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A COMMENTARY ON THE ICANN “BLUEPRINT” FOR EVOLUTION AND REFORM

*David R. Johnson, * David Post, ** and Susan P. Crawford****

I. SUMMARY

Contracts between the Internet Corporation for Assigned Names and Numbers (ICANN) and domain name registries and registrars give ICANN the right to impose domain name policies on those registries and registrars (and thereby on the wider user community), but only where those policies have been the subject of documented consensus.¹ The “consensus policy” theory is central to ICANN’s legitimacy and was the product of intense negotiation at the time of ICANN’s founding.² In October 2002, in Shanghai, China, the ICANN Board approved new bylaws that allow the Board to adopt domain name policies by a vote of the Board, irrespective of the presence or absence of consensus among any of the various stakeholders.³ These new bylaws represent an intentional departure from the consensus decision-making model, and a move towards centralized, top-down policy-making.

We believe that abandoning consensus as the basis for ICANN policy-making is neither in ICANN’s best interests nor in the best interests of the Internet community. It will substantially undermine ICANN’s authority, as it eliminates the only answer that now exists

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1. See Registrar Accreditation Agreement, pt. II.D.1.b.i (Nov. 9, 1999), at <http://www.icann.org/nsi/icann-raa-04nov99.htm>.

2. See ICANN Background (Nov. 4, 1999), at <http://www.icann.org/general/background.htm#7>.

3. See Preliminary Report: ICANN Meeting in Shanghai (Oct. 31, 2002), at <http://www.icann.org/minutes/prelim-report-31oct02.htm>.

to the question that more and more people will ask: “What gives ICANN the right to tell anyone what to do?”

II. BACKGROUND

In late September 1999, a web of contracts was announced between and among Network Solutions, Inc. (NSI), the year-old ICANN, and the U.S. Department of Commerce.⁴ NSI was, at the time, the sole registry and the sole registrar for the “.com,” “.net,” and “.org” top-level domains (TLDs).⁵ ICANN and the Department of Commerce made it clear that NSI’s monopoly on registrar functions was going to end; ICANN was proceeding with its plan to open up the registrar function to competitors who would have the ability to sell second-level domains (like “ibm.com”) in these TLDs and to register those second-level domains on their customers’ behalf in the central registry.⁶ In the contract, ICANN and the Department of Commerce agreed to allow NSI to continue to operate the top-level registries in these domains, and to charge registrars a fee of up to six dollars per name for the registration of second-level domains within those registries.⁷

NSI, in turn, agreed to submit to ICANN’s authority over its activities.⁸ More specifically, NSI agreed to comply with ICANN’s then-current domain name policies, *as well as with ICANN’s future policies* relating to “issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, technical reliability and/or stable operation of the Internet or

4. See Approved Agreements among ICANN, the U.S. Department of Commerce, and Network Solutions, Inc. (Nov. 10, 1999), at <http://www.icann.org/nsi/nsi-agreements.htm>; Registrar Accreditation Agreement, *supra* note 1.

5. See ICANN, REGISTRAR ACCREDITATION: HISTORY OF THE SRS [hereinafter ICANN, REGISTRAR ACCREDITATION], at <http://www.icann.org/registrars/accreditation-history.htm> (last visited Mar. 28, 2003).

6. See *id.*; Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998) (statement of policy).

7. See ICANN, REGISTRAR ACCREDITATION, *supra* note 5; see also NSI-Registrar License Agreement § 5.2(b) (Nov. 9, 1999), at <http://www.icann.org/nsi/nsi-rla-04nov99.htm>.

8. See Amendment 19 to Cooperative Agreement Between NSI and U.S. Government (Nov. 8, 1999), at <http://www.icann.org/nsi/coopagmt-amend19-04nov99.htm> (stating, “[a]mendment 19 solidifies those arrangements and provides that in operating the registry NSI will abide by consensus policies adopted in the ICANN process.”).

domain-name system.”⁹ There was, however, a proviso: only policies that were the result of consensus, as documented by a written report showing (a) the extent of agreement among affected groups, (b) the outreach process used to obtain the views of groups likely to be affected, and (c) the nature and intensity of reasoned support and opposition to the proposed policy—and that were recommended by at least a two-thirds vote of the council of the ICANN Supporting Organization addressing the issue—would be binding on NSI in the future.¹⁰ In addition, the contract provided that in the event of a disagreement about the existence vel non of a consensus on any such future policy, the issue would be reviewed by an Independent Review Panel (IRP) to be established under ICANN’s bylaws.¹¹

These provisions became standard in ICANN’s contracts with all of the gTLD (non-country code) registrars and registries.¹² The basic notion behind the consensus policy regime is that registry and registrar businesses have agreed to comply with future policies that do not exist at the time they sign their contracts, mandating or prohibiting particular actions by these businesses. But parties must only comply with policies that are actually the product of a documented outreach process and enjoy documented support by

9. ICANN-NSI Registry Agreement, Agreements pt. 3(A)(ii)(b) (Nov. 10, 1999), at <http://www.icann.org/nsi/nsi-registry-agreement-04nov99.htm>.

10. See *id.* at Definitions pt. 1. During the first four years of ICANN’s existence, ICANN’s Supporting Organizations were each focused on different parts of ICANN’s mandate: addressing through the Address Supporting Organization; assigning domain names through the Domain Name Supporting Organization; and assigning protocols through the Protocol Support Organization. Almost all of the energy and controversy in the ICANN context during these four years took place in the Domain Name Supporting Organization. Within the Domain Name Supporting Organization, there were still more groups—various constituencies established in ICANN’s bylaws (registries for generic names (gTLDs), registrars, intellectual property groups, business, registries for country code names (ccTLDs), and a Names Council made up of delegates from these constituencies.) The Names Council’s job was to facilitate and encourage the work of documenting “consensus” among affected constituencies or parties concerning new mandatory policies.

11. See Registrar Accreditation Agreement, *supra* note 1, pt. I.B.2. For complicated reasons, the IRP has never been formed.

12. See *id.* pt. I.B.1-3 (paralleling the provisions of the ICANN-NSI Registry Agreement).

parties that are substantially affected by the policy.¹³ In the absence of a consensus policy to the contrary, a registry or registrar is free to innovate and run its business as it sees fit.

The premise of the consensus policy regime should have been easy to understand: if most of those affected by a rule agree that it will improve things, and intense opposition is absent, irrational, limited to those who do not bear the costs of the policy in question, or limited to those whose objection is based solely on a desire to continue to engage in unjustifiable wrongdoing, then those who have to implement the rule agree, by contract, to do so. This consensus regime was designed to produce very few global rules for the naming system. The idea was that everything not subject to a global consensus policy would be subject to “local” control—control by the registry itself, which would be subject to local law enforcement. Only those policies that most affected parties agreed were needed to assure interoperability and stability of the Domain Name System (DNS) would be implemented in a global fashion.

Even before the 1999 web of contracts was implemented, the ICANN community had an example of how the consensus policy process could work. The Uniform Dispute Resolution Policy (UDRP), for which implementation documents were adopted in late October 1999, is the closest thing that ICANN has to a consensus policy.¹⁴ The report that accompanied the proposed UDRP reflected an extensive series of discussions among those affected by the proposal, documented arguments for and against the proposal, and provided related background information.¹⁵ The decision of the Board to adopt the UDRP was based on the fact that intense discussions among strong proponents of differing viewpoints had yielded a document that was not vigorously opposed by any substantially affected party.¹⁶ It is true that both substantive and

13. See *id.* pt. I.B.1.

14. See Registrar Accreditation Agreement, *supra* note 1, part I.B.5.

15. See Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy (Oct. 25, 1999), at www.icann.org/udrp/udrp-second-staff-report-24oct1999.htm; Draft Policy Prepared by ICANN Staff and Counsel and Posted for Public Review and Comment (Sept. 29, 1999), at www.icann.org/udrp/udrp-policy-29Sept1999.htm.

16. See Minutes of Special Meeting, (Oct. 24, 1999), at <http://www.icann.org/minutes/minutes-24oct99.htm>.

procedural mistakes were made with respect to the resulting policy.¹⁷ But the UDRP was not adopted until there was a widely shared view that going forward with the proposal was better than not having any standardized policy on the issue.¹⁸

Since 1999, however, no consensus policies have been created or adopted by ICANN. There are several reasons for this phenomenon. First, ICANN staff, who played a crucial role in facilitating the deal-making and consensus-building that led to the adoption of the UDRP, have not publicly exerted leadership in calling for the creation of consensus policies and running the process. ICANN staff and management have had deep concerns about the consensus process from the beginning, because they worry that holdouts will make the development of consensus impossible.¹⁹ They also worry that ICANN's credibility and ability to make both global and effective rules will be undermined by this process, which involves documentation of outreach and other time-consuming efforts.²⁰

Second, the development and structure of the constituency system within the Domain Name Supporting Organization and the work of the Names Council block any work towards true community consensus along the lines followed by those who worked on the UDRP. Each constituency views itself as a group of "representatives" who work to further the perceived goals of their constituents. At the same time, the Names Council, which was supposed to facilitate the development of consensus, views itself as a legislature. This "legislature" view has had the effect of filtering and distorting events, producing a flurry of seat-claiming and report-controlling but very little substantive work. The consensus report

17. See Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP* (Aug. 2001), at <http://aixl.uottawa.ca/~geist/frameset.html> (criticizing UDRP); see also Internet Democracy Project, Answers from Andy Mueller-Maguhn to IDP Questionnaire at <http://www.internetdemocracyproject.org/IDPanswersmueller.htm> (last visited Mar. 28, 2003).

18. See Geist, *supra* note 17.

19. See Committee on ICANN Evolution and Reform, Working Paper on the Policy-Development Process, pt. 1.A (May 7, 2002) [hereinafter Working Paper on the Policy-Development Process], at <http://www.icann.org/committees/evol-reform/working-paper-process-07may02.htm>.

20. See *id.* pt. I.B.

structure set forth in the registry/registrar contracts, with its requirements of analysis and outreach, should have encouraged staff and working groups to see themselves as the community's staff rather than as a group of self-appointed representatives. Unfortunately, that has not happened.

In February 2002, M. Stuart Lynn, ICANN's President, announced that ICANN was broken and would have to be fixed before it could continue its coordination work.²¹ Lynn proposed to reform ICANN by increasing the staff by fifty percent (going from twenty to thirty) and substantially increasing ICANN's budget.²² He also wanted to change ICANN's organizational structure by revising its Supporting Organizations and reducing the number of Board members—and by dropping the effort to elect at-large Board members from the Internet community.²³ Instead, he proposed to add five representatives from governments to represent the public interest.²⁴ Finally, he proposed that the ICANN Board should be able to create global rules on its own that would mandate particular actions by existing registries and registrars under contract with ICANN—and thus, to eliminate the consensus requirement.²⁵ This Article focuses on this last proposal.

ICANN's Board formed an Evolution and Reform Committee (ERC) that published several drafts of a "Blueprint" for the new ICANN during the summer of 2002.²⁶ This work formed the basis of the new bylaws that were adopted in October 2002 in Shanghai by the ICANN Board.²⁷ As of the date of this Article, ICANN has not announced how it intends to deal with the existing registry and registrar contracts. Currently, these contracts require documented consensus as a condition for imposing a mandatory policy on registry

21. See M. STUART LYNN, PRESIDENT'S REPORT: ICANN—THE CASE FOR REFORM (Feb. 24, 2002), at <http://www.icann.org/general/lynn-reform-proposal-24feb02-htm>.

22. See *id.* (proposing—in part three under the heading "Why the Current Course Won't Work"—a budget increase of 300-500% to fully fund ICANN).

23. See *id.*

24. See *id.*

25. See *id.* Although how that could be done without amending the registry and registrar contracts was not discussed.

26. See Committee on ICANN Evolution and Reform, ICANN: A Blueprint for Reform (June 20, 2002) [hereinafter ICANN: A Blueprint for Reform], at <http://www.icann.org/committees/evol-reform/blueprint-20jun02.htm>.

27. Preliminary Report ICANN Meeting in Shanghai, *supra* note 3.

and registrar businesses.²⁸ What will happen when ICANN tries to impose on a registry a new policy that has not been the subject of documented consensus?

III. WHY CARE ABOUT CONSENSUS?

Although the consensus policy regime has been in place within ICANN for four years, many people who follow ICANN issues do not understand, and are impatient with, the idea of consensus.²⁹ But consensus provides a concrete answer to the question “Who gave ICANN the right to tell me what to do?” In a sense, the consensus policy theory provides a real “social contract” and contractually binding “consent of the governed.” The ICANN consensus theory asks each potential participant whether they will agree contractually to implement and abide by a future rule, sight unseen, provided that most people support it and that those parties substantially affected by the policy either do not vigorously oppose it, or their objection is unreasonable.

This contract supports ICANN’s legitimacy, and helps in understanding ICANN, because it provides a demonstration that each participant in the ICANN regime has affirmatively agreed to ICANN’s jurisdiction. However, ICANN’s jurisdiction is limited to the purpose of making global rules with which most affected participants agree to go along. It is intentionally designed to produce only those rules that most people agree should be global—and very few rules will fall into this category. Everything that is not the subject of a global consensus agreement will be left to local decision-making. The consensus policy theory provides subjective balancing between necessary global rules and local rules that no amount of expertise can pretend to provide.

Rather than eliminate the requirement that mandatory policies be supported by documented consensus, ICANN should more effectively implement the consensus theory through increased Board and staff participation in the consensus development process. The consensus process cannot work without strong leadership. And, if consensus of most of those substantially affected by a particular rule

28. See Registrar Accreditation Agreement, *supra* note 1, pt. I.

29. See Working Paper on the Policy-Development Process, *supra* note 19, pt. I.B.1.

does not exist, the default setting should be local policies—rather than a top-down Board vote to create a new global policy. Because ICANN can never be a global democracy and has no delegated rule-making authority from the U.S. government, or any other government, it needs another basis for legitimacy.

We have structured this Article as a commentary on the text of the Blueprint that was published by the Board's ERC during the summer of 2002. We suggest a different route than the one that was ultimately adopted by the Board in Shanghai. We think the Board should have upheld the key role of consensus as a limitation on its authority to promulgate mandatory policies.

IV. ERC BLUEPRINT AND COMMENTARY

A. Policy Responsibility of the ICANN Board

The Board of Directors is ICANN's ultimate decision-making body. It and it alone has the legal responsibility to make and be legally accountable for all policy and other decisions. It is ultimately responsible for the management of the policy development process. Therefore, while it is highly desirable to seek and wherever possible find consensus, it does not follow that even proposals that enjoy consensus support should receive uncritical Board approval. The Board has a fiduciary responsibility to make decisions on the basis of good faith judgment in furthering the public interest.³⁰

In this regard, the ERC is stating that the Board can and should, acting alone, have the ability to make all "policy and other" decisions.³¹ The ERC has presented its concern as: Right now, every decision the Board makes has to be supported by consensus. This is an untenable situation. We cannot be effective in this context. We need reform to make these decisions on our own without waiting for consensus.³²

We think it is important to understand that the Board makes several different kinds of decisions. Only a small subset of these decisions—those dealing with mandatory policies that flow down through registry and registrar contracts—need to be supported by

30. See ICANN: A Blueprint for Reform, *supra* note 26, § 4.

31. See *id.*

32. See Working Paper on the Policy-Development Process, *supra* note 19.

documented consensus. Documented consensus is required only when the rule adopted mandates or prohibits particular actions by registries and registrars with whom ICANN has contracts incorporating the consensus policy process.

There are, in general, four types of Board policy decisions: (1) administrative, (2) amendments to existing contracts (or approvals under existing contracts), (3) emergency, and (4) mandatory policies that are binding on registries or registrars.³³

1. The Board can act administratively without consensus

When the Board needs to hire staff, allocate tasks, create a committee of experts, or rent new space, it can do so without anyone's consensus.³⁴

2. The Board can amend its contracts with registries, registrars, and others (or approve actions under these contracts) without consensus

When, for one reason or another, provisions of contracts that ICANN has entered into are amended by the mutual agreement of ICANN and the other contracting party, only the Board can authorize such amendments on behalf of ICANN. Similarly, approvals called for in ICANN's contracts must be endorsed by the Board applying criteria implicit in the intent underlying those contracts. In a sense, the Board is the only voice ICANN has. The Board can authorize amendments to these contracts, amendments that are voluntary on both sides, or give approvals within parameters and for purposes set forth in the contracts, without consensus. Of course, the Board can ask anyone it likes for advice on the subject of contractual amendments and approvals.

3. The Board can act in an emergency without consensus

Importantly, the Board can always adopt a temporary specification or policy mandating (or prohibiting) particular action by registries or registrars in an emergency. This is found in the power to act when "the Board reasonably determines that immediate temporary establishment of a specification or policy on the subject is necessary to maintain the operational stability of Registrar Services,

33. See ICANN: A Blueprint for Reform, *supra* note 26, § 4.

34. See *id.*

the DNS, or the Internet.”³⁵ Even in the absence of documented consensus, such temporary policies can be treated as consensus policies for up to a year while the real consensus process runs its course.

4. But the Board cannot, in the absence of an emergency, adopt a mandatory policy that is binding on a registry or registrar without documented consensus

Under the current contracts ICANN has signed, when ICANN seeks to impose a policy on a registry or registrar with which it already has a contract, such policies must be the result of consensus.³⁶

There is a very specific process set forth in those contracts: a consensus must be demonstrated by a written report documenting (a) the extent of agreement among impacted groups, (b) the outreach process used to obtain the views of groups likely to be affected, and (c) the nature and intensity of reasoned support and opposition to the proposed policy—and must be recommended by at least a two-thirds vote of the council of the ICANN Supporting Organization addressing the issue.³⁷

When ICANN adopts policies that registries (or registrars) must follow, those policies are only binding when a documented consensus exists and when an IRP is available to review the Board’s determination that this is so.³⁸ When the Board makes decisions about how many staff to pay for, or how many TLDs to open up, or how to make decisions required directly by its contracts, it can simply do that without documented consensus.³⁹ Additionally, the Board is directly entitled to adopt some binding policies in emergency circumstances when the stability of the DNS is threatened.⁴⁰ But ICANN’s contracts with gTLDs and sponsored top-level domains (sTLD) registries, and with its accredited registrars, currently obligate the contracting parties to follow future

35. Registrar Accreditation Agreement § 4.3.4 (May 17, 2001), at <http://www.icann.org/registrars/ra-agreement-17may01.htm>.

36. *See id.* § 4.1.1.

37. *See id.* § 4.3.1.

38. *See id.* §§ 4.3.2, 4.3.6.

39. *See id.* §§ 4.1.1, 4.1.2, 4.3.4, 4.4 (limiting the circumstances under which registrars must comply).

40. *See id.* § 4.3.4.

policies only when they are supported by both appropriate votes and by documentation that demonstrates the existence of consensus among affected parties.⁴¹

We believe that the most effective ICANN reform would have been based on and implemented through the existing contracts that registries and registrars have signed. The Board should continue to make future policies binding in accordance with the consensus process as outlined in those documents. A claimed need for consensus should not be allowed to hold up Board action on matters that do not require the imposition of mandatory future policies on contracting parties.

The Blueprint uses the word “policy” in two very different ways, and the usage of this word should be clarified to avoid confusion. While the Board is ultimately responsible for all policy decisions, its ability to enforce policies that mandate particular actions (or prohibit particular actions) by registries and registrars is dependent on the terms of the contracts that ICANN has entered. Accordingly, ICANN’s Board should distinguish between those decisions that are either administrative or that merely set policy regarding future ICANN actions and those that create an obligation on the part of contracting parties to follow such policies.

In determining whether a consensus exists, the Board is not required to find that there are no opposing voices. Dissent may be overridden when it is irrational or comes from parties not substantially affected by a proposed policy. Dissent may also be overridden if it comes from those whose objection stems from a desire to continue activities that are “wrongful” because they interfere with orderly markets or unjustifiably impose harm on third parties.

ICANN’s consensus process is broken because, among other things, stakeholders lack adequate incentives to come to the policy development table prepared to make a deal. It is clear that an important implementation step should have been the establishment of clearer guidelines for the Board’s management of the consensus development process (including deadlines and clear allocation of

41. *See id.* §§ 4.1, 4.1.1 (stating that “[d]uring the Term of this Agreement, Registrar shall comply with the terms of this Agreement on the schedule set forth in Subsection 4.4, with . . . new or revised specifications . . . and policies established by ICANN as Consensus Policies . . .”).

responsibility), exercise of its role in determining the existence of consensus, and clear recognition of the Board's ability to take actions that do not require consensus because they do not impose mandatory rules on contracting parties. The Board should not have acted to free itself completely from the strictures of the consensus policy concept.

B. Policy and Consensus Defined

"Policy" is a term that does not apply to every action that ICANN takes, through its Board or otherwise. To qualify as a policy decision, a matter brought before the Board for Board action should exhibit some or all of the following characteristics:

- It should be broadly applicable to multiple situations or organizations (that is, not apply to just a single one-off situation);
- It should be expected to have lasting value or applicability, albeit with occasional updates;
- It should establish a guide or framework for future decision-making.⁴²

We think that the ERC got it wrong with respect to what policy means, and created a great deal of confusion with respect to this issue. Policies may come in various forms. Some policies may provide a framework for future decision-making but may not require compliance by contracting registries and registrars. Some policies may represent the kinds of "consensus policies" for which ICANN's existing contracts explicitly require registries and registrars to comply. Any proposed policy should be explicitly identified at the outset as falling within one or another of these categories, as the procedures and documentation differ for different kinds of policies.

Many, if not most, decisions made by the Board do not fit within this meaning of a policy decision. They may, for example, be decisions regarding a single one-off situation that has no foreseeable future applicability, or they may be administrative decisions. To the extent possible, however, other decisions made by ICANN should be made within the framework of already developed policies. Certainly, specific decisions may stimulate the need to develop broad policies.⁴³

42. ICANN: A Blueprint for Reform, *supra* note 26, § 4.

43. *See id.*

As set forth above, many, if not most, of the Board's decisions need not be based on a documented consensus. We agree that there should be a clear mechanism for the Board or any constituency to propose any kind of policy. This mechanism should be effective for either consensus or another sort of policy.

Policy development through bottom-up consensus processes should be encouraged. To be presumptively binding, any policy developed must reflect a true consensus, that is, a policy acceptable to the great majority of those affected, with no strong and reasoned opposition. Any such policy recommended to the ICANN Board, if not acceptable to the Board, should be returned to the policy development body with a clear statement of the Board's concerns. If and when such a recommendation is returned to the Board as a true consensus policy recommendation, the Board may reject or modify such a recommendation only by a 2/3 vote. In the absence of true consensus being achievable, the Board will act according to its own best judgment accounting for community principles, needs, and desires as best it can interpret them.⁴⁴

There are several problems with this paragraph. First, "to be presumptively binding," a consensus policy must come from below, instead of being created by the Board. Second, the description of reasons that would justify derailing a consensus policy should be made clear and should not include "wrongful" action. Third, the Board should not presume that it has the endorsement of the worldwide public in applying its "own best judgment." No one could presume to speak on behalf of the global Internet. We find breathtaking the ERC's assertion that the Board could act to create binding policies based solely on its own "judgment." We believe this paragraph should have been revised to read:

Policy development through bottom-up consensus processes should be encouraged. To be presumptively binding, any policy developed must reflect a true consensus, that is, a policy acceptable to the great majority of those affected, with no strong and reasoned opposition: or with opposition only from those who seek to continue or

44. *Id.*

commence activities that harm the competitive marketplace or impose unjustifiable costs on third parties. Any such policy recommended to the ICANN Board, if not acceptable to the Board, should be returned to the policy development body with a clear statement of the Board's concerns. If and when such a recommendation is returned to the Board as a true consensus policy recommendation, the Board may reject ~~or modify~~ such a recommendation only by a 2/3 vote. In the absence of true consensus as defined above being achievable, the Board ~~will~~ may act according in exigent circumstances to its own best judgment accounting for community principles, needs, and desires as best it can interpret them preserve interoperability or the stable operation of the Internet.⁴⁵

The revised paragraph makes clear that the Board may modify proposed binding consensus policies only if the modifications themselves meet these consensus criteria (i.e., only when the Board can document that objections to the modification are not "strong and reasoned," do not come from substantially affected parties, or come only from those engaged in "unjustifiable wrongdoing.")

Of course, the Board may act "according to its own best judgment" in all other matters that do not involve enforcing a decision against potentially unwilling contracting parties absent consensus as defined by the contracts and as clarified by this additional interpretive language.

In contrast, any recommendations made by ICANN's policy development bodies on matters other than policy as defined above should have only whatever persuasive merit is inherent in the recommendation.

C. Process

A bottom-up, consensus-driven approach to policy development is preferable wherever such approaches do not prevent the Board from carrying out its [sic] ultimate responsibility for ensuring policies are developed, approved, and implemented as necessary to accomplish ICANN's mission. That is, wherever practical, the

45. *Id.* (alterations added).

development or modification of policies would benefit from undergoing policy development in the appropriate policy development body acting with appropriate community review and input.

New policy development or revisions to existing policies (collectively called “policy development”) may be initiated by the Board or by the appropriate policy development body. Any policy development process, particularly when initiated by the Board, should have most of the following characteristics:

- A clear assignment to the appropriate policy development body. If more than one such body has an appropriate interest, one body shall be assigned the lead responsibility for coordinating with the others;
- A defined timescale for completing the policy development leading to a recommendation to the Board, normally in the range of 60 days or less;
- A predefined process and timescale for collecting and evaluating community and public input;
- A recommendation to the Board that reflects the inputs received and corresponding reasons for the presence or absence of true consensus; the pros and cons of any recommendation; and summaries of supporters and opponents;
- An opportunity for the Board to receive advice from other bodies including Expert Advisory Panels or bodies . . . and the GAC;
- A requirement that where practicable the Board publish a tentative decision that allows for a period of public comment and review by the assigned policy development body prior to making a final decision.

These general principles must be adapted by the Board to different circumstances. Emergency circumstances may be addressed by implementing temporary policies to be modified if necessary in follow-up work. The key elements are that in every situation there be a policy development plan including a timescale for completion, a process for receiving public input and other advice, and a process for

seeking consensus where possible. To the extent feasible these plans should be developed before initiating the policy development process.⁴⁶

The Blueprint's all-purpose use of the word "policy" should have been amplified and clarified as part of this implementation process, so that clear lines would have been drawn between the various kinds of policies the ICANN Board could create.⁴⁷

As indicated elsewhere, staff support must be provided to the policy development groups to ensure they can perform their work in a timely manner.⁴⁸

We agree that both the Board and ICANN staff may and should actively participate in the consensus development process. The consensus process cannot work without strong leadership, and there is no requirement that the Board or the staff be neutral about policy outcomes. Instead, the key requirement for Board and staff involvement is that they provide adequate opportunities for participation and accurately report the existence or lack of true consensus.

None of the above is intended to inhibit the Board from making policy decisions as appropriate in the absence of the ability of the community to reach consensus.⁴⁹

As noted above, the limited exception to this statement is that the ability of the Board to enforce policies that direct contracting parties to do something or not to do something will, of course, turn on the contractual requirement of documented consensus. Again, many, if not most, Board actions will *not* fall into this category.

Ultimately, the Board's legitimacy and effectiveness in enforcing its policies stem from the fact that parties contracting with ICANN have voluntarily agreed to abide by future policies under certain circumstances. No registry or registrar may irrationally, or for rational reasons based on a desire to continue or commence activities that harm the competitive marketplace or impose

46. *Id.*

47. The policies the ICANN Board can adopt are: administrative, implementation of existing contractual agreements, emergency, and consensus policies binding on registries and registrars. *See supra* note 35 and accompanying text.

48. *See id.*

49. *See id.*

unjustifiable harms on third parties simply veto the judgment of the community reflected in a documented consensus process.

As part of the transition process, a task force composed of representatives from the broad ICANN community should be established to recommend a specific set of policy development procedures and timetables. The task force should complete its work before August 31, 2002, so that its recommendations can be posted for public comment prior to ICANN's meeting in Shanghai.⁵⁰

We believe that the Board should have set specific time frames for responses by constituencies and Supporting Organization's (SO) to proposed *consensus policies*, instead of reserving for itself the ability to modify these policies or adopting by vote their own "mandatory" policies. Here is a set of guidelines that would facilitate consensus policy development:

1. The Board calls for work on a particular consensus policy (either on its own or when requested to do so). Any refusal or failure by the Board to respond to a request for a consensus policy should be subject to review. The Board:

- Indicates its preliminary beliefs about which parties would be affected by the policy;
- Chooses a SO that will be responsible for the reviewing report;
- Appoints, with the assistance and oversight of staff, a facilitator who is personally responsible for creating the written consensus policy report (and can be trusted to do an unbiased job);
- Sets a sixty-day deadline for submission of a report to the relevant SO (all stated deadlines to be modified only where justified on the basis of compelling, articulated reasons).

2. The report drafter/facilitator goes to work. The report drafter:

- Interviews/meets with affected parties;
- Gathers position papers;
- Facilitates consensus to the extent possible;

50. *See id.*

- Prepares a report documenting policy recommendation which includes the extent of agreement among affected groups, the outreach process used to obtain the views of groups likely to be affected, and the nature and intensity of reasoned support and opposition to the proposed policy;
 - Sends report to the relevant SO within the time limit.
3. The SO receives the report. The SO:
- Has thirty days to review the report;
 - Council must vote on or before the thirtieth day whether to recommend that the policy be established;
 - Sends a report, as revised in collaboration with the facilitator, promptly to the Board, including any dissenting views.
4. The Board receives the report. The Board:
- Hears presentation from facilitator/drafter;
 - Has thirty days to review the report;
 - Must vote on or before the thirtieth day whether or not to establish the policy;
 - May override dissent if it is unreasoned or from unaffected groups.
5. If a dissenter does not agree that consensus was adequately documented (disputes the presence of a consensus), it may request IRP review within fifteen days of the decision by the Board.
6. If the IRP sustains the Board's determination that the specification or policy is based on a consensus among Internet stakeholders represented in the ICANN process then the dissenter must implement such specification or policy unless it promptly seeks and obtains a stay or injunctive relief from a court or arbitrator.
- The report creation should last no more than sixty days. SO consideration of the report should last an additional thirty days. Another thirty days would be devoted to Board consideration, plus fifteen days where any decision could be appealed. Should there be an appeal, the IRP should prepare an opinion in thirty days. In total this process should take no

more than 165 days (five to six months), not including court action or arbitration.

Given the effort to be expended by the report drafter/facilitator, it would be best if, in time, this work were paid for in some neutral fashion. The Board should be more active in pushing the consensus policy process along. There are four ways this could be accomplished:

1. The Board could call for work on a particular consensus policy;
2. The Board could indicate its preliminary beliefs about which parties would be affected by the policy;
3. A facilitator could be appointed who would be personally responsible for creating the written consensus policy report (and could be trusted to do an unbiased job);
4. Strict deadlines could be set for submission of the report to the relevant SO.

Leadership on the part of the Board and staff can make an enormous difference. At a minimum, establishing clear processes can force those who oppose a proposed policy to clearly articulate their objections. This articulation requirement is likely by itself to eliminate a significant amount of unjustifiable opposition. More generally, the Board and staff can more clearly express their own views concerning proposed solutions. So long as the ultimate decision by the Board concerns whether a "true consensus" has been generated, there is no requirement for Board or staff neutrality about the outcome.

Such leadership can force dissenting parties to articulate the reasons why they oppose a proposed policy. And, notably, when presented with a report that documents widely held support for a proposed rule, the Board may consider, among other things, whether the dissenter's opposition to the consensus policy is based solely on a desire to continue to engage in unjustifiable wrongdoing. The Board should start by asking:

1. Is the party raising the question substantially impacted?
2. Is its opposition rational or reasoned?

If the answer to either question is "no," the Board may adopt the policy as supported by consensus despite the dissenter's opposition. Even if the answers to both of those initial questions are "yes," the Board may find that rational/reasoned opposition of an impacted

party may be disregarded to the extent that the opposition is based on a desire to continue or commence an activity that imposes substantial unjustified burdens on third parties, or that will disrupt or prevent emergence of an orderly, competitive marketplace.

This “unjustifiable opposition” test is already implicit in the consensus standard. Many people have erroneously assumed that any refusal to agree to a new policy could prevent ICANN action.⁵¹ To the contrary, just as ICANN can reasonably override dissent from those who are not affected by its policies and from those who will not make reasoned arguments, it may, under the current contracts, reasonably disregard opposition from parties who seek unjustifiably to impose harm on others.

The existing contracts require the IRP to exist in order for registries and registrars to be bound by consensus policies.⁵² The arbitration contemplated by the Blueprint should have been implemented in a fashion that preserved the basic framework for independent review that is contemplated by the current registry and registrar contracts.

V. CONCLUSION

We believe the “consensus process” for mandating globally applicable rules was a basic premise underlying ICANN’s establishment. Because ICANN was not established by the United States, or any other government, it has no statutory authority. Additionally, it cannot claim to be a representative democracy. ICANN has no power to enforce its rules other than by means of its contracts with registries and registrars. No self-respecting business would sign up for open-ended policy-making by ICANN’s Board of Directors, given the complete uncertainty such a scheme would pose to investors. Thus, as has been the case since the earliest days of the Internet, any mandatory naming policies need to be supported by a consensus that emerges from bottom-up processes involving all affected parties.

It is clear to us that ICANN should have been restructured to work towards consensus more effectively. ICANN’s goal should

51. See Working Paper on the Policy-Development Process, *supra* note 19, pts. 1, 1(A).

52. See Registrar Accreditation Agreement, *supra* note 35, § 4.3.6.

have been to make it possible for stakeholders to decide collectively when global, mandatory rules are necessary and legitimate. Seizing more power to make that decision centrally did not serve ICANN's core mission, as set forth in its Memorandum of Understanding with the Department of Commerce, of preserving decentralized decision-making. We fear for ICANN's future in an increasingly litigious world.

