

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 50 2013 00 1083

DotConnectAfrica Trust,

Claimant,

v.

Internet Corporation for Assigned Names and Numbers,

Respondent.

DCA'S RESPONSE TO ICANN'S REQUEST FOR RECONSIDERATION

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I. INTRODUCTION

1. Pursuant to the Panel’s Procedural Order No. 2,¹ DotConnectAfrica Trust (“DCA”) hereby provides its response to the request of the Internet Corporation for Assigned Names and Numbers (“ICANN”) that the Panel reconsider a portion of its Decision on Interim Measures of Protection² and “eliminate any inference or statement” from paragraphs 29 and 33 therein that “ICANN failed to follow its Bylaws.”³

II. THE PANEL’S DECISION SHOULD NOT BE MODIFIED BECAUSE ICANN HAS NOT FORMED A STANDING PANEL IN ACCORDANCE WITH ITS GOVERNING DOCUMENTS

2. There is no basis for modifying the Panel’s Decision on Interim Measures of Protection to remove references to ICANN’s breaches of its Bylaws and failure to comply with the Supplementary Procedures, for the simple reason that ICANN was under an obligation to create a standing panel and failed to do so.⁴ ICANN’s Bylaws state that “[t]here *shall be* an omnibus standing panel,”⁵ meaning that ICANN *must* form an omnibus standing panel; it is not optional. ICANN does not dispute that it has failed to create such a panel.

3. ICANN adopted the standing panel requirement in April 2013 at the recommendation of a panel of three experts chosen to evaluate ICANN’s accountability structures and suggest improvements.⁶ Notably, the experts recommended that ICANN institute a standing panel, but did *not* recommend that there be any alternatives for forming an IRP Panel in the event that

¹ See Procedural Order No. 2 (27 May 2014).

² See Decision on Interim Measures of Protection (12 May 2014).

³ ICANN’s Response to the Panel’s 12 May 2014 Decision and Request for Partial Reconsideration (20 May 2014).

⁴ See Decision on Interim Measures of Protection, paras. 29, 33.

⁵ ICANN Bylaws, Art. 4, § 3(6) (emphasis added) [Amended Notice of IRP, Ex. C-10].

⁶ See Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel, Art. IV, § 3(6) [Ex. C-M-42]; Report by Accountability Structures Expert Panel (Oct. 2012), PDF p. 30 [Ex. C-M-43]. This is the panel of experts to which ICANN’s counsel referred during the First Procedural Hearing.

ICANN neglected to create such a panel.⁷ It is not clear how the additional language relating to the constitution of an IRP Panel in the absence of a standing panel came to be added to the Bylaws, since the ICANN Board of Directors added this language after the public comment period had ended and after the expert panel had concluded that no changes to the panel's recommended revisions should be made.⁸ The ICANN Board Resolution approving the amended language stated only that “[i]f a standing panel cannot be comprised, or cannot remain comprised, the Bylaws now allow for Independent Review proceedings to go forward with individually selected panelists.”⁹

4. ICANN's Supplementary Procedures were amended to reflect the changes to the Bylaws. They provide that the IRP Panel “*will be* comprised of *members of a standing panel* identified in coordination with the ICDR,” making it clear that the alternative methods for selecting an IRP panel are the exception and not the norm.¹⁰ Likewise, the provision regarding Interim Measures of Protection in the Supplementary Procedures presumes that a standing panel will be in place: “Where the IRP PANEL is not yet comprised, the *Chair of the standing panel* may provide a recommendation on the stay of any action or decision.”¹¹

5. This history suggests that ICANN added the language on the constitution of an IRP Panel in the absence of a standing panel solely in order to avoid delaying any potential IRP proceedings commenced after the effective date of the revised Bylaws but before ICANN had the

⁷ See Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel [Ex. C-M-42].

⁸ See Expert Recommended Improvements to ICANN's Accountability Structures, Report of Public Comments (12 Dec. 2012), available at <https://www.icann.org/en/system/files/files/report-comments-asep-recommendations-12dec12-en.pdf> [Ex. C-M-44].

⁹ ICANN Accountability Structures Bylaws Effective Date, Rationale for Resolution 2013.04.11.06, p. 7 (11 Apr. 2013), available at <https://www.icann.org/resources/board-material/resolutions-2013-04-11-en#1.d> [Ex. C-M-45].

¹⁰ ICANN Supplementary Procedures, Art. 1 (emphasis added) [Amended Notice of IRP, Ex. C-3].

¹¹ *Id.*, Art. 7 (emphasis added).

opportunity to form an omnibus standing panel. In other words, this language does not mean that ICANN is not obligated to create a standing panel; rather, it serves the temporary function of permitting IRP proceedings to proceed during the temporal gap between amendment of the Bylaws and the constitution of the standing panel. Although there is no deadline in the Bylaws for forming the standing panel, given the mandatory nature of the provision, ICANN certainly should have acted by now—more than one year later—to establish it.¹²

6. For these reasons, it was appropriate for the Panel to find that ICANN has failed to follow its Bylaws and Supplementary Procedures with respect to the creation of a standing panel. It bears noting that ICANN’s Request for Reconsideration once again demonstrates ICANN’s willingness to rely on technicalities when doing so may further ICANN’s self-serving interpretations of the documents governing this proceeding, while reflexively disavowing such precision when doing so would be inconvenient to ICANN’s position in this proceeding. Indeed, even if ICANN were correct that there is any ambiguity in the Bylaws as to whether or not it is obligated to create a standing panel – which there is not – such ambiguity would in itself constitute a further breach of ICANN’s obligation of transparency and accountability to Internet stakeholders.

¹² Indeed, we are unaware of any actions ICANN has taken even to initiate the formation of such a panel. One ICANN observer has raised questions concerning ICANN’s intention to ever form such a panel in a blog post commenting on this case. *See* Kevin Murphy, “Was panel wrong to put .africa on ice or does ICANN have an accountability problem?” Domain Incite (13 May 2014), *available at* <http://domainincite.com/16652-was-panel-wrong-to-put-africa-on-ice-or-does-icann-have-an-accountability-problem> (recounting what is known of sequence of events leading to language in Bylaws on which ICANN relies and commenting, “I could be wrong, but it does look a little bit like the ICANN board giving itself a carte blanche [sic] to ignore the recommendations of the ASEP, and therefore, indirectly, the ATRT”) (accessed 28 May 2014) [Ex. C-M-46]. “ASEP” refers to the Accountability Structures Expert Panel that recommended the creation of a standing panel; “ATRT” is the Accountability and Transparency Review Team, formed to address concerns about ICANN’s lack of accountability and transparency. *See* <https://www.icann.org/resources/pages/applications-2012-11-14-en> (accessed 28 May 2014) [Ex. C-M-47].

III. CONCLUSION

7. Based on the foregoing, DCA respectfully requests that the Panel deny ICANN's Request for Reconsideration.

Respectfully submitted,



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LIST OF EXHIBITS

Exhibit No.	Description
C-M-42	Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel
C-M-43	Report by Accountability Structures Expert Panel (ASEP) (October 2012)
C-M-44	Expert Recommended Improvements to ICANN's Accountability Structures, Report of Public Comments (12 Dec. 2012)
C-M-45	ICANN Approved Board Resolutions – Regular Meeting of the ICANN Board (11 April 2013)
C-M-46	Kevin Murphy, "Was panel wrong to put .africa on ice or does ICANN have an accountability problem?" Domain Incite (13 May 2014)
C-M-47	ICANN, Applications Received for the Accountability and Transparency Review Team 2 (ATRT 2)

Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel

Article IV, Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in [Section 2 of this Article](#), ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. [In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.](#)
3. [A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting \(and the accompanying Board Briefing Materials, if available\) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.](#)
- 3.4. [Requests for such independent review shall be referred to an Independent Review Process Panel \("IRP Panel"\), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:](#)
 - a. [The IRP did the Board act without conflict of interest in taking its decision?;](#)
 - b. [did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and](#)
 - c. [did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?](#)
5. [Requests for independent review shall be operated not exceed 25 pages \(double-spaced, 12-point font\) of argument. ICANN's response shall not exceed that same length. Parties may submit documentary evidence](#)

Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel

supporting their positions without limitation. In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence.

6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel.

4.7. All IRP proceedings shall be administered by an international arbitration dispute resolution provider appointed from time to time by ICANN ("the IRP Provider") ~~using arbitrators under contract with or nominated~~, The membership of the standing panel shall be coordinated by that provider the IRP Provider subject to approval by ICANN.

5.8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this [Section 3](#).

6.9. Either party may ~~elect~~request that the ~~request for independent review~~IRP be considered by a one- or three-member panel; ~~in the absence~~Chair of ~~any such election~~, the ~~issue standing panel shall be considered by a one member panel~~make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.

7.10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels; ~~provided that if ICANN so directs, the IRP Provider shall establish a standing panel to hear such claims.~~

8.11. The IRP Panel shall have the authority to:

a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;

a.b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;

Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel

~~b-c.~~ _____ declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

~~e-d.~~ _____ recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP_i;

~~9. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the IRP.~~

e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and

f. determine the timing for each proceeding.

~~10-12.~~ _____ In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by e-mail and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.

~~11-13.~~ _____ The IRP All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.

~~14. Declarations of the IRP shall be in writing. The IRP~~Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.

Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.

~~12-18.~~ The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

~~13-19.~~ The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ~~the Website~~ICANN's website when they become available.

~~14-20.~~ The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.

~~15-21.~~ Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.

Report by Accountability Structures Expert Panel (ASEP)

October 2012

Basis for ASEP Review

- ICANN's Articles of Incorporation, Bylaws, and Affirmation of Commitments, calling for:
 - Open and transparent governance
 - Accountability to multi-stakeholder community
 - Effective, efficient, open and inclusive reconsideration and review of ICANN decisions

Scope of ASEP Review

- **ATRT Recommendations 23/25**
 - Researched development and use of Reconsideration & Review structures
 - Reviewed Improving Institutional Confidence (IIC) Recommendations and community comment
 - Understood community concern and lack of consensus on IIC recommendations

Guiding Principles

The Four Es:

- Enhancing effectiveness of structures
- Efficiency in process
- Allowing expeditious resolution
- Enhancing community's ease of access to accountability structures

The Board must always act with objectivity and fairness in the best interests of ICANN, but in doing so take account of the legitimate needs, interests and expectations of stakeholders material to the issue being decided. Staff must act in same manner.

Guiding Principles (cont.)

- Bring fresh perspective to ICANN, accounting for today's circumstances
- Build on prior recommendations where possible
- Make improvements; give ICANN a base for future consideration & improvement
- Focus on enhancement and clarifications to structures, not restrictions

Guiding Principles

- Create stability through building of precedent
- Where possible, reduce burden and costs to those accessing structures
- Accountability structures should not preclude any party from filing suit against ICANN in court of competent jurisdiction

Current Accountability Structures

- Ombudsman, Bylaws, Art. V
- Reconsideration Request - considered by Board Governance Committee (BGC), Bylaws, Art IV, Section 2
- Independent Review - administered by International Centre for Dispute Resolution, Bylaws, Art IV, Section 3

Current Accountability Structures

- No change recommended to role of Ombudsman
 - Ombudsman undertaking own review of work in line with international standards
 - Ability to bring claims of unfairness across ICANN community seems to be working well
- Reconsideration and Independent Review processes to remain, but improvement required

Key Recommendations

Summary of Recommendations

RECONSIDERATION

- Improve access - add claims for consideration of inaccurate material information
- Define key terms, such as “material information”, “materially harmed”
- Modify time limits for submissions
- Include terms and conditions in request form
- Allow for urgent review in place of stay
- Allow for summary dismissal when warranted
- Allow “class” filings/consolidation
- Require allegations of standing

INDEPENDENT REVIEW

- Create omnibus standing panel
- Define key terms
- Introduce optional cooperative engagement and conciliation phases to narrow issues and improve efficiency
- Require submission form with terms and conditions
- Introduce: (i) time limits for filing and decision; (ii) and page limitations for argument
- Eliminate in-person proceedings absent real need
- Allow “class” filings/consolidation
- Require allegations of standing

Reconsideration Process

Reconsideration Process Recommendations

Form of Reconsideration Model

- BGC to continue reconsideration of Board's prior decisions.
- The full BGC, and not a subset, should remain as the body considering Reconsideration Requests.

Reconsideration Process

Recommendations

What May Be Reconsidered?

- Staff action: Policies that can be basis for challenging staff action/inaction should be those that are approved by the Board (after community input) that will impact the community in some way.
 - For those processes/procedures that are not policies, complaints regarding staff action/inaction are more appropriately addressed to ICANN management, or the Ombudsman if unfairness can be alleged.

Reconsideration Process

Recommendations

What May Be Reconsidered?

- Board action: Grounds for Reconsideration should be expanded to include both:
 - If information was available at time of Board decision, but not presented to Board, except where the requestor could have submitted but did not submit the information, and the information could have formed the basis for the decision.
 - If the requestor can demonstrate that inaccurate/false/misleading information was presented to, and formed the basis for, the challenged Board action or inaction, if it materially and adversely affected a party.
 - Requires more than allegation of inaccuracy; requestor must demonstrate inaccuracy and the causal connection between the inaccuracy and the challenged Board decision.

Reconsideration Process

Recommendations

What May Be Reconsidered?

- Standard for “materially harmed” and “adversely impacted”
 - Aggrieved party must demonstrate: a loss or injury suffered (financial or non-financial) that is directly and causally connected to challenged Board or staff action or inaction.
 - Aggrieved party must set out the loss or injury and the direct nature of that harm in specific and particular details.
 - The relief requested must be capable of reversing the alleged harm.
 - Injury or harm caused by third parties as a result of acting in line with the challenged decision is not a sufficient ground for reconsideration.
 - The impact of the injury or harm must be in itself of sufficient magnitude to justify the reconsideration and not exacerbated by the actions or omissions of a third party.
 - The request may be summarily dismissed, with due notice in the request form, if the facts relied on do not evidence “harm” or “impact”.

Reconsideration Process Recommendations

What May Be Reconsidered?

● Define “Material Information”

- “Material information” = Facts that are material to the Board’s decision.

● Revise Reconsideration Request Form to Incorporate Definitions

- The Reconsideration Request form should include terms and conditions and be modified to call for information specific to the definitions laid out here.

Reconsideration Process Recommendations

Clarification of Process - New Time Limitations

- For Board actions, Requests must be filed within 15 days of posting of the resolution at issue, or from the initial posting of the rationale (if rationale is not posted with resolution).
- For staff actions, requests should be received within 15 days of the staff action/inaction taking effect.
- The BGC must issue recommendation on the Request within 30 days of filing, or as soon thereafter as feasible. The feasibility of time limits depend on issues such as the complexity of the request, the number of requests pending simultaneously, or similar situations.
- The Board to issue determination on the BGC recommendation within 60 days of receipt or as soon thereafter as feasible; circumstances that delay the Board action should be published on the website.

Reconsideration Process Recommendations

Clarification of Process - Page Limitations

- Incorporating a page limitation for the submission of argument is not anticipated to curtail any of the principles identified.
- Efficiency, expeditiousness and ease of access will be enhanced by limiting argument (legal submissions) to no more than 25 pages of double-spaced, 12-point font.
- Requestors may submit all facts necessary in the request form, without limitation, to demonstrate why the decision should be reconsidered.

Reconsideration Process Recommendations

Clarification of Process - BGC Role in Considering Staff Action/Inaction

- When a reconsideration request is brought to challenge a staff action/inaction, BGC should have delegated authority from the Board to make the final determination.
- In these situations, as the staff action/inaction was not initially a matter before the Board, there is no need for the Board as a whole to review these recommendations.
- The BGC may determine if it is appropriate to take a recommendation of this type to the Board, and the BGC retains the authority and discretion to do so.
- This vesting of responsibility to the BGC may necessitate a modification to the BGC Charter.

Reconsideration Process Recommendations

Clarification of Process - Summary Review and Dismissal

- The BGC should have the power to dismiss a reconsideration request summarily; there is no benefit to continue process when there is no substance to request or if it is frivolous, querulous or vexatious.
- Reconsideration Request form should be modified to put requestors on notice of the potential for a summary dismissal.
- A question similar to the following must be included in the form: “Please state specifically the grounds under which you have the standing and the right to assert this claim.” This question may be tailored to address the definition of “materiality” that will be incorporated into the Request Form.

Reconsideration Process Recommendations

Clarification of Process - “Stay” Not Feasible; Provide for Urgent Review Instead

- A stay adds – not diminishes – uncertainty to the process. ICANN is not able to grant the relief to third parties that normally accompany a stay in other scenarios, such as a right to a bond in the event the stay is improperly taken.
- Many people or entities, not just a Requestor, rely upon the Board’s action. The ASEP does not view this lightly; it is important to note that ICANN is to be accountable to all, not just those aggrieved by a particular decision.

Reconsideration Process Recommendations

Clarification of Process - “Stay” Not Feasible; Provide for Urgent Review Instead (cont.)

- Provide a right to apply to the BGC for urgent reconsideration.
- An request for urgent consideration must be made within two business days (calculated at ICANN’s headquarters in Los Angeles, California) of posting of the resolution at issue; must set out why the matter is urgent for reconsideration; and must demonstrate a likelihood of success in the resolution of a request for reconsideration.
- The BGC must respond in two working days or as soon as feasible thereafter as to whether the matter is urgent.
- If the matter is deemed as urgent, the requestor will be given an additional two business days to complete the submission of a Reconsideration Request. The BGC must consider this issue as a matter of urgency within seven days thereafter.

Reconsideration Process Recommendations

Clarification of Process - Hearings Not Required

- No hearing is required in the Reconsideration Process. However, the BGC retains the absolute discretion to call people before it to provide additional information.
- Complainants may request an opportunity to be heard by the BGC; the BGC decision on such a request to be heard is final.
- This should be included in the Request form.

Reconsideration Process

Recommendations

Clarification of Process - Combined/Consolidated Request

- “Class” type filings may be appropriate within the reconsideration process. The definition of the standard for review of the feasibility of “class” treatment should be “Is the alleged causal connection and the resulting harm the same for all of the complaining parties?”
- Representational complaints, such as those brought by a trade group on behalf of membership, may only be submitted if the requestor itself can demonstrate that it has been materially harmed and adversely impacted by the action/inaction giving rise to the request.
- As needed, the BGC shall have the ability to consolidate the consideration of reconsideration requests if they are sufficiently similar.

Reconsideration Process Recommendations

Clarification of Process - Third Party Participation in Process

- All material information relevant to the request should be provided through the requestor.
- However, if information comes to the BGC through another channel the BGC should provide that information to the requestor and post it on the ICANN website.

Reconsideration Process

Recommendations

Effect Of Outcomes - No Right to “Appeal” Decisions on Reconsideration

- The Board’s decision on the BGC’s recommendation is final (i.e., not subject to a Reconsideration Request).
- In the event the matter is about Staff action/inaction, the BGC’s determination is final.
- Notice of this should be made clear to those seeking reconsideration through the introduction of a Terms and Conditions section in the form provided for the submission of Reconsideration Requests.

Reconsideration Process

Recommendations

Effect Of Outcomes - Precedential Value of Decision

- **Board Action:** When a reconsideration request is about Board action, the concept of “precedent” is not relevant, as the question focuses on whether or not the Board considered material information in a specific instance.
- **Staff Action:** When the request is about staff action, the BGC consideration of violation of the policy should have precedential value. The fact of precedential value carried by prior recommendations on Reconsideration should be noted in the Reconsideration Request form.

Reconsideration Process

Recommendations

Metrics to Identify Effectiveness

- It is difficult to identify metrics to show that the Reconsideration process adds value, as it should not be based solely upon how many requests are filed or how many requests succeed. The fact of use of the process may show that the availability of the process as means to make sure the Board and staff act appropriately is of value. When the process is invoked, it will be important to evaluate if the BGC/Board performed the process in a consistent and transparent manner.
- For complaints of staff action, a proposed metric is: If the BGC determines that staff did not follow a policy, did staff properly re-evaluate and follow policy thereafter?

Independent Review Process (IRP)

Independent Review Process Recommendations

Independent Review - Omnibus Standing Panel

- The ASEP recommends establishing an omnibus standing panel of six-to-nine members, taking account of geographic diversity. Each member should receive an annual retainer, and a small per-diem fee as they are called for service.
- Each IRP panel will be selected from among the omnibus standing panel members.
- The expertise desired on the standing panel include jurisprudence, judicial experience, alternative dispute resolution, and knowledge of ICANN's mission and work.
- For consistency in IRP panel decisions and administration of proceedings, due care must be given in the selection of panelists to assure a broad range of experience and meeting of objective criteria for service.

Independent Review Process Recommendations

Independent Review Panel – Omnibus Standing Panel (cont.)

- The standing panel should have a Chair that may, at his/her discretion, serve on any or all selected panels during his/her tenure (not to exceed three years) as another measure of continuity throughout the proceedings. There should be administrative support for the standing panel.
- Appointment periods for the panelists should be staggered to allow for continued review of whether the panel has the correct number of members and the required skills and capacity.

Independent Review Process Recommendations

Independent Review - Size of IRP Panel

- While the parties can request that an IRP be heard by a one- or three-member panel, the Chair of the standing panel retains the right to decide on the size of the panel and make recommendations on who will be on the panel, based upon issues such as the complexity of the matter alleged and whether any particular expertise is called for.
- The terms and conditions section of IRP submission form will describe the panel selection process.

Independent Review Process Recommendations

What May Be Subject of IRP? – Complainant must be “materially harmed”:

- The complainant must demonstrate, in specific and particular details, the injury or harm suffered (financial or non-financial) that is a directly and causally connected to the Board’s alleged violation of the Bylaws or Articles of Incorporation.
- The decision of the panel (as reviewed and acted upon by the Board) must be capable of reversing the injury alleged by complainant.
- Injury or harm caused by third parties as a result of acting in line with the Board’s decision is not a sufficient ground for independent review.
- The impact of the injury or harm must be in itself of sufficient magnitude to justify the review and not exacerbated by the actions or omissions of a third party.
- The request may be summarily dismissed, with due notice in the IRP submission form, if the facts relied on do not evidence “injury” or “harm” as defined.

Independent Review Process Recommendations

What May Be Subject of IRP? - Material Standing Requirement:

- There has to be some definition of locus to ICANN. The person or entity bringing an IRP against ICANN must be able to specifically identify how it has been directly impacted by an ICANN Board decision, and not by the actions of third parties.
- This will be called for in the IRP submission form.

Independent Review Process Recommendations

Clarification of Process – Time Limitations

- A reasonable but not excessive limitation must be imposed. The request must be filed within 30 days of the posting of approved minutes (and accompanying Board Briefing Materials) that demonstrate the requestor's contention that ICANN violated its Bylaws or Articles of Incorporation. If the request is not filed within that time, the requestor is time barred.

Independent Review Process Recommendations

Clarification of Process - Time Limitations (cont.)

- It is generally recommended that an IRP conclude to determination within four-to-six months of filing.
- The IRP Panel will retain ultimate responsibility and control of the timing of each IRP and the schedule for the parties to follow.
- The form for requesting an IRP should include a term and condition that the IRP Panel sets the timetable for the proceeding and violations of the IRP Panel's timetable may result in an appropriate order.

Independent Review Process Recommendations

Clarification of Process - Cooperative Engagement

- It is recommended that the complainant initiate a period of cooperative engagement with ICANN prior to seeking independent review.
- The cooperative engagement mechanism will be an opportunity for ICANN and the complainant, in good faith and without outside counsel, to discuss the ways in which the party alleges the Board has violated ICANN's Bylaws or Articles of Incorporation and to determine if the issue can be resolved without an IRP, or if the issues can be narrowed.
- When the cooperative engagement is initiated, ICANN will designate a representative for the discussions, and in-person consultation is recommended, if reasonable.

Independent Review Process Recommendations

Clarification of Process - Cooperative Engagement (cont.)

- The cooperative engagement period should last for approximately 14 days.
- Cooperative engagement is not mandatory, but recommended.
- All matters discussed during cooperative engagement are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
- Cooperative engagement period should be initiated prior to a requestor incurring fees for preparing filings for an IRP.

Independent Review Process Recommendations

Clarification of Process – Conciliation

- Upon the filing of an IRP a period of good faith conciliation is recommended, to resolve or narrow the remaining issues.
- A conciliator will be appointed by Chair of the omnibus standing panel from among the standing panel members (if the creation of a standing panel is adopted).
- The conciliator will receive a limited per-diem fee.
- The conciliator will not serve on the IRP panel.
- The IRP panel chair may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues.
- The conciliation period should last for approximately three weeks.
- All matters discussed during conciliation are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.

Independent Review Process Recommendations

Clarification of Process - Effect of Not Using Cooperative Engagement or Conciliation

- Neither cooperative engagement nor conciliation is required, but if IRP complainant does not avail itself in good faith of cooperative engagement or conciliation AND the IRP complainant is not successful, the IRP panel must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.
- ICANN is expected to participate in the cooperative engagement and conciliation processes, as requested, in good faith.
- This should be included as a term and condition in the IRP submission form.

Independent Review Process Recommendations

Clarification of Process - Summary Review and Dismissal

- An IRP should be summarily dismissed for lack of standing, lack of substance., being frivolous or vexatious.
 - Allowing a claim to proceed and use community resources when there is no merit to the claim is not an enhancement to accountability and is not in the interest of the community.
- Notice of the option of summary dismissal must be in the IRP Form. A question similar to the following must be included: “Please state specifically the grounds under which you have the standing and the right to assert this claim and the specific grounds on which you rely.”
- A question may be tailored to address the definition of “materiality” that will be incorporated into the IRP.

Independent Review Process Recommendations

Clarification of Process - Page Limitations

- Written submissions of legal argument to the IRP Panel should be limited to 25 pages, double spaced and in 12-point font (both requestor and ICANN are subject to the same limits). This does not include evidence.
- All necessary evidence to demonstrate the claims that ICANN violated its Bylaws or Articles of Incorporation should be submitted in the IRP form.

Independent Review Process Recommendations

Clarification of Process - Expert Submissions Allowed

- The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence by exchange of the written objections with written rebuttals filed within 14 days of receipt of the written expert evidence.

Independent Review Process Recommendations

Clarification of Process - In-Person Hearings Not Authorized

- The nature of the IRP panel is to determine if ICANN followed its Bylaws or Articles of Incorporation, which does not seem to lend to hearings.
- In general, there should not be an in-person hearing. The parties should maximize electronic communication in their submissions.
- If there is need for a hearing, in the discretion of the IRP Panel, the hearing should be limited to argument only; all evidence (including witness statements, expert statements, etc.) shall be submitted in writing.

Independent Review Process Recommendations

Clarification of Process – Panel Selection

- Once the size of the panel is determined, the parties may agree on panel selection process.
- Panelist selection must be completed within 21 days after the completion of the conciliation phase (or if no conciliation phase, the filing of the IRP).
- If the parties have not agreed on the selection at that time, the Chair of the standing panel shall complete selection of panelists within seven days.
- This will be identified in the IRP filing terms and conditions.

Independent Review Process Recommendations

Clarification of Process – Combined/Consolidated Proceedings

- “Class” type filings may be appropriate within the IRP process. The definition of the standard for review of the feasibility of “class” treatment should be “Is the causal connection between the circumstances of the complaint and the harm the same for all of the complaining parties?”
- Representational complaints, such as those brought by a trade group on behalf of membership, may only be submitted if the requestor itself can demonstrate that it has standing and has been materially impacted by the Board action in violation of the Articles of Incorporation or Bylaws that gives rise to the request.
- As needed, the IRP Panel shall have the ability to consolidate IRP requests if they are sufficiently similar.

Independent Review Process Recommendations

Clarification of Process - Third Party Participation

- If third parties believe that they have information to provide to the IRP, that information should be provided through the claimant.

Independent Review Process Recommendations

Clarification of Process - A Defined Standard of Review Must Be Incorporated

- The IRP should be subject to a defined standard of review, including: (i) did the Board act without conflict of interest in taking its decision; (ii) did the Board exercise due diligence and care in having a reasonable amount of facts in front of them; (iii) did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
- If a complainant demonstrates that the Board did not make a reasonable inquiry to determine it had sufficient facts available, Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the complainant will have properly stated grounds for review.

Independent Review Process Recommendations

Effect of Outcomes - Outcomes of the IRP Process are Final

- The declarations of the IRP, and ICANN's subsequent actions on those declarations, should have precedential value.
- If an IRP is later initiated on the same issue, the prior decision may serve as grounds for a summary dismissal.
- The terms and conditions within the submission form must note that the ultimate Board decision following on from the IRP determination is final and creates precedent.

Future Work & Next Steps

Next Steps

- The ASEP recommends that ICANN Community carefully consider the recommendations.
- If comments are received that suggest modifications to these recommendations would further ICANN's accountability and transparency, the ASEP will take those into consideration.
- The ASEP encourages a further schedule of review of the accountability structures once there is experience with the structures as modified.
- The ASEP also encourages future consideration of adoption of new accountability structures as would serve the global public interest.

The Experts

Accountability Structures Expert Panel



Mervyn King

- **Senior Counsel and former Judge of the Supreme Court of South Africa**
- **Professor Extraordinaire at the University of South Africa on Corporate Citizenship**
- **Chair of King Committee on Corporate Governance (S.A.)**
- **Former Chair, UN Committee on Governance and Oversight**
- **Chairman of the International Integrated Reporting Council**

Accountability Structures Expert Panel



Graham McDonald

- **40 year legal career**
- **Inaugural Australian Banking Ombudsman**
- **Served 22 years as a Presidential Member of Australia's Administrative Appeals Tribunal**
- **On board of AuDA**

Accountability Structures Expert Panel

Richard Moran



- **CEO and Vice Chair, Accretive Solutions**
- **Director on several Boards**
- **Active with the National Association of Corporate Directors, working with boards to improve effectiveness**
- **Business author and radio host**

Report of Public Comments

Title:	Expert Recommended Improvement to ICANN's Accountability Structures		
Publication Date:			
Prepared By:	Samantha Eisner, Senior Counsel		
Comment Period:		Important Information Links	
Open Date:	26 October 2012	Announcement	
Close Date:	8 December 2012	Public Comment Box	
Time (UTC):	23:59 UTC	View Comments Submitted	
Staff Contact:	Samantha Eisner	Email:	Samantha.eisner@icann.org
Section I: General Overview and Next Steps			
<p>Arising out of Recommendations 23 and 25 of the Accountability and Review Team's Final Report, ICANN convened a panel of three experts to review ICANN's Accountability Mechanisms and to provide recommendations for improvements. The Accountability Structures Expert Panel (ASEP) is comprised of three international experts in the fields of corporate governance, accountability, judicial review and international dispute resolution. After significant review and evaluation, the ASEP provided a report on recommended enhancements. Proposed Bylaws changes to give effect to the ASEP's recommendations were also posted for public comment.</p> <p>The two comments (one to the report and one reply) received, to the extent they called for changes to the ASEP's recommendations, were provided to the ASEP for consideration. After review of the comments, no changes to the ASEP recommendations are recommended, and the report will be forwarded to the Board for consideration and action, along with the proposed Bylaws amendments.</p>			
Section II: Contributors			
<p><i>At the time this report was prepared, a total of two community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.</i></p>			
Organizations and Groups:			
Name	Submitted by	Initials	
gTLD Registries Stakeholders Group	Paul Diaz	RySG	
Individuals:			
Name	Affiliation (if provided)	Initials	
Alejandro Pisanty		AP	

Section III: Summary of Comments

General Disclaimer: This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

The RySG provided lengthy comment, primary of which is the application of the standard of review proposed for the Independent Review process (IRP), noting that it may be possible for the Board to violate its Articles of Incorporation or Bylaws while acting without a conflict of interest or acting in a manner it believes to be in the best interest of ICANN. The RySG noted its belief that this will “frustrate[] the overall purpose of the IRP.” The RySG also questioned the recommendation of implementing a standing panel for the IRP, and the eligibility for any tribunal should remain open. Three areas of clarification were also identified for the Reconsideration process. First, is a request that “participation” include participation through a constituency or stakeholder group, which is how many are involved in the ICANN Community. Second, the RySG questioned the introduction of terms and conditions as part of the submission of a Reconsideration Request, noting that it is important that nothing in those terms and conditions waives a right to proceed with alternative relief. Finally, the RySG emphasized the import of the Board following crisp timelines when considering Reconsideration Requests. In closing, the RySG commented on the time constraints placed on the ASEP’s work, and called for further time for consideration of the recommendations.

AP noted that the ASEP recommendations “go a long way into establishing clear processes, placing the burden of proof in complaints at the right place, and creating a commitment by all parties to the results of the processes they engage in.” AP commented in favor of the establishment of a standing panel, in contrast to the RySG, noting that “previous experience in the panels will become an asset” in terms of expediency and predictability of decisions. AP noted that there are items to be kept in mind, as the panel could focus more on legal and process knowledge and less on subject matter expertise, which may not be the right path. In addition, the creation of more formalized process gives the risk of entering more bureaucracy, so care has to be given to implementing the recommendations in a positive way.

Section IV: Analysis of Comments

General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.

After review of the comments in coordination with the ASEP, in response to the RySG, it is important to note that the imposition of a standard of review into the Independent Review process assures that the process will be used for review, and not for a rehearing. There is a need for Board decisions to be able to be relied upon and implemented, unless there is the type of failure identified by the ASEP (decision taken in violation of the Articles of Incorporation or Bylaws, or with a conflict of interest, or not believed to be in the best interests of the organization). As suggested by AP, the inclusion of a standing panel will allow for more efficient decision making and a greater degree of consistency in

those decisions. The fact that there is a standing panel is not expected to infringe on the independence of that panel. AP's caution of not allowing the panel to add delay and bureaucracy is well taken, and should be considered in the final implementation of the revised IRP.

To address the RySG concern about the potential abrogation of rights to proceed to court, the recommendations do not include any suggestion that a party would have to waive rights to proceed to court, and that will not be a term and condition of a submission form.

Prior to submitting their report, the Board Governance Committee offered to the ASEP that more time could be allotted to finish their work. The ASEP declined this offer, as they did not believe that additional time would result in added value to their recommendations.



Resources

Approved Board Resolutions | Regular Meeting of the ICANN Board

11 Apr 2013

1. Consent Agenda

- a. [Approval of Board Meeting Minutes](#)
- b. [RSSAC Bylaws Amendments](#)
[Rationale for Resolution 2013.04.11.02](#)
- c. [Hub office in Istanbul, Turkey](#)
[Rationale for Resolutions 2013.04.11.03 – 2013.04.11.05](#)
- d. [Accountability Structures Bylaws Effective Date](#)
[Rationale for Resolution 2013.04.11.06](#)
- e. [.CAT Cross-Ownership Removal Request](#)
[Rationale for Resolution 2013.04.11.07](#)
- f. [Confirm Process Followed Regarding Redlegation of the .GA domain representing Gabon](#)
[Rationale for Resolution 2013.04.11.08](#)
- g. [Change to Public Participation Committee Name](#)
[Rationale for Resolution 2013.04.11.09](#)
- h. [SO/AC Fast-Track Budget Request](#)
[Rationale for Resolution 2013.04.11.10](#)
- i. [Thank You Resolutions – Departing Community Members](#)
- j. [Thank You to Sponsors of ICANN 46 Meeting](#)
- k. [Thank You to Scribes, Interpreters, Staff, Event and Hotel Teams of ICANN 46 Meeting](#)
- l. [Thank You to Local Hosts of ICANN 46 Meeting](#)

2. Main Agenda

- a. [IDN Variant TLD Root LGR Procedure and User Experience Study Recommendations](#)
[Rationale for Resolutions 2013.04.](#)

2013.04.11.14

- b. [PIA-CC Application to Form New Constituency](#)
[Rationale for Resolutions 2013.04.11.15 –](#)
[2013.04.11.16](#)
- c. [Any Other Business](#)

1. Consent Agenda

a. Approval of Board Meeting Minutes

Resolved (2013.04.11.01), the Board approves the minutes of the 28 February 2013 Special Meeting of the [theICANN Board](#).

b. [RSSAC Bylaws Amendments](#)

Whereas, in Resolution [2011.01.25.10](#), the Board approved the Root Server System Advisory Committee ([RSSAC](#)) review final report implementation steps and instructed the Structural Improvements Committee ([SIC](#)), in coordination with staff, to provide the Board with a final implementation plan to address the [RSSAC](#) review final recommendations and conclusions.

Whereas, in July and August 2012, a working group of [RSSAC](#) and [SIC](#) members was formed to draft a revised [RSSAC](#) charter in order to meet the requirements of the final [RSSAC](#) review recommendations. The [RSSAC](#) Charter is set forth within the [ICANN](#) Bylaws at [Article XI, Section 2.3](#).

Whereas, on 4 December 2012, the [SIC](#) reviewed the proposed Bylaws revisions and recommended that the suggested changes to Article XI, Section 2.3 be posted for public comment. The Board approved the public comment posting on 20 December 2012, and the comment period was opened on 3 January 2013. No comments were received.

Whereas, on 28 March 2013, the [SIC](#) recommended that the Board adopt the changes to Article IX, Section 2.3 of

the Bylaws.

Resolved (2013.04.11.02), the Board adopts the proposed changes to Article XI, Section 2.3 of the ICANNBylaws that are necessary to modify the charter for the RSSAC in line with the recommendations arising out of the organizational review of the RSSAC.

Rationale for Resolution 2013.04.11.02

These ICANN Bylaws amendments will clarify the continuing purpose of the Root Server Advisory Committee (RSSAC). They were recommended by the joint RSSAC-SIC Working Group formed to conclude the implementation of the [RSSAC review WG final report: implementation steps](#) [PDF, 448 KB], approved by the Board on 25 January 2011. The proposed Bylaws changes were posted for public comment, and no comments were received in response. The absence of public comment indicates that such amendments are desirable for the RSSAC to improve its effectiveness in the current environment. The Bylaws revisions are drafted to allow the RSSAC sufficient time to coordinate the new RSSAC member terms that are required under the Bylaws, with the first full term under the new Bylaws provision beginning on 1 July 2013.

The approval of these Bylaws revisions is an Organizational Administrative Function for which public comment was sought. While the approval of the Bylaws amendments has no budget implications per se, it is expected that the Bylaws revisions will induce RSSACexpenditures. Empowered by the revised Bylaws amendment, the RSSAC will contribute to strengthening the security, stability and resiliency of the DNS.

This is an Organizational Administrative Function for which public comment was received.

c. Hub office in Istanbul, Turkey

Resolved (2013.04.11.03), the President and CEO is

authorized to implement either the resolutions relating to a liaison office or the resolutions relating to the branch office, which ever is deemed by the President and CEO to be more appropriate, and to open any bank accounts necessary to support the office in Turkey.

(i) Whereas, the Internet Corporation for Assigned Names and Numbers, a legal entity duly incorporated and existing under the laws of the State of California and the United States of America, having its principal place of business at 12025 E. Waterfront Drive, Suite 300, Los Angeles, California USA 90094 ("ICANN"), has decided to establish a branch office in Istanbul, Turkey ("Branch Office").

Resolved (2013.04.11.04), David Olive, holding a United States passport numbered [REDACTED], is appointed as the representative of the Branch Office with each and every authority to act individually on behalf of the Branch Office before, including but not limited to, any and all courts, private and public institutions.

(ii) Whereas, the Internet Corporation for Assigned Names and Numbers, a legal entity duly incorporated and existing under the laws of the State of California and the United States of America, having its principal place of business at 12025 E. Waterfront Drive, Suite 300, Los Angeles, California USA 90094 ("ICANN"), has decided to establish a liaison office in Istanbul, Turkey ("Liaison Office").

Resolved (2013.04.11.05), David Olive, [personal identification information REDACTED], is appointed as the representative of the Liaison Office with each and every authority to act individually on behalf

of the Liaison Office before, including but not limited to, any and all courts, private and public institutions.

Rationale for Resolutions 2013.04.11.03 – 2013.04.11.05

ICANN is committed to continuing to expand its global reach and

presence in all time zones throughout the globe. One of the key aspects of ICANN's internationalization is to establish offices in Turkey and Singapore. Another key aspect of ICANN's internationalization is to ensure that not all members of ICANN's senior management are located in the Los Angeles office. To that end, one of ICANN's officers, David Olive, has agreed to relocate to Istanbul and to be the designated branch representative.

In order to formally establish an office in Istanbul, ICANN must register to do business in Turkey. The registration to do business in Turkey requires a specific Board resolution establishing the branch and designating the branch representative, which is why the Board has passed this resolution.

Establishing hub office around the globe will be a positive step for the ICANN community as it will provide a broader global reach to all members of the community. There will be a fiscal impact on ICANN, which has been considered in the FY13 budget and will be taken into account when approving the FY14 budget and beyond. This resolution is not intended to have any impact on the security, stability and resiliency of the DNS except that it might provide additional coverage around the globe that could help more quickly address any security, stability or resiliency issues.

This is an Organizational Administrative Function not requiring public comment.

d. Accountability Structures Bylaws Effective Date

Whereas, the Accountability and Transparency Review Team's Recommendations 23 and 25 recommended that ICANN retain independent experts to review ICANN's accountability structures and the historical work performed on those structures.

Whereas, ICANN convened the Accountability Structures Expert Panel (ASEP), comprised of three international experts on issues of corporate governance, accountability and international dispute resolution, which after research and review of ICANN's Reconsideration and Independent Review processes and multiple opportunities for public input, produced a report in October 2012.

Whereas, the ASEP report was posted for public comment, along with proposed Bylaws revisions to address the recommendations within the report.

Whereas, after ASEP and Board review and consideration of the public comment received, on 20 December 2012 the Board approved Bylaws revision to give effect to the ASEP's recommendations, and directed additional implementation work to be followed by a staff recommendation for the effective date if the revised Bylaws.

Whereas, as contemplated within the Board resolution, and as reflected in public comment, further minor revisions are needed to the Bylaws to provide flexibility in the composition of a standing panel for the Independent Review process (IRP).

Resolved (2013.04.11.06), the Bylaws revisions to Article IV, Section 2 (Reconsideration) and Article IV, Section 3 (Independent Review) as approved by the Board and subject to a minor amendment to address public comments regarding the composition of a standing panel for the IRP, shall be effective on 11 April 2013.

Rationale for Resolution 2013.04.11.06

The Board's action in accepting the report of the Accountability Structures Expert Panel (ASEP) and approving the attendant Bylaws revisions is in furtherance of the Board's commitment to act on the recommendations of the Accountability and Transparency Review Team (ATRT). The ASEP's work was called for in ATRT Recommendations 23 and 25, and the work performed, including a review of the recommendations from the President's Strategy Committee's work on Improving Institutional Confidence, is directly aligned with the ATRT requested review.

The adoption of the ASEP's work represents a great stride in ICANN's commitment to accountability to its community. The revised mechanisms adopted today will bring easier access to the Reconsideration and Independent Review processes through the implementation of forms, the institution of defined terms to eliminate vagueness, and the ability to bring collective requests. A new ground for Reconsideration is being added, which will enhance the ability for the community to seek to hold the Board accountable for its decisions. The revisions are geared towards instituting more predictability into the processes, and certainty in ICANN's decision making, while at the same time making it clearer when a decision is capable of being reviewed. The Bylaws as further revised also address a potential area of concern raised by the community during the public comments on this issue, regarding the ability for ICANN to maintain a standing panel for the Independent Review proceedings. If a standing panel cannot be comprised, or cannot remain comprised, the Bylaws now allow for Independent Review proceedings to go forward with individually selected panelists.

The adoption of these recommendations will have a fiscal impact on ICANN, in that there are anticipated costs associated with maintaining a Chair of the standing panel for the Independent Review process and potential costs to retain other members of the panel. However, the

recommendations are expected to result in less costly and time-consuming proceedings, which will be positive for ICANN, the community, and those seeking review under these accountability structures. The outcomes of this work are expected to have positive impacts on ICANN and the community in enhanced availability of accountability mechanisms. This decision is not expected to have any impact on the security, stability or resiliency of the DNS.

This is an Organizational Administrative Function of the Board for which the Board received public comment.

e. .CAT Cross-Ownership Removal Request

Whereas, in December 2012, the Fundació puntCAT requested the removal of the cross-ownership restrictions reflected on the 23 September 2005 Registry Agreement signed between ICANN and Fundació puntCAT.

Whereas, the request followed the "Process for Handling Requests for Removal of Cross-Ownership Restrictions on Operators of Existing gTLDs" adopted by the Board on 18 October 2012.

Whereas, ICANN conducted a competition review in accordance to the Board-approved process and has determined that the request does not raise significant competition issues.

Whereas, a public comment period took place between 22 December 2012 and 11 February 2013 and only one comment was received, which was in support of Fundació puntCAT's request.

Resolved (2013.04.11.07), an amendment to remove the cross-ownership restriction in the Fundació puntCAT 23 September 2005 Registry Agreement is approved, and the President and CEO and the General Counsel are authorized to take such actions as appropriate to implement the amendment.

Rationale for Resolution 2013.04.11.07

Why the Board is addressing the issue?

The cross-ownership removal for existing registries has been subject to extensive discussions by the board and the community. This is the first time an existing registry has made the request according to the Board-approved process adopted 18 October 2012. However, the Board is likely to see additional requests in the future. Under the Board process adopted in October 2012, to lift cross-ownership restrictions existing gTLD registry operators could either request an amendment to their existing Registry Agreement or request transition to the new form of Registry Agreement for new gTLDs. Although Fundació puntCAT requested an amendment to its Registry Agreement, it still will be offered the opportunity to transition to the new form of Registry Agreement for the new gTLDs. Removal of the cross-ownership restrictions for .BIZ, .INFO and .ORG are being considered as part of their overall renewal negotiations. ICANN is also in preliminary discussions with .MOBI and .PRO on removal of the cross-ownership restrictions.

What is the proposal being considered?

An amendment to the 23 September 2005 Registry Agreement signed between ICANN and Fundació puntCAT.

Which stakeholders or others were consulted?

A public comment period took place between 22 December 2012 and 11 February 2013.

What concerns or issues were raised by the community?

Only one comment was received during the public comment period. The comment was in favor of the Fundació puntCAT request.

What factors did the Board find to be significant?

ICANN conducted a competition review in accordance to with the Board-approved process for handling requests of removal of cross-ownership restrictions in Registry Agreements. ICANN has determined that the request does not raise significant competition issues.

Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

There is no fiscal impact to ICANN.

Are there any security, stability or resiliency issues relating to the DNS?

There are no security, stability and resiliency issues identified.

Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?

This request followed the "Process for Handling Requests for Removal of Cross-Ownership Restrictions on Operators of Existing gTLDs" adopted by the Board on 18 October 2012.

This is an Organizational Administrative Function for which public comment was received.

f. Confirm Process Followed Regarding Redelegation of the .GA domain representing Gabon

Resolved (2013.04.11.08), ICANN has reviewed and evaluated the request, and the documentation demonstrates the process was followed and the redelegation is in the interests of the local and global

Internet communities.

Rationale for Resolution 2013.04.11.08

As part of the IANA Functions, ICANN receives request to delegate and redelegate country-code top-level domains. ICANN Staff has reviewed and evaluated a redelegation request for this domain and has provided a report to the ICANN Board that proper procedures were followed in that evaluation. The Board's oversight of the process helps ensure ICANN is properly executing its responsibilities relating to the stable and secure operation of critical unique identifier systems on the Internet and pursuant to the IANA Functions Contract.

Ensuring that the process is followed adds to the accountability of ICANN. This action will have no fiscal impact on ICANN or the community, and will have a positive impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

g. Change to Public Participation Committee Name

Whereas, Article XII of the Bylaws provides that the "Board may establish one or more committees of the Board, which shall continue to exist until otherwise determined by the Board".

Whereas, on 7 November 2008, the Board established a committee named the Public Participation Committee pursuant to its authority under Article XII of the Bylaws.

Whereas, the Public Participation Committee now desires to change its name to the "Public and Stakeholder Engagement Committee," which will be consistent with the new Stakeholder Engagement focus that ICANN has adopted.

Whereas, the Board Governance Committee has recommended that the Board approve this committee name change.

Resolved (2013.04.11.09), the Board approves the name change of the Public Participation Committee to the Public and Stakeholder Engagement Committee.

Rationale for Resolution 2013.04.11.09

The proposed name change is consistent with the manner in which ICANN is now focusing on Stakeholder Engagement on a global basis.

This resolution seeks only a name change of the Committee, and not a change in the structure or scope of the Committee. As the Board Governance Committee ("BGC") intends to conduct a full review of the structure and scope of all committees later this year the current resolution seeks only a name change for the PPC.

Taking this action will positively impact the ICANN community by ensuring that the committee's name adequately reflects the global outreach and engagement with under which ICANN is operating and the committee is overseeing. This resolution will not have any fiscal impact on ICANN or the community. This action will not have any impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

h. SO/AC Fast-Track Budget Request

Whereas, a working group on budget improvements, which include ICANN staff and Community members identified the need for an earlier decision on the funding of specific requests from the ICANN Community which required funding at the beginning of the fiscal year.

Whereas, an SO/AC Additional Budget Requests Fast-

Track Process was developed in response to the working groups suggestion; the process was meant to facilitate the collection, review and submission of budget requests to the Board Finance Committee and the Board for consideration.

Whereas, timely requests were submitted by the ICANN Community, and were reviewed by a panel of staff members representing the Policy, Stakeholder Engagement and Finance personnel.

Whereas, the review panel recommended 12 fast track budget requests representing \$279,000 requests for approval.

Whereas the Board Finance Committee met on 5 April 2013, reviewed the process followed and the staff's recommendations, and has recommend that the Board approve the staff's recommendation.

Resolved (2013.04.11.10), the Board approves the inclusion in ICANN's Fiscal Year 2014 budget an amount for funds relating to 12 requests identified by the Community as part of the SO/AC Additional Budget Requests Fast-Track Process.

Rationale for Resolution 2013.04.11.10

The SO/AC Additional Budget Requests Fast-Track Process leading to budget approval earlier than usual is a reasonable accommodation for activities that begin near the beginning of FY14. This slight augmentation to ICANN's established budget approval process and timeline helps facilitate the work of the ICANN Community and of the ICANN Staff, and does not create additional expenses. The amount of the committed expenses resulting from this resolution is considered sufficiently small so as not to require resources to be specifically identified and separately approved.

There is no anticipated impact from this decision on the security, stability and resiliency of the domain name

system as a result of this decision.

This is an Organizational Administrative Function for which ICANN received community input.

i. Thank You Resolutions – Departing Community Members

Whereas, ICANN wishes to acknowledge the considerable energy and skills that members of the stakeholder community bring to the ICANN process.

Whereas, in recognition of these contributions, ICANN wishes to acknowledge and thank members of the community when their terms of service on Supporting Organizations and Advisory Committees end.

Whereas, the following member of the Commercial and Business Users Constituency (BC) of the Generic Names Supporting Organization (GNSO) is leaving her position when her term ends:

Marilyn Cade

Resolved (2013.04.11.11), Marilyn Cade has earned the deep appreciation of the Board for her term of service, and the Board wishes her well in future endeavors.

Whereas, the following members of the Country Code Names Supporting Organization (ccNSO) Council are leaving their positions when their terms end:

Fernando Espana, .us
Paulos Nyirenda, .mw
Rolando Toledo, .pe

Resolved (2013.04.11.12), Fernando Espana, Paulos Nyirenda and Rolando Toledo have earned the deep appreciation of the Board for their terms of service, and the Board wishes them well in their future endeavors.

j. Thank You to Sponsors of ICANN 46

Meeting

The Board wishes to thank the following sponsors:

Verisign, Inc., Afiliac Limited, .ORG, The Public InterestRegistry, HiChina Zchicheng Technology Limited, .PWRegistry, Community.Asia, Iron Mountain, Zodiac Holding Limited, Minds + Machines, Neustar Inc., KNET Co., Ltd., Deloitte Bedrijfsrevisoren BV owve CVBA, JSC Regional Network Information Center (RU-CENTER), UniForum SA T/A ZA Central Registry, CORE Internet Council ofRegistrars, Symantec, APNIC Pty Ltd, NCC Group,APTLD (Asia Pacific Top Level Domain Association), Freedom Registry B.V., Uniregistry Corp., Afnic, ICANNWIKI and our local sponsors CNNIC, CONAC and Internet Society of China.

k. Thank You to Scribes, Interpreters, Staff, Event and Hotel Teams of ICANN 46 Meeting

The Board expresses its appreciation to the scribes, interpreters, technical teams, and the entire ICANN staff for their efforts in facilitating the smooth operation of the meeting. Board would also like to thank the management and staff of the Beijing International Hotel for the wonderful facility to hold this event. Special thanks are given to Li Yun, Senior Sales Manager, Beijing International Hotel and Nick Yang, Manager of Convention Services, Beijing International Hotel.

i. Thank You to Local Hosts of ICANN 46 Meeting

Local Hosts of Beijing Meeting. The Board wishes to extend its thanks to the local host organizer, Mr. Bing SHANG, Minister of Ministry of Industry and Information Technology; Ms. Xia HAN, Director of the Telecommunications Regulation Bureau of MIIT; Mr. Er-Wei SHI, Vice President of Chinese Academy of Sciences; Mr. Tieniu TAN, Vice Secretary General of Chinese Academy of Sciences; Mr. Xiangyang HUANG,

Director of CNNIC; Mr. Xiaodong Lee, Chief Executive Officer of CNNIC; Mr. Feng WANG, Vice Minister of State Commission Office for Public Sector Reform; Mr. Ning, FU Chairman of CONAC Board; Mr. Ran ZUO, Vice Chairman of CONAC Board; Mr. Qing SONG, CEO of CONAC; Ms. Qiheng HU, President of Internet Society of China; Mr. Xinmin GAO, Vice President of Internet Society of China; Mr. Wei LU, Secretary General of Internet Society of China.

2. Main Agenda

a. IDN Variant TLD Root LGR Procedure and User Experience Study Recommendations

Whereas, IDNs have been a Board priority for several years to enable Internet users to access domain names in their own language, and the Board recognizes that IDN variants are an important component for some IDN TLDstrings;

Whereas, the Board previously resolved that IDN variantgTLDs and IDN variant ccTLDs will not be delegated until relevant work is completed;

Whereas, since December 2010 ICANN has been working to find solutions to ensure a secure and stable delegation of IDN variant TLDs, and the IDN Variant TLDProgram benefited from significant community participation in developing the Procedure to Develop and Maintain the Label Generation Rules for the Root Zone in Respect of IDNA Labels and the Report on User Experience Implications of Active Variant TLDs.

Resolved (2013.04.11.13), the Board directs staff to implement the [Procedure to Develop and Maintain the Label Generation Rules for the Root Zone in Respect of IDNA Labels](#) [PDF, 772 KB], including updating the gTLDApplicant Guidebook and IDN ccTLD Process to incorporate the Label Generation Rules for the Root Zonein Respect of IDNA Labels in the respective evaluation processes.

Resolved (2013.04.11.14), the Board requests that, by 1 July 2013, interested Supporting Organizations and Advisory Committees provide staff with any input and guidance they may have to be factored into implementation of the Recommendations from the [Report on User Experience Implications of Active Variant TLDs](#) [PDF, 1.38 MB].

Rationale for Resolutions 2013.04.11.13 – 2013.04.11.14

Why the Board is addressing the issue now?

IDN variant TLDs have been a subject of interest for several years to a number of IDN users. The IDN Variant TLD Program has been working with subject matter experts in the community to develop solutions to enable a secure and stable delegation of IDN variant TLDs. The Program has concluded the work on two key components of the solution: the Procedure to Develop and Maintain the Label Generation Rules for the Root Zone in Respect of IDNA Labels and the Report on User Experience Implications of Active Variant TLDs, hereinafter referred to as the Procedure. The Procedure is now ready for consideration for adoption as the mechanism, between other things, to evaluate potential IDN TLD strings and to identify their variants (if any). The recommendations from Report on User Experience Implications of Active Variant TLDs are now ready to be implemented with any input and guidance that interested Supporting Organizations and Advisory Committees may have.

What is the proposal being considered?

The Procedure describes how to populate and maintain the Label Generation Rules for the Root Zone in Respect of IDNA Labels, which is expected to become a key component in processing IDN TLD applications. The Procedure requires participation from the relevant communities as a central component. The Procedure includes safeguards to ensure maximum community

participation of a given linguistic community and avoid dominance of a single interested party, and requires technical experts involvement to ensure technical and linguistic accuracy on the contents of the Rules. The Report on User Experience Implications of Active Variant TLDs includes a series of recommendations to enable a good user experience with IDN variant TLDs.

What Stakeholders or others were consulted?

The development of the Procedure and the Report included full participation of several members from the community. Both documents also went through two public comment processes and a number of public presentations where feedback was gathered.

What concerns or issues were raised by the community?

There were concerns raised about the idea that variants in general are inappropriate in the root zone, though, allowing that some specific case might be acceptable. There were also concerns about conflict resolution and governance of the Procedure. However, by having a requirement of consensus within and between panels the conflict resolution issue would seem to be mitigated. In regard to the governance of the Procedure, it is foreseen that having the integration panel under contract with ICANN will allow removing a panelist that could be behaving in a non-constructive manner.

Concerns were also raised that the issues raised in the Report may frighten readers away from supporting variants and the Report does not highlight the risks (problems and security issues) if variants are not supported or activated. However, in order to ensure a secure, stable and acceptable experience, these issues need to be called out for the respective parties to work on. The need for variants is well articulated by the individual issues reports, so that issue outside the scope of the current study.

What significant materials did Board review?

A Board paper and Reference Materials detailing the proposal, the Procedure to Develop and Maintain the Label Generation Rules for the Root Zone in Respect of IDNA Labels, and the Report on User Experience Implications of Active Variant TLDs.

What factors the Board found to be significant?

The Board found that the Label Generation Rules for the Root Zone in Respect of IDNA Labels will improve the current process to evaluate IDN strings by using a pre-approved, deterministic process to define which code points are allowed in the root. The Board also found significant that the rules are a key component to consistently identify the variants of applied-for IDN strings. The Procedure has the participation of the relevant communities as a core feature. In addition, the Recommendations aim to enable a good user experience in regards to IDN variant TLDs.

Are there Positive or Negative Community Impacts?

Adopting the Procedure and consequently the Label Generation Rules for the Root Zone in Respect of IDNA Labels will benefit future TLD applicants by enabling future applicants to check whether the string they are intending to apply for is allowed. The Rules will also allow the deterministic identification of IDN variants for the applied-for strings. Implementing the Recommendations will enable a good user experience with IDN variant TLDs.

Are there fiscal impacts/ramifications on ICANN(Strategic Plan, Operating Plan, Budget); the community; and/or the public?

No fiscal impacts/ramifications on ICANN are foreseen by adopting this resolution.

Are there any Security, Stability or Resiliency issues relating to the DNS?

The adoption of the Rules and the implementation of the Recommendations is expected to have a positive impact on the Security of the DNS by having a technically sound process with multiple checkpoints, including public review, of the code points and their variants (if any) that will be allowed in the root zone and the deployment of measures avoid user confusion regarding IDN variant TLDs.

Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?

This is an Organizational Administrative Function not requiring public comment.

b. **PIA-CC Application to Form New Constituency**

Whereas, the ICANN Board wants to encourage participation by a broad spectrum of existing and potential community groupings in ICANN processes and activities.

Whereas, the ICANN Board has established a Process for the Recognition of New GNSO Constituencies that includes objective eligibility criteria, encourages collaboration and puts the decisions regarding applications, in the first instance, in the hands of the communities to be directly impacted by the potential new Constituency.

Whereas, the Cybercafé Association of India (CCAOI), submitted an application for formal recognition of a new GNSO Constituency called the "Public Internet Access/Cybercafé Ecosystem (PIA/CC)" within the GNSO's Non-Commercial Stakeholder Group (NCSG).

Whereas, ICANN staff managed a 68-day Public Comment Forum for community review and reaction to the

PIA/CC proposal.

Whereas, the NCSG Leadership and ICANN staff engaged in collaborative consultation and dialogue with the PIA/CC proponents.

Whereas the NCSG Leadership and ICANN staff have followed the process and the NCSG has advised the Structural Improvements Committee of the Board of its determination to deny the application because the application does not meet the criteria established by the Board.

Resolved (2013.04.11.15) the decision of the NCSG to deny the PIA/CC application is ratified with the understanding that the decision is without prejudice and the Constituency proponents have the right to re-submit a new application.

Resolved (2013.04.11.16) the President and CEO is directed to continue collaborative discussions with the PIA/CC proponents to further investigate and consider other options for community engagement within the ICANN community and its processes.

Rationale for Resolutions 2013.04.11.15 – 2013.04.11.16

The process for the recognition of new GNSO Constituencies was designed to provide specific and objective application criteria and to place decisions on the recognition of new GNSO Constituencies, in the first instance, in the hands of the community groups in the best position to evaluate those applications. In the present case, the process was followed and the NCSG has made its determination.

It is important to note that Board ratification of the NCSG decision to reject the PIA/CC application is without prejudice to the right of the proponents to resubmit a new application. The Board hopes that further

discussions with the PIA/CC proponents can result in a course of action that will allow PIA/CC interests to be effectively incorporated into ICANN's activities and processes.

This action will have no immediate or substantial impact on ICANN's resources. This action is not expected to have any impact on the security, stability or resiliency of the DNS.

This action is an Organizational Administrative Function for which public comment was received.

c. Any Other Business

No resolutions taken.

Published on 11 April 2013

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Was panel wrong to put .africa on ice or does ICANN have an accountability problem?

Kevin Murphy, May 13, 2014, 21:40:22 (UTC), Domain Policy

Did an Independent Review Process panel get it wrong when it accused ICANN of failing to implement proper accountability mechanisms, or did it actually highlight a more serious problem?

As we [reported yesterday](#), an IRP panel has ordered ICANN to not delegate ZA Central Registry's .africa gTLD until it's heard an appeal by failed rival bidder DotConnectAfrica.

IRP is ICANN's last avenue of appeal for organizations that believe they've been wronged by ICANN decisions. Due to the duration of the process and the need for legal representation, it's extremely expensive.

The IRP panel in the .africa case based its decision largely on the fact that ICANN has failed to create a "standing panel" of would-be IRP panelists, something the panel said would have sped up the process.

A "standing panel" is supposed to be six to nine panelists-in-waiting — all respected jurists — from which three-person IRP panels could be selected when needed in future.

DCA would not have needed to file for an emergency injunction against .africa's delegation had this standing panel been created, the panel said.

According to the IRP panel, the creation of a standing panel has been "required" by the ICANN bylaws since April 2013, and ICANN has "failed" to follow its own rules by not creating one. It wrote:

the Panel is of the view that this Independent Review Process could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws... which require the creation of a standing panel

But ICANN disagrees, getting in touch with us today to point out that the panel only partially quoted the ICANN bylaws.

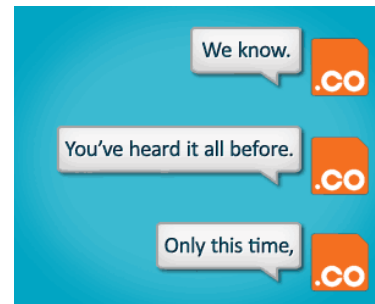
This is the bit of the bylaws the panel quoted:

There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected.

There seems to me to be little ambiguity in that paragraph; ICANN "shall" create a standing panel.

But ICANN reminds us that the IRP panel ignored a second bit of this paragraph, which states:

In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding



spot

[Amazon's bid for .amazon is dead](#)

[.club misses first target but hopes to be #1 new gTLD "within days"](#)

[OpenDNS raises \\$35 million](#)

[DNA has new plan for gTLD auctions: give us your money!](#)

[Was panel wrong to put .africa on ice or does ICANN have an accountability problem?](#)

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[.africa frozen by panel after ICANN screwup](#)

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Basically, the bit of the bylaws stating that ICANN "shall" create a standing panel is almost immediately negated by a bit that explains what is supposed to happen if ICANN does not create a standing panel.

It's confusing.

Is ICANN "required" (the panel's word) to create this standing panel or not? ICANN seems to think not, but the panel thinks otherwise.

I have no opinion because, luckily, I'm not a lawyer.

But I did a bit of digging into the public record to figure out why the bylaws are so confusing on this issue and what I found is slightly worrying if you're concerned about ICANN accountability.

The bylaws paragraph in question was added in April 2013, but it has its roots in the findings of the first Accountability and Transparency Review Team, which is the key way ICANN's accountability is reviewed under the 2009 Affirmation of Commitments with the US government.

The ATRT said in 2010 ([pdf](#)) that ICANN should "seek input from a committee of independent experts on the restructuring of the three review mechanisms" including the IRP.

ICANN did this, convening a three-person Accountability Structures Expert Panel, made up of widely respected corporate/legal brains Mervyn King, Graham McDonald and Richard Moran

It was this ASEP that came up with the idea for a standing panel, which it said would speed up IRP decisions and reduce costs.

Members of the standing panel would be paid an annual retainer even when not working on an IRP, but it would be cheaper because IRP complainants and ICANN wouldn't have to repeatedly explain to a new panel of dodderly old ex-judges what ICANN is and does.

The ASEP, in its report ([pdf](#)) did not specify what should happen if ICANN decided not to implement its recommendation on the standing panel.

I can't know for sure, but from the public record it seems that the confusing second part of the bylaws amendment was the creation of the ICANN board, possibly based on a single comment from gTLD registries.

The provision about a standing panel was formally added to the bylaws with an [April 2013 resolution](#) of ICANN's board of directors, which followed a [December 2012 resolution](#) that approved the change in principle.

The second part of the amendment, the bit about what happens if ICANN does not institute a standing panel, was added at some point between those two resolutions.

The April resolution sheds a little light on the reason for the addition, saying (with my added emphasis):

Whereas, as contemplated within the [December 2012] Board resolution, and **as reflected in public comment**, further minor revisions are needed to the Bylaws to provide flexibility in the composition of a standing panel for the Independent Review process (IRP).

Resolved (2013.04.11.06), the Bylaws revisions to Article IV, Section 2 (Reconsideration) and Article IV, Section 3 (Independent Review) as approved by the Board and **subject to a minor amendment to address public comments** regarding the composition of a standing panel for the IRP, shall be effective on 11 April 2013.

The notes to the resolution further explain (again with my emphasis):

by the community during the public comments on this issue, regarding the ability for ICANN to maintain a standing panel for the Independent Review proceedings. If a standing panel cannot be comprised, or cannot remain comprised, the Bylaws now allow for Independent Review proceedings to go forward with individually selected panelists.

The "minor amendment" referred to in the resolution seems to have enabled ICANN to basically ignore the ASEP recommendations, which (remember) stem from the ATRT review, for the last 12 months.

The April 2013 resolution was on the consent agenda for the meeting, so there was no minuted discussion by the board, but it seems pretty clear that "public comments" are responsible for the second part of the bylaws amendment.

But whose public comments?

When the ASEP report was open for comment, [only two people responded](#) — the Registries Stakeholder Group and former ICANN director Alejandro Pisanty, apparently commenting in a personal capacity.

On the subject of the proposed standing panel, the RySG said it wasn't happy:

We also are concerned with the concept of standing panels for the IRP. A key component of the IRP is that the review is "independent." To keep this independence, we believe that service on an IRP tribunal should be open to all eligible panelists, not just those with previous experience with or knowledge of ICANN. Determining whether an organization has complied with its bylaws or articles of incorporation should not require historic knowledge of the organization itself, and we believe that any jurist generally qualified by the IRP provider should be more than capable of acting as a panelist for an IRP.

It wasn't the RySG's main concern, and it wasn't given much space in its comment.

Pisanty, commenting during the comment-reply period, seemed to disagree with the RySG, saying that the ongoing institutional knowledge of a standing panel could be a boon to the IRP.

When the ASEP report was discussed at a lightly attended early-morning session of the ICANN Toronto meeting in October 2012, the only person to comment on the standing panel was Neustar lawyer Becky Burr, and she liked the idea ([transcript](#)).

It's not what you'd call a groundswell of opposition to the standing panel idea. There were few opinions, those opinions were split, and if anything the balance of commentary favors the notion.

In any event, when ICANN compiled its usual compilation report on the public comments ([pdf](#)) its legal staffer said:

After review of the comments, no changes to the ASEP recommendations are recommended, and the report will be forwarded to the Board for consideration and action, along with the proposed Bylaws amendments.

ICANN staff, it seems, didn't think the RySG's (lone?) opposition to the standing panel concept was worth messing with the ASEP's recommendations.

And yet the ICANN board added the text about what happens in the event of a standing panel not existing anyway.

I could be wrong, but it does look a little bit like the ICANN board giving itself a *carte blanche* to ignore the recommendations of the ASEP, and therefore, indirectly, the ATRT.

ICANN may well have a point about the .africa IRP panel inappropriately ignoring

Applications Received for the Accountability and Transparency Review Team 2 (ATRT 2)

5 October 2012 – ICANN invites interested individuals to apply for a position of Volunteer Review Team Member, in representation of a Supporting Organization or Advisory Committee, and/or for a position of Independent Expert on the second Accountability and Transparency Review Team (ATRT 2). [Please read the Call for Applicants to find details on the application procedure](#), mission, timeline, mandate, desired skillset etc.

3 December 2012 – In consideration of the low number of applications received to date, the deadline to apply for a position of volunteer Review Team Member representing an ICANN SO or AC, or for a position of independent expert on the ATRT 2 is now extended to **14 January 2013 – 23:59 UTC**. Please refer to the announcement:

<http://www.icann.org/en/news/announcements/announcement-03dec12-en.htm>

Schedule:

- 14 January 2013 – Deadline to submit applications
- 28 January 2013 – SO/ACs reveal the names of endorsed candidates
- 15 February 2013 – Selectors announce the composition of the Review Team
- Early March 2013 – Kick-off meeting

Volunteer Review Team Member in Representation of a Supporting Organization (SO) or Advisory Committee (AC)					
Candidate	Gender	Country	Endorsement	SO/AC	Documents
Neeraj Aarora	M	IN	Endorsed	GAC	<ul style="list-style-type: none"> • Curriculum Vitae [PDF, 161 KB] • Letter of Motivation [PDF, 131 KB] • Statement of Interest [PDF, 102 KB]
Jørgen Andersen	M	DK	Endorsed	GAC	<p>(Application submitted on 21 November 2012)</p> <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 30 KB] • Letter of Motivation [PDF, 27 KB] • Statement of Interest [PDF, 43 KB]
Fiona Asonga	F	KE	Endorsed	ASO	<p>(Application submitted on 4 December 2012)</p> <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 103 KB] • Letter of Motivation [PDF, 326 KB] • Statement of Interest [PDF, 112 KB]
Thomas Barrett	M	US	Endorsed	GNSO	<p>(Application submitted on 25 November 2012)</p> <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 23 KB] • Letter of Motivation + Statement of Interest [PDF, 47 KB]
David Conrad	M	US	Endorsed	SSAC	<p>(Application submitted on 3 December 2012)</p> <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 76 KB] • Letter of Motivation [PDF, 36 KB] • Statement of Interest [PDF, 78 KB]

					KB]
					(Application submitted on 2 December 2012)
Stephen Conroy	M	AU	Endorsed	GAC	<ul style="list-style-type: none"> • Curriculum Vitae + Letter of Motivation + Declaration of Interests [PDF, 818 KB]
					(Application submitted on 18 December 2012)
Brian Cute	M	US	Endorsed	GNSO	<ul style="list-style-type: none"> • Curriculum Vitae [PDF, 256 KB] • Letter of Motivation [PDF, 108 KB] • Statement of Interest [PDF, 213 KB]
					(Application submitted on 2 December 2012)
Olivier Crépin- M Leblond		FR	Endorsed (1 st preference)	ALAC	<ul style="list-style-type: none"> • Curriculum Vitae [PDF, 75 KB] • Letter of Motivation [PDF, 23 KB] • Statement of Interest [PDF, 588 KB]
					(Application submitted on 4 January 2013)
Dejan Djukic	M	RS	Endorsed	ccNSO	<ul style="list-style-type: none"> • Curriculum Vitae [PDF, 139 KB] • Letter of Motivation [PDF, 69 KB] • Statement of Interest [PDF, 1.19 MB]
					(Application submitted on 11 January 2013)
Avri Doria	F	US	Endorsed	GNSO	<ul style="list-style-type: none"> • Curriculum Vitae [PDF, 90 KB] • Letter of Motivation [PDF, 42 KB] • Statement of Interest [PDF, 78 KB]
					(Application submitted on 4 December 2012)
Sarah Falvey	F	US	Not Endorsed	GNSO	<ul style="list-style-type: none"> • Curriculum Vitae + Letter of Motivation + Statement of Interest [PDF, 561 KB]
					(Application submitted on 3 January 2013)
Lise Fuhr	F	DK	Endorsed	ccNSO	<ul style="list-style-type: none"> • Curriculum Vitae [PDF, 150 KB] • Letter of Motivation [PDF, 155 KB] • Statement of Interest [PDF, 300 KB]
					(Application submitted on 14 January 2013)
Tomohiro Fujisaki	M	JP	Endorsed	ASO	<ul style="list-style-type: none"> • Curriculum Vitae [PDF, 39 KB] • Letter of Motivation [PDF, 36 KB] • Statement of Interest [PDF, 139 KB]
					(Application submitted on 30

Demi Getschko	M	BR	Endorsed	ccNSO	<p>November 2012)</p> <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 34 KB] • Letter of Motivation [PDF, 59 KB] • Statement of Interest [PDF, 65 KB]
Alan Greenberg	M	CA	Endorsed	ALAC	<p>(Application submitted on 11 January 2013)</p> <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 27 KB] • Letter of Motivation [PDF, 102 KB] • Statement of Interest [PDF, 48 KB]
Carlos Raúl Gutiérrez	M	CR	Endorsed	GAC	<p>(Application submitted on 14 January 2013)</p> <ul style="list-style-type: none"> • Curriculum Vitae + Letter of Motivation [PDF, 97 KB] • Statement of Interest [PDF, 277 KB]
Scott Blake Harris	M	US	Not Endorsed	GNSO	<p>(Application submitted on 5 November 2012)</p> <ul style="list-style-type: none"> • Curriculum Vitae + Letter of Motivation + Statement of Interest [PDF, 818 KB]
Marie-Laure Lemineur	F	CR	Not Endorsed	GNSO	<p>(Application submitted on 8 January 2013)</p> <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 266 KB] • Letter of Motivation [PDF, 55 KB] • Statement of Interest [PDF, 619 KB]
Olivier Muron	M	FR	Not Endorsed	GNSO	<p>(Application submitted on 27 November 2012)</p> <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 9 KB] • Letter of Motivation [PDF, 10 KB] • Statement of Interest [PDF, 27 KB]
Paulos B. Nyirenda	M	MW	Endorsed	ccNSO	<p>(Application submitted on 7 January 2013)</p> <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 152 KB] • Letter of Motivation [PDF, 140 KB] • Statement of Interest [PDF, 60 KB]
Daniel Reed	M	US	Not Endorsed	ALAC	<p>(Application submitted on 14 January 2013)</p> <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 110 KB] • Letter of Motivation [PDF, 56 KB] • Statement of Interest [PDF, 78 KB]
Michael	M	US	Endorsed	GNSO	<p>(Application submitted on 14 January 2013)</p> <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 619

Roberts					<ul style="list-style-type: none"> • Letter of Motivation [PDF, 45 KB] • Statement of Interest [PDF, 60 KB]
Jean-Jacques M Subrenat	FR	Endorsed	ALAC	(Application submitted on 13 January 2013) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 81 KB] • Letter of Motivation [PDF, 53 KB] • Statement of Interest [PDF, 107 KB] 	
Zhang Xinsheng	M CN	Endorsed	GAC	(Application submitted on 4 January 2013) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 64 KB] • Letter of Motivation [PDF, 8 KB] • Statement of Interest [PDF, 53 KB] 	
Michael Yakushev	M RU	Endorsed	GAC	(Application submitted on 19 December 2012) <ul style="list-style-type: none"> • Curriculum Vitae + Letter of Motivation + Statement of Interest [PDF, 129 KB] 	
Hongbin Zhu	M CN	Endorsed	ccNSO	(Application submitted on 14 January 2013) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 101 KB] • Letter of Motivation [PDF, 161 KB] • Statement of Interest [PDF, 707 KB] 	
				(Application submitted on 14 January 2013)	

Independent Expert

Candidate	Gender	Country	Documents
Nick Ashton-Hart	M	CH	<ul style="list-style-type: none"> • Curriculum Vitae [PDF, 185 KB] • Letter of Motivation [PDF, 194 KB] • Statement of Interest [PDF, 160 KB]
Ali AlMeshal	M	BH	(Application submitted on 14 January 2013) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 449 KB] • Letter of Motivation [PDF, 88 KB] • Statement of Interest [PDF, 3.11 MB]
Neeraj Aarora	M	IN	(Application submitted on 2 January 2013) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 161 KB] • Letter of Motivation [PDF, 131 KB] • Statement of Interest [PDF, 102 KB]
Hago Dafalla	M	SD	(Application submitted on 21 November 2012) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 65 KB] • Letter of Motivation [PDF, 67 KB] • Statement of Interest [PDF, 532 KB]

			<ul style="list-style-type: none"> • References [PDF, 24 KB]
Bertrand de la Chapelle	M	FR	(Application submitted on 7 November 2012) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 79 KB] • Letter of Motivation [PDF, 49 KB] • Statement of Interest [PDF, 72 KB]
Carlos Raúl Gutiérrez	M	CR	(Application submitted on 14 January 2013) <ul style="list-style-type: none"> • Curriculum Vitae + Letter of Motivation [PDF, 97 KB] • Statement of Interest [PDF, 277 KB]
Artur Piechocki	M	PL	(Application submitted on 5 November 2012) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 136 KB] • Letter of Motivation [PDF, 728 KB] • Statement of Interest [PDF, 790 KB]
Oksana Prykhodko	F	UA	(Application submitted on 13 January 2013) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 126 KB] • Letter of Motivation [PDF, 95 KB] • Statement of Interest [PDF, 41 KB]
Rinalia Abdul Rahim	F	MY	(Application submitted on 14 January 2013) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 69 KB] • Letter of Motivation [PDF, 66 KB] • Statement of Interest [PDF, 1 MB]
Daniel Reed	M	US	(Application submitted on 13 January 2013) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 110 KB] • Letter of Motivation [PDF, 56 KB] • Statement of Interest [PDF, 78 KB]
Philip Sheppard	M	BE	(Application submitted on 14 January 2013) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 75 KB] • Letter of Motivation [PDF, 165 KB] • Statement of Interest [PDF, 62 KB]
Jean-Jacques Subrenat	M	FR	(Application submitted on 8 January 2013) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 81 KB] • Letter of Motivation [PDF, 53 KB] • Statement of Interest [PDF, 107 KB]
Katim S. Touray	M	GM	(Application submitted on 4 January 2013) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 530 KB] • Letter of Motivation [PDF, 277 KB] • Statement of Interest [PDF, 404 KB]
Cheick Traoré	M	CI	(Application submitted on 11 December 2012) <ul style="list-style-type: none"> • Curriculum Vitae [PDF, 126 KB] • Letter of Motivation [PDF, 72 KB] • Statement of Interest [PDF, 96 KB]
Michael Yakushev	M	RU	(Application submitted on 15 November 2012) <ul style="list-style-type: none"> • Curriculum Vitae + Letter of Motivation + Statement of Interest [PDF, 129 KB]
			(Application submitted on 14 January 2013)