**Final Legal assessment in reply to last document from the Authors.**

In fact I do not only raise an issue of potential risks. Indeed they are real risks to which AFRINIC shall be exposed in the event that this proposal, as presented, is ratified.

I thought by this time, after several versions of the original proposal has been produced, my legal concern would have been understood especially after my last document, which I wrote after my meeting with Serge in J’burgh.

I do apologize for not having been clear enough.
I cannot, as AFFRINIC’s legal adviser, not point out the legal risks involved in the implementation of such a proposal.

As I have expressly highlighted earlier, the proposal places AFRINIC in a position where it will, in certain circumstances, after a full review, have to recall resources from members who would fail the review process.( this is avowedly one of the objectives of the proposal) AFRINIC in doing so would have to rely on ***information/data/evidence submitted to it by a third party.***

***My point is and I make it very strongly, that such evidence must be reliable, admissible and authentic. This is where my problem lies. I shall never advise AFRINIC to embark upon an exercise where it will have to shoulder an obligation to test the reliability, admissibility and authenticity of such facts/data/information submitted by a third party.***

***It must be an obligation for the third party to shoulder i.e it must convince AFRINIC that the evidence has all the characteristics of reliability, admissibility and authenticity. How it does that, is for the third party to decide. I suggested having recourse to a commissioner of oath or sworn affidavits.***

Contractual Obligations ( referred to by the authors in their last reply)

Let us be clear here, the contractual obligations, I referred to stem from the RSA and not from the proposal. The obligation was for applicants to provide information etc. How can a policy be adopted to implement a contractual obligation? A contract is made between two distinguishable and existing legal entities. With or without this proposal both AFRINIC and members who seek resources are already bound by contractual obligations as found in the RSA. The proposal if ratified is not a contract. It is of general application to all members and AFRINIC.
I still maintain that they ( the legal issues) were not addressed as the gist of your argument rested on the premise that what is being proposed is already being provided for in the RSA.

The authors do not say how the information /data/facts shall be verified or authenticated. I say it again that the review that AFRINIC can do under the RSA, is one done at its own discretion and initiative, on the basis of evidence/information/data it would have found by itself and whose authenticity/veracity it can test. This is not the same as working on third party inputs which may or may not have been verified or authenticated. This is for the third party to do. This obligation cannot be thrust on AFRINIC.

Examination of the three scenarii

As I stated earlier, this scenario ( the 13.3.2 scenario) poses no problem as AFRINIC staff would be relying on their own investigation and assessing the weight of the evidence they would find. No third party is involved herein.

In this second scenario ( 13.3.3 scenario) as well there is no difficulty as the member, having volunteered to submit itself to a review is expected to produce such evidence which are reliable and verifiable as it is in its interest to do so, to prevent resources being recalled from it.

The “ Community Complaint Scenario”

 *We agree therefore that the third party must produce the evidence ( not mere facts) and it is not for AFRINIC to do so. This is why I keep stating that the probative value of the evidence cannot be based on mere declaration of the third party. I further suggested that the third party must have recourse either to a Commissioner of Oath/sworn affidavits to produce reliable evidence.*

 *I suggested to Serge during our meeting, that it is for the authors to find out if there are other means of verification which are used in other jurisdictions. Thereafter the evaluation can be embarked upon by AFRINIC staff.*

*Under this scenario, if AFRINIC is sued, it can raise as defence that it acted in good faith as it based its review process on sworn evidence or evidence declared to be true before a Commissioner of Oath by one of its members.*

*On such evidence, if AFRINIC is sued it can call the party supplying this evidence in guarantee. The guaranteeing party will have to pay any damage in lieu and stead of AFRINIC, if the latter is called on to pay.*

I state once again that the proposal must not place any burden on staff to evaluate “raw facts”. What must be submitted ( the community complaint) to AFRINIC is reliable, authentic and verifiable evidence of the basis of the complaint.

Evaluation of facts

See my remarks above relating to the distinction between raw facts and evidence.( above)

Need for legal document

I respectfully disagree with the authors here.To all intents and purposes the requirement of legal documents is crucial for AFRINIC to protect itself against legal suits as I have already hinted at. I insist on this.

“ Legal Counsel to guide organisation”

I had thought that this was what I have been doing so far. These documents cannot work by default. They must authenticate/verify the status of the information/data/facts submitted by the third party. This is what I have been stressing all through.

As I have already stated assessing information/data/facts from a bona fide applicant for resources is totally different from such assessment which could lead to recall of resources. The difference lies in the fact that if the applicant does not submit reliable and verifiable documentation its application will be unsuccessful.

Whereas if AFRINIC was to rely on “raw facts” and has eventually to face litigation, the party which submitted the raw facts does not bear any liability.

 On authors’ statement that the “RSA does not require sworn affidavit to provide information to staff.”

You seem to confuse two important elements here. The information being sought under an RSA is for allocation/ assignment of resources and it is for the applicant to shoulder the burden of submitting such information which can be tested by AFRINIC.

If the status of the information is not good enough to satisfy AFRINIC, the application is not granted. AFRINIC does not bear any liability as the applicant is the sole party responsible for this.

On the contrary, the information which third parties will submit to AFRINIC is going to be the basis for the recall of such resources which have been allocated/assigned already.

 The “reviewed member” will be deprived of such resources on the basis of which it runs its business. If such information reveals itself to be insufficient, lacking, forged or false, the “reviewed member” will sue AFRINIC for prejudices suffered and not the “ whistleblower”.

**I shall go further and require of the latter a written undertaking to the effect that it would compensate AFRINIC for any sum that the latter will pay to the “ reviewed member” if it was to win its case against AFRINIC**.

Since you have chosen to illustrate your point on an appeal process (above) by referring to Section 3.5 of the CPM, do note that in this appeal, AFRINIC is not a party thereto. It can consequently set up an Appeal Committee and have the disagreement adjudicated upon and resolved.

Whether you segregate the appeals as against (i) the result of the review or (ii) actions taken by AFRINIC based on the result of the review, in both cases AFRINIC is a party thereto. It cannot, consequently, put up a mechanism to have its own action reviewed. It simply does not make sense.

This is why I have right from the beginning made reference to the Mauritius Code of Civil Procedure where the process for arbitration is already provided for.

Section 13 of RSA

Since the issue “ of Section 13 of the RSA” is raised, do note that the appeal procedure provided for therein, regards a complaint by an organisation/member against the non performance of an assigning registry of its “ task in the requisite manner”. AFRINIC is not a party thereto and its Board can sit on appeal to examine the complaint. Thus there is no incompatibility with the Mauritius Code of Civil Procedure.

Mechanism for investigation

As regards the above observations, I once again reiterate the distinction between a bona fide applicant for allocation of resources and a third party “ whistle blowing” and who provides unreliable/unverified/unauthenticated facts. The mechanism existing in the RSA caters for the first scenario and not for the second one. The proposal must address this.

 On the authors’ statement that “Afrinic does not conduct hearings with requesting members, so not required”

Under the RSA AFRINIC will always be in a bilateral situation where it will be faced with an applicant who voluntarily submits all documentation to buttress its case for allocation/assignment.

Whereas under the proposal, AFRINIC will have to deal with a scenario where

1. The documentation is not voluntarily submitted by a member ( who may be subjected to review).
2. The veracity /authenticity/ will have to be tested by AFRINIC staff.
3. AFRINIC will have to confront the member with the documentation coming from a third party.
4. AFRINIC will have to conduct an investigation to test the status of the documentation.

This is the investigation that I have in mind with three parties involved. It is not the same situation where a member is applying for resources.

The investigative mechanism is highly relevant and the proposal must describe same.

You state that the investigated party must collaborate, would it not wish to know the reason why AFRINIC is asking for information especially where it is not applying for resources and already hold them. AFRINIC will have to disclose the reason. Transparency must prevail.

Choice of jurisdiction

As I have elaborated lengthily above where the appeal/arbitration involves AFRINIC as a “ Respondent” party, this matter falls outside the purview of the RSA. Deciding the question of jurisdiction should have been addressed in the proposal.

The arguments raised by the authors rest too much on the RSA which is a contract between AFRINIC and individual members. It is not a policy.

It is with much regret that I have to state that my concerns have remained unaddressed to this

day.

Ashok.B.Radhakissoon

Legal Adviser

AFRINIC

This 10 July 2017.