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

1. Summary

01 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.

02 The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, including:

- Expanding the scope of permissible requests.
- Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
- Narrowing the grounds for summary dismissal.
- Making the ICANN Board of Directors responsible for determinations on all requests (rather than a committee handling staff issues).
- Making ICANN's Ombudsman responsible for initial substantive evaluation of the requests.

03 The CCWG-Accountability also proposes several enhancements to transparency requirements and firm deadlines in issuing of determinations, including:

- Recordings/transcripts of Board discussion should be posted at the option of the requestor.
- An opportunity to rebut the Board Governance Committee's (BGC's) final recommendation before a final decision by the ICANN Board should be provided.
- Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

04 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 requestors to obtain internal ICANN documents that are relevant to their requests.

2. CCWG-Accountability Recommendations

05 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 to 30 days.
- Narrowing the grounds for summary dismissal.

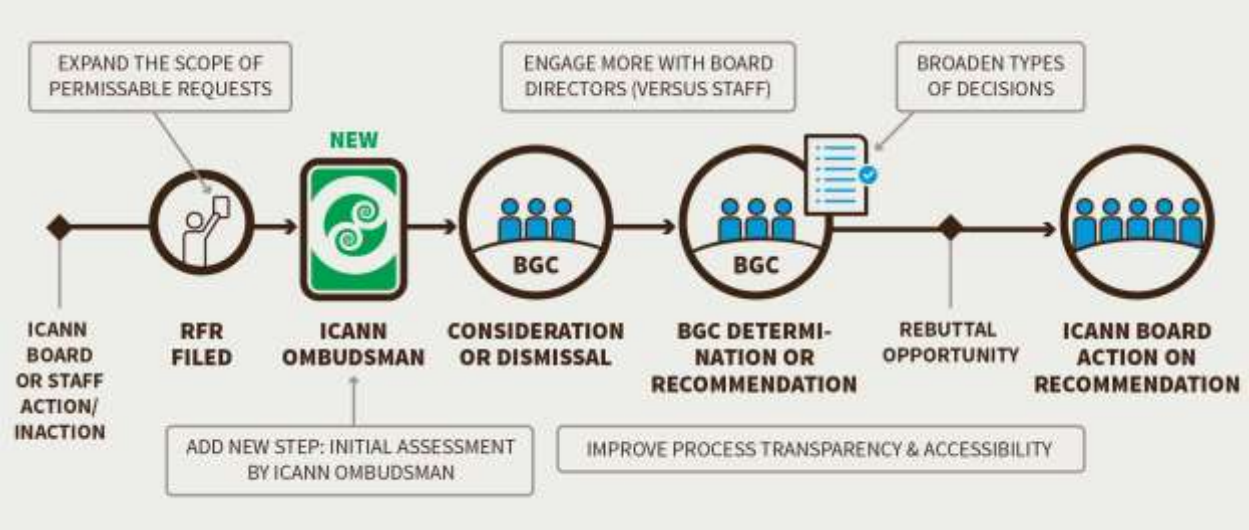
- Requiring determinations on all requests to be made by the ICANN Board of Directors (rather than a committee handling staff issues).
- Requiring ICANN's Ombudsman to make the initial substantive evaluation of the requests.
- Requiring recordings/transcripts of Board discussion to be posted at the option of the requestor.
- Providing a rebuttal opportunity to the BGC's final recommendation before a final decision by the ICANN Board.
- Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

3. Detailed Explanation of Recommendations

06 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.

07 The key reforms proposed include:

- The scope of permissible requests should be expanded to include Board/staff actions or inactions that contradict ICANN's Mission, Commitments, and/or Core Values and for reconciling conflicting/inconsistent "expert opinions."
- The time for filing a Request for Reconsideration should be extended from 15 to 30 days.
- The grounds for summary dismissal should be narrowed and 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 to aid the BGC in its recommendation.
- Requestors should be provided an opportunity to rebut the BGC's recommendation before a final decision by the entire ICANN Board.
- More transparency requirements and firm deadlines should be added for issuing of determinations.



08 Standing

09 The CCWG-Accountability recommends amending "who" has proper standing to file a Request for Reconsideration to widen its scope by including Board/staff actions/inactions that contradict ICANN's Mission, Commitments, and/or Core Values (was only policies before). It is noted that under the existing ICANN Bylaws, paragraph 2 significantly reduces the rights purportedly granted in paragraph 1 of the Request for Reconsideration.

10 ICANN's Bylaws could be revised (added text in red below, text to be removed is in strike-through):

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 to the extent that he, she, or it has been adversely affected by:
    a. One or more ICANN Board or staff actions or inactions that contradict established ICANN policy/policies, its Mission, Commitments, and/or Core Values; or
    b. 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
    c. 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.

11 Note: The language proposed in recommendations for ICANN Bylaw revisions are conceptual in nature at this stage. The CCWG-Accountability's external legal counsel and the ICANN legal team will draft final language for these revisions to the Bylaws.

12 In a letter dated 15 April 2015, the CWG-Stewardship request indicated, "As such, any appeal mechanism developed by the CCWG-Accountability should not cover Country Code Top Level Domain (ccTLD) delegation/redelegation 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 redelegations would be excluded from standing until

relevant appeals mechanisms have been developed by the ccTLD community, in coordination with other interested parties.

13 Disputes related to Internet number resources, protocols and parameters are out of scope of the Request for Reconsideration process.

14 Goals

15 The CCWG-Accountability recommendations aim to:

- Broaden the types of decisions that can be re-examined to include Board/staff action/inaction that contradicts ICANN's Mission, Commitments, and/or Core Values (as stated in Bylaws/Articles) and for the purpose of reconciling conflicting/inconsistent expert panel opinions.
- Provide more transparency in the dismissal and reconsideration processes.
- Provide the Board Governance Committee (BGC) with the 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 nine on BGC summary dismissal as follows:
    - The Board Governance Committee shall review each Request for Reconsideration upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Request for Reconsideration if:

        (i) The requestor fails to meet the requirements for bringing a Reconsideration Request; or

        (ii) It is frivolous. ~~querulous or vexatious(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 Request for Reconsideration shall be documented and promptly posted on the website.

16 Composition

17 The CCWG-Accountability determined there is a need to rely less on the ICANN legal department (which holds a strong legal obligation to protect the corporation) to guide the BGC on its recommendations. More ICANN Board Director engagement is needed in the overall decision-making process.

18 Requests should no longer go to ICANN's lawyers (in-house or external legal counsel) for the first substantive evaluation. Instead, the Requests for Reconsideration should go to ICANN's Ombudsman, who will make the initial recommendation to the BGC because the CCWG-Accountability believes that the Ombudsman may have more of an eye for fairness to the community in reviewing requests. Note that the ICANN Bylaws charge the BGC with these duties, which means the BGC would utilize the Ombudsman instead of its current practice of using ICANN's lawyers to aid the BGC in its initial evaluation.

19 All final determinations of Requests for Reconsideration (other than requests that have been summarily dismissed by the BGC as discussed above) are to be made by the ICANN Board (not only requests about Board actions as is the current practice).

20 Amend paragraph 3:

3. The Board has designated the BGC to review and consider any such Request for Reconsideration. The BGC shall have the authority to:

- Evaluate requests for review or reconsideration.
- Summarily dismiss insufficient or frivolous 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;~~
- Make a recommendation to the Board of Directors on the merits of the request, as necessary.

21 Delete paragraph 15, because the Board will make all final decisions regarding requests related to staff action/inaction.

22 Decision-Making

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

24 A rebuttal opportunity to the BGC's final recommendation (although requestors cannot raise new issues in a rebuttal) needs to be provided before the full Board finally decides.

25 Hard deadlines to the process are to be added, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

26 It is proposed that the rules for a Request for Reconsideration be amended as follows:

The Board Governance Committee (BGC) shall make a final recommendation to the Board with respect to a Request for Reconsideration within 30 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 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 Board for its evaluation.

The Board shall not be bound to follow the recommendations of the BGC. The final decision of the Board and its rationale 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 BGC within 45 days of receipt of the recommendation 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 135 days of receipt of the request. The final decision shall be promptly posted on ICANN's website.

27 ### Accessibility

28 The CCWG-Accountability recommends that the time deadline for filing a Request for Reconsideration be extended from 15 to 30 days from when requestor learns of the decision/inaction, except as otherwise described below.

29 Amend paragraph 5 so that it reads:

5. All Requests for Reconsideration must be submitted to an email address designated by the BGC 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.

30 ### Due Process

31 ICANN's DIDP is an important issue to be addressed in Work Stream 2 and should be improved to accommodate the legitimate need for requestors to obtain internal ICANN documents that are relevant to their requests.

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

33 Final decisions should be issued sooner. Changes will include an affirmative goal that final determinations of the Board should be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

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

35 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 "Third Draft Proposal on Work Stream 1 Recommendations"

- Conflicts in timing for Board approval addressed by changing 60 days to 75 days and the total of 120 days to 135 days.

5. Stress Tests Related to this Recommendation

- N/A

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

- N/A

7. How does this address NTIA Criteria?

36 **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.

37 **Maintain the security, stability and resiliency of the Internet DNS.**

- These accountability measures were designed to contribute to maintaining the operational functioning of the organization.

38 **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 the organization.

39 **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.

40 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- N/A