Annex 08 – Recommendation #8: Fortifying ICANN's Request for Reconsideration Process

1. Summary

Comment [1]: Make conforming changes from summary proposal.

- Currently, any person or entity may submit a request for reconsideration or review of an ICANN action or inaction as provided for in Article IV, Section 2 of ICANN's Bylaws.
- The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, whereby the ICANN Board of Directors is obliged to reconsider a recent decision or action / inaction by ICANN's Board or staff, including:
  - Expanding the scope of permissible requests
  - Extending the time period for filing a Request for Reconsideration from 15 - 30 Days
  - The grounds for summary dismissal have been narrowed
  - The ICANN Board of Directors must make determinations on all requests (rather than a committee handling staff issues)
  - ICANN's Ombudsman should make the initial substantive evaluation of the requests
- The CCWG-Accountability also proposes several enhancements to transparency requirements and firm deadlines in issuing of determinations are also proposed, including:
  - Recordings/transcripts of board discussion should be posted
  - Provision of a rebuttal opportunity to the BGC's final recommendation
  - Hard deadlines should be added to the process, including an affirmative goal that final determinations of the Board be issued within 60 days from request filing wherever possible, and in no case more than 120 days from the date of the request.
- ICANN's Document and Information Disclosure Policy (DIDP) will be addressed in Work Stream 2. The CCWG-Accountability recommends that the policy should be improved to accommodate the legitimate need for requesters to obtain internal ICANN documents that are relevant to their requests.

2. CCWG-Accountability Recommendations

Modify Article IV, Section 2 of ICANN's Bylaws to reflect the following changes:

- Expanding the scope of permissible requests
- Extending the time period for filing a Request for Reconsideration from 15 - 30 Days
- The grounds for summary dismissal have been narrowed
- The ICANN Board of Directors must make determinations on all requests (rather than a committee handling staff issues)
- ICANN's Ombudsman should make the initial substantive evaluation of the requests
- Recordings/transcripts of board discussion should be posted
- Provision of a rebuttal opportunity to the BGC's final recommendation
- Hard deadlines should be added to the process, including an affirmative goal that final determinations of the Board be issued within 60 days from request filing wherever possible, and in no case more than 120 days from the date of the request.

3. Detailed Explanation of Recommendations

The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, whereby the ICANN Board of Directors is obliged to reconsider a recent decision or action / inaction by ICANN's Board or staff, and which is provided for in Article IV, Section 2 of ICANN's Bylaws. The key reforms proposed include: the scope of permissible requests has been expanded to include Board/staff actions or inactions that contradict ICANN's Mission or Core Values and for reconciling conflicting/inconsistent "expert opinions," and the time for filing a Request for Reconsideration has been extended from 15 to 30 days. Additionally, the grounds for summary dismissal have been narrowed and the ICANN Board of directors must make determinations on all requests (rather than a committee handling staff issues). Another proposed change is that ICANN's Ombudsman should make the initial substantive evaluation of the requests to aid the Board Governance Committee in its recommendation, and then requesters are provided an opportunity to rebut the Board Governance Committee's recommendation before a final decision by the entire Board. More transparency requirements and firm deadlines in issuing of determinations are also proposed.

Standing

Amend "who" has proper standing to file a Reconsideration Request to widen its scope by including Board/staff actions/inactions that contradict ICANN's Mission or core values (was only policies before). It is noted that under the existing Bylaws paragraph 2 significantly reduces the rights purportedly granted in paragraph 1 of the Reconsideration Request process.

ICANN's bylaws could be revised (added text in red below):

Comment [2]: Note that bylaws text is subject to legal review.

1. ICANN shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN Board or staff may request the review or reconsideration of that action or inaction by the Board.

2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

3. One or more ICANN Board or staff actions or inactions that contradict established ICANN policy(ies), its Mission, Commitments and/or Core Values; or

4. One or more actions or inactions of the ICANN Board/staff that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

5. One or more actions or inactions of the ICANN Board/staff that are taken as a result of the Board's reliance on false or inaccurate ~~material~~ relevant information.

In their letter dated 15 April 2015, the CWG-Stewardship request indicated "As such, any appeal mechanism developed by the CCWG-Accountability should not cover ccTLD delegation / re-delegation issues as these are expected to be developed by the ccTLD community through the appropriate processes." As requested by the CWG-Stewardship, decisions regarding ccTLD

delegations or revocations would be excluded from standing, until relevant appeal mechanisms have been developed by the ccTLD community, in coordination with other interested parties.

Disputes related to Internet number resources are out of scope of the IRP.

Comment [3]: Should this say "Reconsideration Process" instead of "IRP"?

Goals

The CCWG-Accountability proposals aim to:

- Broaden the types of decisions, which can be re-examined to include Board/staff action/inaction against ICANN's Mission or Core Values (as stated in Bylaws / Articles) and for the purpose of reconciling conflicting/inconsistent expert panel opinions.
- Provide more transparency in dismissal process.
- Provide the Board with reasonable right to dismiss frivolous requests, but not solely on the grounds that the complainant failed to participate in a relevant policy development or public comment period or that the request is vexatious or querulous.
- Propose to amend Paragraph 9 on BGC summary dismissal as follows:
    - The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous ~~querulous or vexatious~~; or ~~(iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable.~~ The Board Governance Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Website.

Composition

The group considers there is need to rely less on the ICANN legal department (who holds a strong legal obligation to protect the corporation) to guide the BGC on its recommendations. More Board member engagement is needed in the overall decision-making process.

Requests should no longer go to ICANN's lawyers (in-house or out-house) for the first substantive evaluation. Instead, the Requests shall go to ICANN's Ombudsman who would make the initial recommendation to the BGC. The Ombudsman may have more of an eye for fairness to the community in looking at these requests. Note the Bylaws charge the BGC with these duties, so BGC would utilize the Ombudsman instead of its current practice of ICANN's lawyers to aid the BGC's in its initial evaluation.

All final determinations of reconsideration requests are to be made by the entire Board (not only requests about Board actions as is the current practice).

Amend Paragraph 3:

6. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

   - Evaluate requests for review or reconsideration;
   - Summarily dismiss insufficient requests;
   - Evaluate requests for urgent consideration;
   - Conduct whatever factual investigation is deemed appropriate;
   - Request additional written submissions from the affected party, or from other parties;
   - ~~Make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors~~; and
   - Make a recommendation to the Board of Directors on the merits of the request, as necessary.

And delete Paragraph 15 since the Board will make all final decisions regarding requests related to staff action/inaction.

Decision Making

Transparency improvements are needed regarding the information that goes into the Board's decision-making process and the rationale for why decisions are ultimately taken. Recordings / transcripts should be posted of the substantive Board discussions on the option of the requester.

Provide a rebuttal opportunity to the BGC's final recommendation (although requesters can't raise new issues in a rebuttal) before the full Board finally decides.

Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within sixty days from request filing wherever possible, and in no case more than 120 days from the date of the request.

Propose to amend reconsideration rules as follows:

> *The Board Governance Committee shall make a final ~~determination or a~~ recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final ~~determination or~~*

recommendation. In any event, the BGC's final recommendation to the Board shall be made within 90 days of receipt of the Request. The final recommendation shall be promptly posted on ICANN's website and shall address each of the arguments raised in the Request. The Requestor may file a rebuttal to the recommendation of the BGC within 15 days of receipt of it, which shall also be promptly posted to ICANN's website and provided to the entire Board for its evaluation.

The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board and its rational shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website. In any event, the Board's final decision shall be made within 120 days of receipt of the Request. The final recommendation shall be promptly posted on ICANN's website. In any event, the Board's final decision shall be made within 120 days of decision on the recommendation is final.

Accessibility

Extend the time deadline for filing a Reconsideration Request from 15 to 30 days from when Requester learns of the decision/inaction.

Amend paragraph 5 as follows:

1. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within 30 days after:

    a) For requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale; or

    b) For requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or

    c) For requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

Due Process

ICANN's Document and Information Disclosure Policy (DIDP) is an important issue to be addressed in Work Stream 2 and should be improved to accommodate the legitimate need for requesters to obtain internal ICANN documents that are relevant to their requests.

All briefing materials supplied to the Board should be provided to the Requester so that they may know the arguments against them and have an opportunity to respond (subject to legitimate and documented confidentiality and privilege requirements).

Final decisions should be issued sooner – changes will include an affirmative goal that final determinations of the Board should be issued within sixty days from request filing wherever possible, and in no case more than 120 days from the date of the request.

Requesters should be provided more time to learn of action/inaction and to file the request.

Transparency improvements throughout the process are called for, including more complete documentation and prompt publication of submissions and decisions including their rationale.

4. Changes from the 'Second Draft Proposal on Work Stream 1 Recommendations'

5. Stress Tests Related to this Recommendation

6. How does this meet the CWG-Stewardship Requirements?

7. How does this address NTIA Criteria?

Support and enhance the multistakeholder model • By enhancing ICANN's appeals mechanisms and binding arbitration processes and further fortifying and expanding their remit, the community is further empowered
Maintain the security, stability, and resiliency of the Internet DNS • These accountability measures were designed to contribute to maintaining the operational functioning of organization
Meet the needs and expectation of the global customers and partners of the IANA services • These accountability measures were designed to contribute to maintaining the operational functioning of organization
Maintain the openness of the Internet • The accountability measures help to mitigate the likelihood of problematic scenarios by ensuring that robust accountability mechanisms are in place.
NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution