To   ATRT2 / LAX3 meeting
From   CRG

Re   Review of Board's decisions (3 different cases)
        Reconsideration of Board´s decisions (2nd of the 3 cases of review)

A.   Analysis of progress on the previous review teams recommendations

"*Reconsideration of Board's decisions*" is not a new issue for ATRT2[i]. It was already part of the ATRT1. ATRT1 created 4 Working Groups to produce the first report, each group focusing its work on sub-elements of paragraph 9.1. ATRT1's WG #4 looked at all 3 review mechanisms of the Board's decisions and made specific recommendations back in 2010 (Recommendations 23, 25 and 26 on pp.55-56)[ii]. Recommendation 23 specifically proposed that ICANN "seek input from a committee of independent experts on the restructuring of the three [Board] review mechanisms— the Independent Review Panel (IRP), the Reconsideration Process and the Office of the Ombudsman." ATRT1 specifically asked that the expert review consider suggested procedures for compelling the Board to reconsider a decision and for removing the entire Board.

1.   Specific ratings (1-10) to the questions 1-3 on the implementation of ATRT1

Some of the community response to ATRT2 questionnaire show a level of discontent on the implementation of these recommendations, the one on reconsiderations in particular, if we consider at least the first three questions of our initial questionnaire as related to the issue of reconsideration.[iii]

	AP	Vasily	MFarrel NCUC	MHilyard ALAC	Dthompson AL	GChillcott
Q 1A	8	1	4	4	7	n/a
Q 1B			defensive			
Q 1C: Metrics			timeliness!	wording		
Q 2A	4	2	5	n/a	7	7
						Board's
Q 2B			lack openness		financial improv	Rationale
Q 2C						
Q 3A	n/a	2	1	3	5	n/a

2.   More general comments related to Q's 1-3, and to the implementation of   the "Reconsideration" recommendations in particular

Other responses to the questionnaire didn't get into the specific 1-10 metric success of the implementation success of ATRT1 recommendations, but at least 3 commentators mentioned the reconsideration issue specifically:

Registries Stakeholder Group

"In addition to specific ATRT recommendations, ICANN failed with respect to Items 23 and 25, which called on ICANN to create an experts panel to assess and make recommendations for enhancements to ICANN's Reconsideration and Independent Review processes, are examples. Nothing was done on these issues until September 11, 2012, when ICANN appointed an Accountability Structure Experts Panel (ASEP). The Panel issued its report in a commendable time, on October 26, suggesting a radical alteration of the standard of review to be applied by an independent review panel. Under this change, *in considering whether or not an action or inaction by ICANN or the Board violated ICANN's Bylaws*, the relevant questions are limited to asking whether or not the Board: (1) acted without conflict of interest in taking its decision; (2) exercised

due diligence and care in having a reasonable amount of facts in front of them; and (3) exercised independent judgment in taking the decision, believed to be in the best interests of the company.

Only two comments were submitted on the report, both of which expressed the view that the recommendations were fundamentally flawed and in fact ran counter to the concept of accountability. In addition, they noted more work was needed because the timing of the expert panel was such that resources to comment were limited. The Board fundamentally ignored the public comments, using a consent agenda in April to establish the panel with a comment that a RySG point about using outside experts could be followed."

<u>NCSG on Request for Reconsideration #13-3</u> *Staff action of 20 March 2013 titled Trademark Claims Protection for Previously Abused Names'.*

"The second illustration relates to the recently released Board response to the Reconsideration Request filed by the NCSG regarding the late decision to expand the Trademark Clearinghouse (TMCH) to accommodate 50 variants of previously abused names. Without going into the merits of such an expansion here, we wish to state our belief that the Board's response, or rather, the manner in which it was couched and the rationale which the Board (through its representative sub-committee on the matter) chose to employ, was such as to land yet another blow to the vaunted MSM model. Other members of the ICANN community who may not have agreed with the NCSG's substantive position on the TMCH+50 issue also thought that the Board could have chosen a number of different ways to craft its response, achieving the same substantive result without threatening the MSM process. While NCSG reserves its rights to pursue any other means available to it under ICANN's processes to continue engaging with the ICANN Board, we respectfully request ATRT2 to take a look at this incident and determine if the response received by the NCSG to its Reconsideration Request goes against ICANN's principles of accountability in terms of its effect on the MSM model."

<u>S. Gunnarson</u> (Summary section only)[iv]

"ICANN has fallen short of implementing a critical recommendation from the first Accountability and Transparency Review Team ("ATRT1").
...
First, ICANN has not fully implemented ATRT1's Recommendation 23. That Recommendation, calling for an expert study of procedures to review decisions by the ICANN Board of Directors, was not carried out for nearly two years. Delayed implementation is not full implementation. Worse yet, the report issued by ASEP avoided the issue of an effective appeal from Board decisions that gave rise to ASEP's creation and Recommendation 23 in the first place. ASEP's recommendations, moreover, make it more difficult to challenge and reverse ICANN Board decisions—hardly a refinement of ICANN policy in keeping with Recommendation 23 and the concerns expressed by ATRT1.

ATRT2 should address the questions left unresolved by ATRT1: Should ICANN provide an independent and binding appeal from Board decisions? What body should have that authority?"

3. <u>Reconsideration issues raised during Durban meetings with SO/ACs: to whom is ICANN accountable?</u>

Moreover, the reconsideration issues continued to be raised in the Durban meetings, both specifically on reconsideration and in general terms. I want to summarize some of my personal notes taken from the Durban meetings, that I consider important to bring the reconsideration issue

into a larger context ("overarching issues" instead of a long list of single, apparently disconnected recommendations as per ATRT1) and should be discussed within ATRT2 during LAX3:

- The gross generalization that no reconsideration request has been successful ever, is not 100% true in my view if your look at some recent policy recommendations derived from the requests as per hereunder. On top of it, apparently if something is really wrong, in some cases then the recommendation seems to go BACK on the PDP process, even if the request was denied. There is no formality in the procedure though. here things seem to be mixed up between the policy decision and the implementation!

- That there is no other review instance, what puts into question ICANNs Board overall accountability. {Should the BCG, that reviews reconsideration, have stayed out of the first decision? Should the Board have its own internal tribunal?} In any case, it could be considered to be a serious aberration that Staff may use the reconsideration process to make case law jurisprudence on the bylaws!

- Some recent reconsideration requests brings us again to the question that GAC's "late" advice increases uncertainty that cannot be solved trough the reconsideration {there is another black hole here: should GAC should be closer to the PDP process or closer to the reconsideration process........}. Although there is a parallel discussion on bringing GAC "earlier" into the PDP process, GAC still lacks a clear policy of direct and permanent participation in the PDP.

- Related to the previous point, I consider that the BC comments on "public interest" proposes the option that "public interest" issue should be considered at the BEGINNING of any relevant PDP that really merits the question. If GAC is involved in the PDP cycle from the very beginning and has to take a position on "public interest", agreeing that the effort is focused on public interest principles, does this solve the GAC late advice problem? At least it would require a justification on where the process didi loos its original intent.

- Furthermore, and based on the internal staff reviews of the PDP process by M. Konings, would an "endogenous" PDP process would make reconsiderations unnecessary? It is my personal view that the mayor flaw on the internal analysis of the PDP presented in Durban is the "closed loop" mentality prevailing across ICANN, that keeps everybody outside wondering. No beginning stage where outside factors are considered, like the outside definition of public interest as proposed by the BC; no milestone reviews by outside agents, and no higher instance to the Board internal reconsideration (...."and the Cabots speak only to God" syndrome). If the outside expert does not consider an "OPEN" PDP process (open beyond the inner circle), considers exogenous factors at different stages, no progress on the issue can be expected.

4.   <u>Recent requests for Reconsiderations (since ATRT1) and its decisions</u>

8 new reconsideration processes have been started, and 6 resolved[v] since ATRT1 report came out and the general perception that they all end up in a negative decision is understandable, but.......:

- <u>Request 13-5</u>: Booking.com B.V. (Staff action/inaction on non-exact match "hoteis")
     BCG recommendation pending, I guess.

- <u>Request 13-4</u>: DotConnectAfrica Trust (Board action/inaction on the GACs Beijing communique impact on dotafrica application)

Denied as per BCG recommendation, Board resolution pending I guess, as decisions on applications are not final yet

- Request 13-3: Non-Commercial Stakeholders Group (against staff action on Trademarks..+50)
  Initially **Denied by BCG,** BUT eventually recommends to **adopt "revised" recommendation** "*The Request, however, does demonstrate the import of the ongoing work within the ICANN community regarding issues of policy and implementation, and the need to have clear definitions of processes and terms used when seeking community guidance and input. As such, we believe it is advisable for the Board to pay close attention to the policy/implementation debate, and to make sure that the issues raised within this Request be part of that community work. Further, we believe that it is advisable to ask the community to address the issue of how the Board should consider and respond to advice provided by the Supporting Organizations (outside of the PDP) and what types of consultation mechanisms, if any, are appropriate in the event the Board elects not to follow that advice. As ICANN evolves, this is an important question for consideration in upholding the multistakeholder model.*" **to be brought to the ongoing community discussion on policy versus implementation within ICANN.**

- Request 13-2: Nameshop (Board/ Staff inaction *on Applicants Support*)
  Denied. Some interesting case law interpretations appear in the BCG recommendation "*Reconsideration is not, and has never been, a tool for requestors to come to the Board to seek the reevaluation of staff decisions. This is an essential time to recognize and advise the ICANN community that the Board is not a mechanism for direct, de novo appeal of staff (or panel) decisions with which the requester disagrees. Seeking such relief from the Board is, in fact, in contravention of established processes and policies within ICANN.*" and the recommendation is taken verbatim into the rationale of the Boards decision!"

- Request 13-1: Ummah Digital, Ltd. (against staff action *on Applicants Support*)
  Denied. ......but recommends Board to review Applicants Support Program

- Request 12-2: GNSO Intellectual Property Constituency (against Board decision on .cat)
  Denied, curious case of preferential treatment allegations for .cat in terms of Whois obligations.....should be seen as a special case of a ccTLD!

- Request 12-1: International Olympic Committee (board decision)
  Denied "*at this time*", but the truth is that the issue still pending on a general policy development process between GAC and GNSO on IGO protection, but moving veeeeery slooooowly............

- Request 11-1: Michael Gende (staff inaction)
  Denied. Not proper instance!!!!! I agree, But then staff should not have accepted in the first

B.   Proposed new recommendations on the <u>**Reconsideration of Board decisions, as related to the "full" and "open" PDP cycle**</u>^{vi}

  -   Hypothesis of the <u>**"new"**</u> problem

      *I would suggest that reconsideration should **not** be analyzed independently of the whole PDP cycle. Furthermore the "open" PDP cycle should start with a careful analysis of the public interest of the initiative open to public and GAC comments. At the Board level, as practices is starting to show, reconsideration should not be seen neither as a direct treat to the Board's authority, nor (even worse)as the place where case law can be developed. Reconsiderations on PDP may just bring the issue back to an earlier stage for fixing the issue, as some of the gTLD related cases are showing to be a necessity*

- Background research undertaken As the problem is not NEW, I would consider the initial section on the results of the respective ATRT1 recommendations 23, 25 and 26 as the Background research

  - Summary of ICANN input

  - Summary of community input via the public comment process and face to face meetings

  - Summary of other relevant research

- Relevant ICANN bylaws

- Relevant ICANN published policies

- Relevant ICANN published procedures

- ATRT2 analysis **of (a) the M. Konings Presentation and (b) the outside expert report**

- Draft recommendation

- Public Comment on Draft Recommendations

- Final recommendation

ATRT1 Final recommendations (Dec. 2010)

D. Review mechanism(s) for Board decisions

23. As soon as possible, but no later than June 2011, the ICANN Board should implement *Recommendation 2.7 of the 2009 Draft Implementation Plan for Improving Institutional Confidence* which calls on ICANN to seek input from a committee of independent experts on the restructuring **of the three review mechanisms** - the Independent Review Panel (IRP), **the Reconsideration Process** and the Office of the Ombudsman. This should be a broad, comprehensive assessment of the accountability and transparency of the three existing mechanisms and of their inter-relation, if any (i.e., whether the three processes provide for a graduated review process), determining whether reducing costs, issuing timelier decisions, and covering a wider spectrum of issues would improve Board accountability. The committee of independent experts should also look at the mechanisms in Recommendation 2.8 and Recommendation 2.9 of the Draft Implementation Plan.

Upon receipt of the final report of the independent experts, the Board should take actions on the recommendations as soon as practicable.
....

25. As soon as possible, but no later than October 2011, the **standard for Reconsideration** requests should be clarified with respect to how it is applied and whether the standard covers all appropriate grounds for using the Reconsideration mechanism.

26. As soon as possible, but no later than October 2011 the ICANN Board, to improve transparency, should **adopt a standard time line and format for Reconsideration Requests** and Board reconsideration outcomes that clearly identifies the status of deliberations and then, once decisions are made, articulates the rationale used to form those decisions.

Furthermore on Page 47:

Reconsideration - Since 1999, there have been 44 requests for Reconsideration raised to the BGC and its predecessor committee. Of these, 32 (72.7%) were rejected or denied, or recommended that the Board take no action. In two cases, the complainant withdrew the request, and one case was declared to be groundless. Nine cases (20.4%) were approved by the BGC and adopted by the Board. One request is currently pending.

Several Reconsideration requests looked at by WG4 did not include sufficient published documentation for WG4 to determine whether or not the Board reconsidered them, requiring further investigation by ICANN Staff.

[iii] *Questions for the ICANN Community on the impact of previous reviews and inputs for the ATRT2*

On the Accountability & Transparency Review Team 1 (ATRT 1)

1.   On a scale of 1 to 10 (1 meaning "not at all" and 10 meaning "fully"), please indicate the level to which the ICANN Board and staff have effectively, transparently, and fully implemented the recommendations of the ATRT1. Please provide specific information as why you believe specific recommendations have or have not been effectively, transparently, and fully implemented. What metrics do you believe would be appropriate to measure effectiveness, transparency, and completeness of recommendation implementation?

2.   On a scale of 1 to 10 (1 meaning "not at all" and 10 meaning "fully"), please indicate to what level the implementation of the ATRT1 recommendations have resulted in the desired improvements in ICANN. Please provide specific information as to why you believe the recommendations have or have not resulted in improvements. What metrics do you believe would be appropriate to measure improvements?

Affirmation of   Commitments, paragraph 9.1 (a):   ICANN Board of Directors Governance

3.   On a scale of 1 to 10 (1 meaning "not at all" and 10 meaning "fully"), what is your assessment of how ICANN's Board is continually assessing and improving its governance as specified in the Affirmation ¶ 9.1 (a)? Are there issues related to this provision you believe should be addressed or investigated by the ATRT2? If so, please provide specific information and suggestions for improving Board governance. What metrics do you believe would be appropriate to measure whether ICANN's board is continually assessing and improving its governance?

[iv] Gunnarson's full comments go far deeper into the issue but becomes pretty subjective on ATRT1's internal work, I would say based on some excerpts from the full text:

"Referring the issue of Board review mechanisms to an expert review was a compromise on the sole point that divided ATRT1. Disagreement centered on whether adequate procedures for reviewing ICANN Board decisions need to be "both binding and independent." Concern was expressed "over the fact that none of the three accountability mechanisms can review and potentially reverse ICANN Board decisions with binding authority." Yet the full membership of ATRT1 "did reach consensus on whether binding authority was the standard upon which to judge ICANN's accountability."

***This disagreement created a unique split between ATRT1 and Working Group 4** ("WG4"), assigned to study procedures for reviewing, reconsidering, and reversing decisions by the ICANN Board. WG4 concluded that all the existing Board review mechanisms were inadequate and sought guidance from ICANN whether California law might constrain its exploration of alternative Board review mechanisms. ICANN's legal department responded with a one-page document asserting that under California law "the board cannot empower any entity to overturn decisions or actions of the board." WG4 viewed the resulting conflict between its mandate and ICANN's legal position in the most serious terms—as "critical to establishing an appeals mechanism that is both binding and independent, and essential to the viability of the ICANN model itself." And WG4 recommended that ATRT1 should conduct further research of California law and "[c]hallenge ICANN's interpretation of California corporate governance law as it applies to ICANN policy development."*

Conflict gave way to compromise. ATRT1's internal divisions led it to suggest an expert committee, but unfortunately that compromise turned out to be ineffective................"

[v] Excellent database on the reconsideration processes by the way, but just publishing the information does not automatically mean transparency. Great scope for improvement (CRG)
[vi] Here I want to suggest a clear separation of **staff action/inaction** reconsideration reviews