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DATE: 18 January 2016
SUBJECT: Board remarks on Human Rights, IRP and Community IRP
TO: CCWG Accountability

The Board appreciates the work by the community on the first readings of reactions to the public comment on the Third Draft Proposal from the CCWG-Accountability. In preparation for the second reading, the Board provides these inputs to the CCWG-Accountability on inclusion of Human Rights in the Bylaws, Scope of IRP and Scope of Community IRP

On Inclusion of Human Rights in the Bylaws, the Board has the following reactions to the points identified in the redline distributed after the first reading before the CCWG.

The Board notes the continued discussion of this issue on the CCWG-Accountability list, and that there continues to be some divergence among the CCWG-Accountability on how to proceed among the options presented. As noted in its comments to the Third Draft Report, the Board remains committed to developing a Human Rights Statement for ICANN, and will report to the community at ICANN 55 Marrakech on progress on this work. The Board appreciates the import of this issue to the ICANN community, and remains committed to working alongside the community towards a meaningful framework to guide human rights considerations within ICANN's mission.

Regarding inclusion in the ICANN Bylaws, the Board supports Option B, or allowing the WS2 effort on defining a framework to proceed prior to considering whether to include a human rights obligation in the Bylaws.

The Board appreciates the consideration the CCWG-Accountability has given to the timing concerns raised by the Board in its comments. Of note, the Board's concerns in introducing a human rights consideration in its Bylaws today prior to the completion of a framework was not the only concern raised. The language presented by the CCWG-Accountability for the Bylaws also raised concerns. As stated in the Board's comments:

While the Board appreciates that the proposed interim Bylaw text is intended to not place any additional obligations on ICANN, the language could actually be used to greatly expand ICANN's human rights obligations. Some specific examples of concern include:

- *Inclusion of a human rights commitment in the Bylaws would immediately allow for IRPs to be brought on human rights grounds. Similarly, there could be lawsuits relying on the Bylaws language filed against ICANN. When the Bylaws commitment is vaguely stated, any interpretation of the Bylaws language will be against ICANN, and have binding impact on the community's ability to define a framework. Neither the IRP or the Courts will have any legal reason to wait for the community to complete the next step, and could make their own interpretations of the language.*

- *The proposed Bylaws text, with reference to "applicable law" to judge the acts of ICANN and those with relationships with ICANN, leaves open the question of which law should be applicable. This language expands, as opposed to limits, the potential scope of human rights challenges.*
- *The language about "any entity having a relationship with ICANN " raises the suggestion that the ICANN Bylaws have the power to bind those with relationships with ICANN in how those entities respect, consider or enforce human rights. ICANN does not have this power. For example, registries and registrars contracted with ICANN do not take on any human rights obligations because they contract with ICANN. This language suggests that because they have a relationship with ICANN, there are human rights concerns that they could be obligated to address.*
- *The language suggests that there is already a framework within which ICANN processes complaints, requests or demands for ICANN to enforce human rights issues, which there is not. Indeed, there still appears to be divergence within the community about what should be considered as human rights considerations within ICANN's Mission. Without a framework, challenges could be raised around issues that are not agreed to be within ICANN's Mission, such as access, content or education.*

Leaving these types of issues open puts the community, ICANN stakeholders such as contracted parties, and ICANN itself at risk. Courts or binding IRP panels could be used to create precedent defining what human rights are within ICANN's Mission. These determinations are better left for the ICANN community to sort out, instead of being imposed. Leaving these questions open for others outside of the ICANN community to define is not consistent with enhancing ICANN's accountability. The Board urges that the full scope of defined work on human rights should include consideration of impacts across all of ICANN's activities.

As noted by ICANN's legal counsel, the concern raised by the Board is not primarily about an increase in the potential litigation across ICANN, but rather about the *impact* of that litigation on the ICANN community, in the potential to define ICANN's human rights obligations before the community has the opportunity to complete that work. The proposed limitation of applicable laws does not provide much comfort, as there are no limitations of which laws will be suggested to be applicable to which parties. This is not a trivial concern. Which court and which law will be relied upon to decide if human rights includes a requirement to make all registrant data public in an attempt to protect against abusive content on websites? Or which court and which law will be relied upon to require all registrant data to be made private to recognize privacy interests or the potential impact to third parties with which ICANN does business? It is examples such as these that demonstrate why the ICANN community needs to weigh in on where ICANN's human rights obligations start and stop, before a court is invited to make those determinations.

Recommendation 7, Scope of IRP:

The Board previously expressed concerns about the IRP being used for substantive appeals from process-specific expert panels, and notes the apparent agreement on the CCWG-Accountability to remove the expert appeals language from the scope of the IRP. Even with

this removal, the Board notes that any violation of the ICANN Articles of Incorporation or Bylaws that occurs in conjunction with the consideration of an expert panel can appropriately be the basis of an IRP. The Board has the following additional comments:

1. The IRP should not be used to determine what documents are to be released as part of ICANN's Documentary Information Disclosure Policy (DIDP). If a DIDP response is in violation of ICANN's Bylaws/AoI, then an IRP can lie on the grounds of a Bylaws/AoI violation. The Board notes that a more substantive appeal process for the DIDP could be developed as part of the DIDP review in WS2. The development of a substantive DIDP appeal process was not previously identified as a WS1 effort.

2. The Board supports the CWG-Stewardship contingency that the IRP is made available as part of the accountability for the performance of the naming function work by PTI. The implementation of this must be done carefully so as to not confuse ICANN's obligations with PTI's obligations.

3. The Board also supports the request from the IAB that the protocol parameters are excluded from the IRP.

4. The Board notes that there should be a broad range of participants for the work of the IRP implementation team (including jurists and those versed in international arbitration).

5. The Board discourages the use of exemptions to the already limited world of "loser pays" outcomes of IRPs, such as a proposed exemption for non-profit entities, as there should not be incentive for a certain group of complainants to more easily bring IRPs if they are not faced with the potential recourse for bringing IRPs on suspect grounds.

Recommendation 4, Scope of Community IRP:

The Board reiterates its concerns regarding the inclusion of expert panel appeals and substantive DIDP appeals, as stated in regards to Recommendation 7.

The Board appreciates the community discussion regarding a carve-out of the Community IRP as it relates to PDP outcomes. The Board notes that, particularly with a threshold of 3 SOs or ACs, there other potential for the filing of a Community IRP to pit parts of the community against other parts of the community, such as countering the Board's acceptance of advice from Advisory Committees. The Board encourages the CCWG-Accountability to see if there are additional protections that can be introduced so that community resources are not used to challenge properly taken actions from another part of the community.