, and on what grounds; and
- How these decisions are communicated to stakeholders?

- Could stakeholder engagement and support be improved by the introduction of codified mechanisms for taking and communicating Board decisions?
 - The timely release of relevant, detailed Board materials: briefing documents, preparatory materials and transcripts of decisions
 - Explanation of how community inputs are received and considered
 - Published rationale for Board decisions, including the advice on which the decisions was based
 - Formalised mechanisms (a section of the ICANN website, direct letters to relevant SOs/ACs, public announcements, public sessions at ICANN meetings) to communicate decisions and reasons to stakeholders.