

CC2 Themes – Work Track 3

Accountability Mechanisms

3.5.1 – Do you believe that the existing accountability mechanisms (Request for Reconsideration, Independent Review Process, and the Ombudsman) are adequate avenues to address issues encountered in the New gTLD Program?

[Jim Prendergast, RySG, BRG, Aflias, INTA, and Google pointed to shortcomings in accountability mechanisms.](#)

Excerpts:

“Clearly no. The fact that the **ICANN Board Governance Committee (BGC) has had to create a separate subcommittee to deal with reconsideration requests related to new gTLDs** is Exhibit A. They are not equipped to handle these. It was also the case that IRP decisions found that the **BGC violated the ICANN by laws in their handling of reconsideration requests.**” – Jim Prendergast

“Some of the objection processes for contested applications had common issues between them. The next gTLD rounds working group identified some of the problems that post-decision mechanisms, such as appeals, may help reduce or solve.

- **Lack of panelist training and consistency** as evidenced by decisions that were decided differently, despite having substantially similar fact patterns,
- **Random opportunities to present new evidence or re-argue a position** based on how vehemently a party insisted on the right.
- **No opportunity to have the merits of a case** revisited – a problem where the providers didn’t properly train panelists. . .” – RySG, BRG, Aflias (excerpted from response to 3.5.2)

“The perception of inconsistent outcomes in objection proceedings led to **overreliance on existing accountability mechanisms, particularly the Reconsideration Request process**, which was **ill suited** to address the objection related issues as Reconsideration Requests are intended to address action or inaction by ICANN staff or the ICANN Board and not determinations by a third party panel. This situation was detrimental to applicants. . .and the ICANN Board’s Governance Committee. . .” – RySG, BRG, Aflias

“In the previous round it was decided not to allow appeals from most decisions, however in practice this has resulted in **extensive use of time consuming and complex requests for reconsideration and independent reviews.**” – INTA (excerpted from response to 3.5.2)

“During the 2012 Round the String Confusion Objection Process resulted in numerous **inconsistent outcomes**. . . Unfortunately, even the **ad hoc mechanisms created by the ICANN Board to address these discrepancies were inadequate**, as they were not made available to both sides of a particular contention set, creating the presumption that the rights of gTLD applicants were given more weight than the rights of objectors.” – Google

RySG, BRG, and Afilias noted that this question may be premature and outside the scope of the PDP.

“Beyond this proposed mechanism, which is specific to the application process, we believe that this **question is premature and may be beyond the WG’s scope**. First, some of the accountability mechanisms under **discussion have changed significantly since since the 2012 round as part of the CCWG-Accountability, and others remain under discussion** and may be altered as a result of Workstream 2 of the CCWG Accountability work. Second, these mechanisms go **beyond the scope of the gTLD application process**, and are more appropriately considered in devoted review or policy processes like the CCWG-Accountability or the Accountability and Transparency Review Process.” – RySG, BRG, Afilias

NCSG recommended that the PDP take into account work and recommendations of the CCWG on Enhancing ICANN’s Accountability.

“This topic is an exclusivity of the New gTLD Subsequent Procedures as the work and further recommendations of the **Cross Community Working Group on Enhancing ICANN’s Accountability with the revision of the accountability mechanisms should be taken into consideration on this topic.**” – NCSG

ALAC responded that mechanisms are adequate in light of new work on accountability measures.

Excerpt:

“Yes, considering the new review mechanisms implemented as a result of the ICANN Accountability measure and subject to the response to 3.5.2.” – ALAC

3.5.2 – Should there be appeal mechanisms, specific to the New gTLD Program, introduced into the program? If yes, for what areas of the program (e.g., evaluations, objections, CPE)? Do you have suggestions for high-level requirements (e.g., if the appeal should be limited to procedural and/or substantive issues, who conducts the review, who is the final arbiter, safeguards against abuse, etc.).

ALAC suggested that if appeals are allowed, they should only be allowed when decision is based on an error of fact that ICANN has available at the time.

INTA, Google, RySG, BRG, and Afilias supported introducing an appeals mechanism.

Excerpts:

“INTA believes that an **appeals process would be beneficial**. . . In order to allow fair recourse for applicants, appeals processes should be identified prior to future releases of new gTLDs, with clear criteria for appeal identified and those who made the initial decisions are not part of any appeals panel.” -- INTA

“Address inconsistencies experienced within application objection procedures through the introduction of a streamlined and balanced appeals process. We support the recommendation made in the comments by the RySG that a more equitable approach is to **introduce the option of a defined appeals process for all applicants that identify either a reasonable inconsistency in outcome or a specific argument as to why the panel failed to apply the proper standard.** A narrowly-tailored appeals process with explicitly delineated grounds for appeal and a relatively high standard for overruling panel decisions, e.g., a “clear error” standard, should also alleviate stress on the Reconsideration Request process. .” – Google

“. . .We recommend that, in a subsequent **application process, a limited appeals process be introduced for the objection procedures** for parties that identify either a reasonable inconsistency in outcome or a specific argument as to why the panel failed to apply the proper standard. We propose below several models to consider for potential appeal options:

- Delayed appeals: For parties that were the first few cases under a new procedure or mechanism, allow the losing party to request a delayed review by panelists who have experience deciding similar cases under the new system, to cross-check for consistency. . .
- Master panel: A traditional appeals process appears to simply substitute the judgment of panelist B for that of panelist A. Instead, hand-pick “master” panelists who have demonstrated consistent, sound judgment in the first round and ensure that they are provided with high-quality briefing materials regarding any changes in the next round. . .
- ICANN Review: A panel or team within ICANN could be established to conduct independent reviews of objection outcomes and to make follow up recommendations. . .
- Appeals: A template exists for this in the URS, TM-PDDRP, and RRDRP. . .
- Existing accountability mechanisms: Existing mechanisms are best utilized if a Provider goes rogue or underperforms, but the Board’s expertise is not policing the day to day work of ADR providers.” – RySG, BRG, Afiliias (note: see full comment for detailed explanation of the recommendations including pros and cons of the proposed models)