

## **Reconsideration Request Form**

Version as of 21 September 2018

ICANN's Board Accountability Mechanisms Committee (BAMC) is responsible for receiving requests for reconsideration (Reconsideration Request) from any person or entity that has been adversely affected by the following:

- (a) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (b) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (c) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information.

The person or entity submitting such a Reconsideration Request is referred to as the Requestor.

Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please refer to [Article 4, Section 4.2 of the ICANN Bylaws](#) and the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

This form is provided to assist a Requestor in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requestors may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12-point font. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

*For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.*

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

## 1. Requestor Information

**Name:** Intellectual Property Constituency (IPC)

**Address:** Contact Information Redacted

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**Email:** Contact Information Redacted

Requestor is represented by its President and Chair, Ms. Lori Schulman.

## 2. Request for Reconsideration of:

**Board action/inaction**

**Staff action/inaction**

## 3. Description of specific action you are seeking to have reconsidered.

The Intellectual Property Constituency (IPC) seeks reconsideration of the ICANN Board Resolutions 2023.10.26.11 and 2023.10.26.12<sup>2</sup> which requires in turn that ICANN reconsiders the actions and inactions leading up to these resolutions, including but not limited to (i) the actions and inactions that have led to (a) the ICANN Board's public comment of 6 December 2018 on the Initial Report of the Cross-Community Working Group on New gTLD Auction

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<sup>1</sup> The address information is not to be published on ICANN's website or otherwise.

<sup>2</sup> Published on 26 October 2023 at <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-26-10-2023-en#section2.d>.

Proceeds (CCWG-AP)<sup>3</sup>, (b) the organization of the public comment phase on the Proposed Final Report of the New gTLD Auction Proceeds Cross Community Working Group<sup>4</sup>, (c) the ICANN Board Resolutions 2022.06.12.13 to 2022.06.12.16<sup>5</sup>, and (ii) the actions and inactions involving the implementation of the ICANN Grant Giving Program (hereinafter, the 'Challenged Decision').

**4. Date of action/inaction:**

26 October 2023 is the date of the Board action for which reconsideration is sought.

**5. On what date did you become aware of the action or that action would not be taken?**

The IPC learned about the resolutions at issue on 27 October 2023.

**6. Describe how you believe you are materially and adversely affected by the action or inaction:**

Requestor is adversely affected by ICANN's actions and inactions both in terms of procedure and in terms of the outcome of the challenged decision.

- As to Requestor's harm resulting from the procedural violations

Harm to procedural rights confers standing under the 'materially

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<sup>3</sup> Available at <https://mm.icann.org/pipermail/comments-new-gtld-auction-proceeds-initial-08oct18/attachments/20181206/222b0ddf/ICANNBoardsubmissiontoCCWG-APPublicCommentonInitialReport6Dec2018.pdf>.

<sup>4</sup> ICANN's Report of this public comment phase is available at <https://itp.cdn.icann.org/en/files/auction-proceeds/report-comments-new-gtld-auction-proceeds-final-25feb20-en.pdf>.

<sup>5</sup> Available at: <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-12-06-2022-en#2.c>.

affected' test if the Requestor has a 'concrete interest' in the procedural rights and alleges 'reasonably credible injury' that is 'causally connected' to the claimed procedural violation.<sup>6</sup> As Requestor is an original and fundamental participant in the ICANN community, and as Requestor actively participated in the CCWG-AP's policy development that has been overturned by the Challenged Decision, Requestor has a concrete interest in all of the procedural rights and responsibilities afforded by the Bylaws. Requestor suffers injuries as set forth below, caused directly by the Resolutions and the processes which preceded them,

- As to Requestor's harm resulting from the outcome of the Challenged Decision

ICANN's Articles of Incorporation ('Aol') and its Bylaws – in particular ICANN's Commitments – form a fundamental compact between ICANN and the community, including Requestor and all of Requestor's members – which include a wide variety of intellectual property owners, practitioners and associations worldwide. Requestor has been an active participant in development and adoption of every iteration of the ICANN Bylaws. Requestor and the members it represents have compromised many times, if not every time in its positions, in order to reach consensus with ICANN and all of its other stakeholders, each time with the expectation that ICANN would comply with the consensus-derived and Board-adopted Bylaws. When ICANN acts or fails to act in violation of its Aol and/or Bylaws, it causes substantial harm to

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<sup>6</sup> ICDR Case No. 01-20-0000-6787, *Namecheap Inc. v. ICANN*, Final Declaration of the Independent Review Process Panel, 23 December 2022, para. 105.

Requestor.

First, any such violations – and especially this violation – creates dangerous precedent upon which ICANN may rely in the future to disregard its Aol and Bylaws in the same or some analogous way. Specifically as to the Challenged Decision, ICANN not only rejects a very clear and consensus recommendation of the CCWG-AP (an unacceptable precedent in itself), but also ICANN moves to i) create a contractual precedent by which parties contracting with ICANN are essentially forced to forego resort to ICANN Accountability Mechanisms; and ii) undertake a much broader Fundamental Bylaws revision than was recommended by the CCWG-AP, which would give the ICANN Board unacceptable power to do away with Accountability Mechanisms in any future instance of its choosing, without any change to the Fundamental Bylaws.

Second, as the Aol and Bylaws – in particular ICANN's Commitments – form a fundamental compact with the IPC and the entire ICANN community, the Requestor's Members rely upon ICANN to comply with its Aol and Bylaws in critical ways. For example, when investing in Internet infrastructure, including but not limited to Internet Protocol (IP) addresses and domain names, IPC Members rely upon ICANN to fulfill its published promises – indefinitely and without fail. Not just its promises about keeping the DNS running smoothly, but also its promises about open and transparent procedures to reasonably evolve and adapt the DNS and IP addressing system over time in accord with the published Aol and Bylaws.

Third, many IP organizations – including IPC Members, members of IPC Member associations, and entities represented by IPC Members – are

interested in and/or likely to apply for grants from the ICANN auction proceeds. If implemented, the Challenged Decision would i) force grant applicants to accept a contractual prohibition against challenging ICANN's decision as to their application; and/or ii) delay, encumber and/or terminate pledged grant payments to successful applicants upon challenges (utilizing the Accountability Mechanisms) from non-applicants who are not bound by the contemplated contractual restriction – which challenges would be precluded under the Fundamental Bylaws revision called for in the CCWG-AP Recommendation (if ever implemented).

Fourth, many volunteers in the IP community will be less inclined and/or will refuse to become members and/or participate in the IPC, as they see that even a consensus CCWG-AP recommendation developed over a period of several years, with the ICANN Board's encouragement all along the way, suddenly at the end of the process can be entirely disregarded by the ICANN Board and Staff in an opaque manner that cannot be considered reasonable or justified by the Aol and Bylaws. As such, the Challenged Decision harms the IPC because the IPC relies upon volunteer participation in order to function within the ICANN Multi-Stakeholder Model.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

Many, if not all other, ICANN stakeholders will be identically (or at least similarly) adversely affected in all four of the ways described above. While the present request is submitted on behalf of the IPC, the IPC is open to other community stakeholders joining the present request when it is subsequently

amended.<sup>7</sup>

## **8. Detail of Board or Staff Action/Inaction – Required Information**

The CCWG-AP was created to develop one or more proposals for consideration by the Chartering Organizations on the mechanism that should be developed to allocate the new gTLD Auction Proceeds.<sup>8</sup> The CCWG-AP was expected to adhere to Guiding Principles, both in the context of its deliberations as well as the final recommendations. The primary Guiding Principles were ‘ensur[ing] transparency & openness’ and ‘provid[ing] sufficient accountability’.<sup>9</sup>

Even before the CCWG-AP delivered its Initial Report with preliminary recommendations, the ICANN Board discussed the work of the CCWG-AP in a secret meeting and, on 5 October 2018, the Board’s liaisons provided limited input to the CCWG-AP on a targeted question.<sup>10</sup>

On 8 October 2018, the CCWG-AP issued its Initial Report for public comments.<sup>11</sup> On 22 October 2018, the CCWG-AP presented the Initial Report at the ICANN63 meeting in Barcelona.<sup>12</sup> During this meeting, an unidentified speaker asked a question to the CCWG-AP as to which of the models

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<sup>7</sup> Via email from ICANN to IPC counsel dated Nov. 14, 2023, ICANN expressly permits the Requestor to ‘subsequently amend’ this RFR, and ‘ICANN will accept an amended request as timely.’

<sup>8</sup> CCWG-AP Charter, <https://community.icann.org/display/CWGONGAP/CCWG+Charter>.

<sup>9</sup> *Id.*

<sup>10</sup> Letter from B. Burr and M. Botterman to CCWG-AP of 5 October 2018, <https://www.icann.org/en/system/files/correspondence/burr-botterman-to-mann-chiao-05oct18-en.pdf>.

<sup>11</sup> CCWG-AP Initial Report, available at <https://community.icann.org/display/CWGONGAP/Initial+Report+Drafting>.

<sup>12</sup> ICANN Transcription ICANN63 Barcelona, GNSO – New gTLD Auction Proceeds – Presentation of Initial Report, 22 October 2018 at 1330 CEST, <https://archive.icann.org/meetings/icann63/files/static/attachments/191915/1540303961.pdf>

proposed 'would keep the grant making process out of the realm of request for reconsideration when a grant is made [... and of the] independent review panel'.<sup>13</sup> Although the question was asked to the CCWG-AP, it was the ICANN Board's liaison who responded, stating that a modification of the Bylaws would be required to carve out grant application decisions from the 'independent review reconsideration process'.<sup>14</sup> Following this response, the anonymous speaker apparently left without further comment.

On 6 December 2018, the ICANN Board submitted a public comment,<sup>15</sup> in which the opinion expressed by the Board liaison was presented as the Board's position. Yet, it is unclear how the ICANN Board came to this position and what the rationale for it was, or is. The Board commented that: 'ICANN accountability mechanisms (including the Ombuds, Reconsideration, and Independent Review), which are designed to ensure that ICANN remains accountable to its Articles of Incorporation and Bylaws, should not, as a general rule, be used as appeals mechanisms for individual unsuccessful applicants for auction proceeds.'<sup>16</sup> The Board then gave thinly

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<sup>13</sup> ICANN Transcription ICANN63 Barcelona, GNSO – New gTLD Auction Proceeds – Presentation of Initial Report, 22 October 2018 at 1330 CEST, <https://archive.icann.org/meetings/icann63/files/static/attachments/191915/1540303961.pdf>, p. 20.

<sup>14</sup> ICANN Transcription ICANN63 Barcelona, GNSO – New gTLD Auction Proceeds – Presentation of Initial Report, 22 October 2018 at 1330 CEST, <https://archive.icann.org/meetings/icann63/files/static/attachments/191915/1540303961.pdf>, p. 21.

<sup>15</sup> ICANN, ICANN Board Submission to Public Comment Period on Initial report on the Cross-Community Working Group on New gTLD Auction Proceeds (CCWG-AP), 6 December 2018, <https://mm.icann.org/pipermail/comments-new-gtld-auction-proceeds-initial-08oct18/attachments/20181206/222b0ddf/ICANNBoardsubmissiontoCCWG-APPublicCommentonInitialReport6Dec2018.pdf>.

<sup>16</sup> ICANN, ICANN Board Submission to Public Comment Period on Initial report on the Cross-Community Working Group on New gTLD Auction Proceeds (CCWG-AP), 6 December 2018, <https://mm.icann.org/pipermail/comments-new-gtld-auction-proceeds-initial-08oct18/attachments/20181206/222b0ddf/ICANNBoardsubmissiontoCCWG-APPublicCommentonInitialReport6Dec2018.pdf>, pp. 3-4.



veiled, but very clear, instructions to the CCWG-AP, by stating it 'would welcome a recommendation from the CCWG on a Bylaws change specifically carving out individual funding decisions from the Bylaws provided accountability mechanisms of Reconsideration and Independent Review'.<sup>17</sup>

The CCWG-AP complied with the Board's instructions. On 23 December 2019, the CCWG-AP's Proposed Final Report was published for public comments on 23 December 2019 and contained the following recommendation<sup>18</sup>:

*'CCWG Recommendation #7: Applicants and other parties should not have access to ICANN accountability mechanisms such as IRP or other appeal mechanisms to challenge a decision from the Independent Project Applications Evaluation Panel to not approve an application, but applicants not selected should receive further details about where information can be found about the next round of applications as well as any educational materials that may be available to assist applicants.'*

ICANN used a largely inaccessible Google Form template for submitting public comments on four questions. The comments received have been published in a spreadsheet that is only readable in part.<sup>19</sup>

The IPC submitted public comments with the following caveat and requesting a further opportunity to comment:

*'The IPC notes that the community has been extremely busy with other matters during the period between the last public comment on the*

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<sup>17</sup> ICANN, ICANN Board Submission to Public Comment Period on Initial report on the Cross-Community Working Group on New gTLD Auction Proceeds (CCWG-AP), 6 December 2018, <https://mm.icann.org/pipermail/comments-new-gtld-auction-proceeds-initial-08oct18/attachments/20181206/222b0ddf/ICANNBoardsubmissiontoCCWG-APPublicCommentonInitialReport6Dec2018.pdf>, pp. 3-4.

<sup>18</sup> See <https://www.icann.org/en/public-comment/proceeding/proposed-final-report-of-the-new-gtld-auction-proceeds-cross-community-working-group-23-12-2019>.

<sup>19</sup> ICANN, Overview of public comments on CCWG-AP Proposed Final Report, [https://docs.google.com/spreadsheets/d/17kMjYzoqWtG\\_IsRELzrmNpZii3BLmh6nZYyj27Jcm1g/edit#gid=427013893](https://docs.google.com/spreadsheets/d/17kMjYzoqWtG_IsRELzrmNpZii3BLmh6nZYyj27Jcm1g/edit#gid=427013893)

*CCWG Auction Proceeds work and this proposed Final Report. The IPC would encourage the CCWG to review the Proposed Final Report with the public at ICANN67 in Cancun in order to obtain further public input from members of the community and the public generally before finalizing the Report.'*

According to the ICANN Staff's report, published on 25 February 2022<sup>20</sup>, the IPC expressed the following concern about the CCWG-AP's Recommendation No. 7:

*'Regarding CCWG Recommendation #7 on page 5 of the proposed Final Report, the IPC agrees that grants should be final and should not be subject to being overturned via appeals mechanisms. Understanding that this will require a change to ICANN's Fundamental ByLaws, the IPC recommends that the language of Recommendation 7 be revised to clarify that the appeal mechanisms should not apply to applications for grants which are "approved" in addition to stating that they will not apply to a grant application that is "not approved". The concern is that persons other than grant applicants may have standing to object to making a particular grant, e.g. on Human Rights or other grounds contained in ICANN's ByLaws or Core Values. This risk may be higher where grant-making administration is maintained inside the ICANN organization as contemplated by Mechanism A. Finally, the IPC believes this Recommendation should be express in stating that nothing in the Recommendation is intended to modify the rights of the Empowered Community in relation to the overall Budget with respect to the proposed line item for Auction Proceeds grants.'*

The Business Constituency further noted that the CCWG-AP *'ha[d] already recognized that Bylaws must be amended to eliminate Request for Reconsideration and Independent Review Panel from the available remedies to challenge grants. These are amendments to Fundamental By-Laws and which should require Empowered Community approval. . .'*

On 29 May 2020<sup>21</sup>, the CCWG-AP issued its Final Report without any

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<sup>20</sup> <https://itp.cdn.icann.org/en/files/auction-proceeds/report-comments-new-gtld-auction-proceeds-final-25feb20-en.pdf>.

<sup>21</sup> According to the ICANN Board, the CCWG-AP submitted its Final Report to its chartering organizations already in March 2020 (ICANN Board, Considerations and Rationale to Resolutions 2022.06.12.13 to 2022.06.12.16, <https://www.icann.org/en/board-activities-and->

opportunity for further comments. The Final Report that was submitted to the chartering organizations, stating as follows in Recommendation No. 7:

**‘CCWG Recommendation #7:** Existing ICANN accountability mechanisms such as IRP or other appeal mechanisms cannot be used to challenge a decision from the Independent Project Applications Evaluation Panel to approve or not approve an application. Applicants not selected should receive further details about where information can be found about the next round of applications as well as any educational materials that may be available to assist applicants. The CCWG recognizes that there will need to be an amendment to the Fundamental Bylaws to eliminate the opportunity to use the Request for Reconsideration and Independent Review Panel to challenge grant decisions. For the sake of clarity, the recommended Bylaws amendment is not intended to affect the existing powers of the Empowered Community specified under the ICANN Bylaws, including rejection powers on the five-year strategic plan, the five-year operating plan, the annual operating plan, and the annual budget.’<sup>22</sup>

The Final Report included the Commercial Stakeholder Group (CSG)’s minority statement of 28 May 2020, providing nuance for interpreting the CCWG’s preference for the proposed mechanisms dedicated to the allocation of auction proceeds. In its strong opposition against adoption of one of the mechanisms, the IPC (which forms part of the CSG) emphasized that the establishment of the fund and making of grants *‘is already encumbered by a need to amend Fundamental Bylaws so that grants may not be challenged via the Request for Reconsideration and Independent Review Panel Processes.’*<sup>23</sup>

When presenting the CCWG-AP’s Final Report on 7 July 2020, both

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[meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-12-06-2022-en#2.c\)](#)

<sup>22</sup> ICANN, *Final Report on the new gTLD Auction Proceeds Cross Community Working Group*, 29 May 2020, available at <https://community.icann.org/display/CWGONGAP/Cross-Community+Working+Group+on+new+gTLD+Auction+Proceeds+Home>

<sup>23</sup> ICANN, *Final Report on the new gTLD Auction Proceeds Cross Community Working Group*, 29 May 2020, available at <https://community.icann.org/display/CWGONGAP/Cross-Community+Working+Group+on+new+gTLD+Auction+Proceeds+Home>, Annex F, pp. 54-55.

ICANN's slides and the co-chair presenting them explicitly stated that Recommendation # 7 requires an amendment to ICANN's Fundamental Bylaws.<sup>24</sup> At the end of the presentation, the co-Chair of the CCWG-AP explained that they had been working together with ICANN legal and received advice from them.<sup>25</sup>

During this presentation the question was asked whether there would be a further opportunity to comment. ICANN replied that '*typically the Board puts out proposals for public comment before it considers for adoption, but this is of course up to the ICANN Board to decide.*'<sup>26</sup>

On 23 July 2020, the GNSO adopted the CCWG-AP's Final Report and recommendations<sup>27</sup>, with the IPC voting against it (for reasons that are tangentially<sup>28</sup> related to this request, namely because the purported grant mechanism of choice presented an unreasonable risk to ICANN, extending ICANN's power beyond its Bylaws).<sup>29</sup> At the GNSO meeting, the CCWG-AP's

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<sup>24</sup> CCWG-AP Workshop of 7 July 2020, <https://icann.zoom.us/rec/play/v5Ukdu-vpjk3S4eU5gSDA6QqW466LK2sgCZM8qAOxR22UiFRZlukYrZGYLTSl2qVkQ3wM6NWAH94WQkQ> at 00:20:40 and Slide 9.

<sup>25</sup> <https://icann.zoom.us/rec/play/v5Ukdu-vpjk3S4eU5gSDA6QqW466LK2sgCZM8qAOxR22UiFRZlukYrZGYLTSl2qVkQ3wM6NWAH94WQkQ> at 00:44:20.

<sup>26</sup> <https://icann.zoom.us/rec/play/v5Ukdu-vpjk3S4eU5gSDA6QqW466LK2sgCZM8qAOxR22UiFRZlukYrZGYLTSl2qVkQ3wM6NWAH94WQkQ> at 00:36:10

<sup>27</sup> ICANN GNSO, *GNSO Adoption of the Final Report of the New gTLD Auction Proceeds Cross-Community Working Group*, <https://gnso.icann.org/en/council/resolutions/2020-current#202007>.

<sup>28</sup> The IPC does not seek to relitigate issues raised within the CCWG-AP, but it cannot be ignored that the risks identified during the GNSO's acceptance of the CCWG-AP Recommendations are unfolding through the Challenged Decision in a manner that is even more detrimental than envisioned at that time.

<sup>29</sup> ICANN GNSO, voting results of 23 July 2020, <https://gnso.icann.org/sites/default/files/file/field-file-attach/gnso-council-motion-recorder-23jul20-en.pdf>; ICANN GNSO, Transcription of GNSO Council of 23 July 2020, <https://gnso.icann.org/sites/default/files/policy/2019/transcript/transcript-gnsocouncil-23jul.en.pdf>, p. 21.

co-Chair emphasized once more that a (fundamental) Bylaw change was required if the recommendations were accepted.<sup>30</sup> The other supporting organizations (SOs) and advisory committees (ACs) also adopted the CCWG-AP's Final Report and recommendations for submission to the Board: RRSAC on 24 July 2020, SSAC on 30 July 2020, ALAC on 31 July 2020, GAC on 6 August 2020, ccNSO on 1 September 2020, and ASO on 5 August 2020.<sup>31</sup>

On 14 September 2020, the CCWG-AP's Final Report was submitted to the ICANN Board.<sup>32</sup> On 18 September 2020, the Board responded that it would '*carefully review and consider each recommendation in order to appropriately direct ICANN org to implementation of the approved [recommendations]*'.<sup>33</sup>

It took the Board almost two years to approve the recommendations through an opaque process leading to the Board's resolutions on 12 June 2022. Apparently, at some point a Board Caucus Group on Grant Giving was created.<sup>34</sup> ICANN made an assessment in an undated document,

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<sup>30</sup> ICANN GNSO, Transcription of GNSO Council of 23 July 2020, <https://gns0.icann.org/sites/default/files/policy/2019/transcript/transcript-gns0-council-23Jul.en.pdf>, p. 24.

<sup>31</sup> ICANN, *Adoption of Final Report by Chartering Organizations*, available at <https://community.icann.org/display/CWGONGAP/Final+Report+Adoption+by+COs>.

<sup>32</sup> ICANN, *Letter of 14 September 2020 from CCWG-AP to ICANN Board*, [https://community.icann.org/display/CWGONGAP/Correspondence?preview=/64075095/147851105/Letter%20from%20CCWG%20Auction%20Proceeds%20Co-Chairs%20to%20ICANN%20Board\\_upd%2014%20Sept%202020.pdf](https://community.icann.org/display/CWGONGAP/Correspondence?preview=/64075095/147851105/Letter%20from%20CCWG%20Auction%20Proceeds%20Co-Chairs%20to%20ICANN%20Board_upd%2014%20Sept%202020.pdf)

<sup>33</sup> ICANN, *Letter of 18 September 2020 from ICANN Board to CCWG-AP*, <https://community.icann.org/download/attachments/64075095/2020-09-18%20Maarten%20Botterman%20to%20Erika%20Mann%20and%20Ching%20Chiao%20CCWG-AP%20Co-Chairs%5B1%5D.pdf?version=1&modificationDate=1600857782000&api=v2>.

<sup>34</sup> ICANN Board, *Considerations and Rationale to Resolutions 2022.06.12.13 to 2022.06.12.16*, <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-12-06-2022-en#2.c>.

recommending adoption of the CCWG-AP's recommendations.<sup>35</sup> ICANN's assessment emphasized that Recommendation # 7 was dependent upon the Empowered Community's approval of a Fundamental Bylaws change and that '[f]uture considerations and community input will be needed to change the existing ICANN Bylaws or other related ICANN governance aspects'.<sup>36</sup> The ICANN Board must also have been given legal advice, as is clear from the 9 redacted pages in the Board briefing material, marked as 'Privileged and Confidential'.<sup>37</sup>

The ICANN Board decided the following with respect to

Recommendation # 7:

**'Approve recommendation** and direct the ICANN President and CEO to prepare a Fundamental Bylaws amendment proposal that addresses the specific scope of the recommended change to ICANN's accountability mechanisms. The Fundamental Bylaws amendment process shall be initiated in sufficient time to allow for Empowered Community approval of the Fundamental Bylaws amendment prior to the launch of the ICANN Grant Giving Program. In the event the Empowered Community rejects the proposed Fundamental Bylaws change, the ICANN President and CEO is directed to seek further guidance from the Board regarding the impact of such rejection on the anticipated launch and operation of the ICANN Grant Giving Program.'<sup>38</sup>

The ICANN Board also determined the following in this respect:

'The CCWG-AP's recommendation creates a large dependency on the success of the Fundamental Bylaws Amendment Process. In the event the Empowered Community rejects an amendment drafted to meet this recommendation, the ICANN Board will need an opportunity to evaluate the impact of such a rejection on the launch of the

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<sup>35</sup> ICANN Org Assessment: Recommendations of the Cross Community Working Group on New gTLD Auction Proceeds (CCWG-AP), <https://www.icann.org/en/system/files/files/icann-org-assessment-ccwg-ap-recommendations-12jun22-en.pdf>; from the date in the link, it can be determined that the recommendations were sent to the Board on the day of the Board meeting.

<sup>36</sup> ICANN Org Assessment: Recommendations of the Cross Community Working Group on New gTLD Auction Proceeds (CCWG-AP), <https://www.icann.org/en/system/files/files/icann-org-assessment-ccwg-ap-recommendations-12jun22-en.pdf>, pp. 29-30.

<sup>37</sup> ICANN BOARD PAPER NO. 2022.06.12.2b, available at <https://itp.cdn.icann.org/en/files/board-meetings/briefing-materials/briefing-materials-1-redacted-12-06-2022-en.pdf>.

<sup>38</sup> ICANN Board Resolution 2022.06.12.14, approving the Scorecard available at <https://www.icann.org/en/system/files/files/scorecard-ccwg-ap-final-recommendations-board-action-12jun22-en.pdf>, p. 7.

ICANN Grant Giving Program. As a result, the Board directs that the Fundamental Bylaws Amendment Process be initiated so that it will conclude prior to the launch of the ICANN Grant Giving Program, with an effective date of any approved amendment commensurate with the launch of the Program, to give the opportunity for such evaluation to occur if needed.’<sup>39</sup>

The Board further directed ICANN’s President and CEO to produce a preliminary implementation plan, including resourcing and timing, within 120 days. Since those resolutions in June 2022, no such plan has been presented to the community, even though the Board had directed its President and CEO ‘to regularly report to the ICANN Board **and** the ICANN Community on the status of the implementation of the ICANN Grant Giving Program.’ Upon information and belief, in the week of 10 October 2022, ICANN Staff provided an update on the development of the preliminary implementation plan to the ICANN Board<sup>40</sup>, but not to the ICANN Community. The Requestor has no information as to the current status of the preliminary implementation plan or the steps taken, if any, for initiating the Fundamental Bylaws Amendment Process, upon which the ICANN Grant Giving Program is dependent.

Then, by its 26 October 2023 resolutions, more than sixteen months later, the Board suddenly<sup>41</sup> decided to dramatically change course, without any Community input and ignoring the reservations expressed by GNSO Council.<sup>42</sup> The Board decided to fundamentally and unilaterally change

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<sup>39</sup> ICANN Board Resolution 2022.06.12.14, approving the Scorecard available at <https://www.icann.org/en/system/files/files/scorecard-ccwg-ap-final-recommendations-board-action-12jun22-en.pdf>, p. 7.

<sup>40</sup> T. Sinha, *ICANN Org Delivers ICANN Grant Program Design and Implementation Plan Update*, 20 October 2022, <https://www.icann.org/en/blogs/details/icann-org-delivers-icann-grant-program-design-and-implementation-plan-update-20-10-2022-en>.

<sup>41</sup> Although ICANN had informed the SO/AC Chairs about its intended change of course (see ICANN, *Letter from X. Calvez to SO/AC Chairs*, 18 August 2023, <https://gns0.icann.org/sites/default/files/policy/2023/correspondence/xacalvez-to-soac-chairs-et-al-18aug23-en.pdf>), the decision was abrupt and without apparent reason or cause.

<sup>42</sup> ICANN GNSO, *Letter from GNSO Chair to X. Calvez*, 28 September 2023, <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fmm.icann.org%2Fpiper>

Recommendation # 7 – a recommendation that the ICANN Board had repeatedly instructed the CCWG-AP and ICANN Staff to adopt. Indeed, the ICANN Board reversed its 12 June 2022 decision on Recommendation # 7, *‘removing the requirement and dependency that a Fundamental Bylaws Amendment is required prior to the launch of the ICANN Grant Cycle’*.<sup>43</sup> While the Bylaws permit the Board to accept or reject a CCWG recommendation (provided it respects its Articles of Incorporation and Bylaws), the Bylaws do not permit the Board to change such a recommendation or replace it with its own. Yet, that is exactly what the ICANN Board has done.

Recommendation # 7 included an express statement that there was a need to amend the Fundamental Bylaws in order to effectuate the recommendation. The ICANN Board now tries to bypass this requirement by instead *‘contractually prohibit[ing] applicants from using ICANN’s accountability mechanisms to challenge decision on individual applications within the ICANN Grant Program’*.<sup>44</sup> The Board seeks to justify its decision by creating its own baseless interpretation of the CCWG-AP’s intent behind Recommendation # 7.<sup>45</sup> However, Recommendation # 7 was the result of a

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[mail%2F council%2F attachments%2F20230928%2F5bc5f05e%2F ResponsetoXavierre.CCWG-AP-28September2023-0001.docx&wdOrigin=BROWSELINK](mailto:council%2Fattachments%2F20230928%2F5bc5f05e%2FResponsetoXavierre.CCWG-AP-28September2023-0001.docx&wdOrigin=BROWSELINK).

<sup>43</sup> ICANN, Board Resolution 2023.10.26.11, <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-26-10-2023-en#section2.d>.

<sup>44</sup> ICANN, Board Resolution 2023.10.26.11, <https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-26-10-2023-en#section2.d> accepting the Revised Scorecard available at <https://www.icann.org/en/system/files/files/revised-scorecard-ccwg-auction-proceeds-final-recs-board-action-26oct23-en.pdf>

<sup>45</sup> The Board states that it *‘acknowledges the balance that the CCWG-AP was attempting to develop between remaining accountable to applicants while also remaining accountable to the goal of preserving auction funds for grants, as opposed to depleting funds through defense against application-related uses of the ICANN’s accountability mechanisms.’* (ICANN, Revised Scorecard CCWG-AP Recommendations of 26 October 2023, <https://www.icann.org/en/system/files/files/revised-scorecard-ccwg-auction-proceeds-final-recs-board-action-26oct23-en.pdf>, p. 7).



compromise among the ACs and SOs that comprised the CCWG-AP and was made dependent expressly on an amendment of ICANN's Fundamental Bylaws. This dependency was an integral part of the recommendation. The Board offers no justification for removing it, and instead creates a harmful and inappropriate precedent as further discussed below, instructing Staff to eliminate resort to Accountability Mechanisms, via contract.

The point is all the stronger, as the CCWG-AP contemplated different mechanisms for organizing the ICANN Grant Giving Program. If amending the Fundamental Bylaws proves to be undesired or impossible, that would require that the purported grant mechanism of preference be reconsidered, altered, or abandoned. Moreover, the impetus behind the Bylaws change was to prevent anyone from challenging grant decisions, including challenges from parties not in contractual privity with ICANN. The Board's hasty solution would only prevent contracting grant applicants from challenging decisions; it would not in any way affect challenges by anyone else – including anyone who wished to challenge the award of a grant. The grant program could be tied in knots by disgruntled parties, competitive organizations or anyone else who wished to delay or prevent ICANN from carrying out any decision to grant funds. This is exactly what the CCWG-AP sought to prevent.

The Challenged Decision violates ICANN's AoI and Bylaws in several ways. While Requestor lists some of these violations below, Requestor reserves the right to supplement this Request upon further discovery and

analysis.<sup>46</sup>

- Failure to meet ICANN's accountability obligations

Article 1(2)(a)(vi) of the ICANN Bylaws commits ICANN to '[r]emain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness'. Through the Challenged Decision, ICANN is seeking to bypass these mechanisms and thereby limit its accountability. In so doing, ICANN is taking steps that go against its commitment to remain accountable to the Internet community.

Moreover, ICANN is doing so in a way that goes against previously adopted policy created through the CCWG-AP. A limitation of ICANN's accountability might be acceptable if ICANN's fundamental compact with the Internet community, its AoI and Bylaws allow for it in a specific instance, but not through contract and not through an open-ended ability to do away with Accountability Mechanisms whenever the Board sees fit. Maintaining the opposite would create a dangerous precedent and negate ICANN's most fundamental obligations with potentially devastating effects towards ICANN's reputation. ICANN thereby violates Article 1(2)(a)(iv) and (v) of its Bylaws.

- Failure to meet ICANN's openness and transparency obligations

Article 3(1) of the Bylaws requires ICANN and its constituent bodies to 'operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate

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<sup>46</sup> Via email from ICANN to IPC counsel dated Nov. 14, 2023, ICANN expressly permits the Requestor to 'subsequently amend' this RFR, and 'ICANN will accept an amended request as timely.'

stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work.’ It also requires ICANN to ‘implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).’

Through the Challenged Decision, ICANN has not operated to the maximum extent feasible in an open and transparent manner. Far from it. Instead of providing advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, ICANN decided to fundamentally eviscerate the expressed Recommendation #7 from the CCWG-AP, without any apparent reason other than to avoid the Bylaws amendment process which the CCWG-AP found necessary. ICANN has substituted its own judgement for that of the CCWG-AP, and without giving the CCWG-AP or broader ICANN community any opportunity to express its opinion before the decision was taken. Hence, ICANN has violated Article 3(1) of the Bylaws.

- Failure to act with a reasonable amount of information

ICANN Bylaws require that ICANN take decisions only after gathering sufficient information. Here, the Board and Staff decided to reverse a consensus CCWG Recommendation which the Board and Staff had repeatedly encouraged and conceptually approved in the past. The

resolutions were taken without any remand to the CCWG, without any consultations with the SOs or ACs that had unanimously approved the CCWG-AP Recommendation, and even without any public comment period. The idea to substitute a Bylaws change with a contractual waiver (that could solve only part of the underlying problem) is a radical idea with no precedent either in procedure or substance. At minimum, the Staff should have sought input first from the SOs, ACs and via public comment before making such a recommendation to the Board. The Board for its part should have required that before resolving to adopt it in the Challenged Decision. Thus, the Board clearly failed to meet the Bylaws standard of having a reasonable amount of information before it took the Challenged Decision.

- Failure to act in the global public interest and to act in good faith

ICANN's actions are not in the global public interest and not in the benefit of the Internet community as a whole. Instead of seeking to implement carefully crafted policy recommendations developed across the community, ICANN is seeking only to circumvent this consensus policy recommendation through contractual means that would make ICANN less accountable, and that would undermine the grant program as discussed above. In addition, the adoption of a contractual exclusion of its accountability mechanisms comes down to a *de facto* amendment of ICANN's Fundamental Bylaws in violation of the amendment process set forth in the Bylaws. By first adopting the policy recommendation, and then suddenly reversing that decision – without showing any change in circumstances or demonstrable preparations for over a year of implementing the recommendations as accepted, without providing

the community an opportunity to comment, and circumventing its Fundamental Bylaws – ICANN has acted arbitrarily and in violation of general principles of international law, which require ICANN to act in good faith. In so doing, ICANN is acting contrary to Articles II and III of its AoI, and to Articles 1(2)(a), 1(2)(b), 2(3) and 3(1) of its Bylaws.

**9. What are you asking ICANN to do now?**

The action should be reversed. While Requestor appreciates that the ICANN Board looks into the implementation of Recommendation # 7, the implementation should be focused on analyzing whether a Fundamental Bylaws change is feasible and, if not, remand the Recommendation # 7, and those recommendations that are dependent on Recommendation # 7<sup>47</sup> to the CCWG-AP.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.**

The specific grounds under which the Requestor, and potentially others who might join the present request, have standing and the right to assert this Reconsideration Request are stated under Sections 6 and 7 above. The grounds and justifications supporting the request are stated under Section 8 above.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

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<sup>47</sup> *E.g.*, ICANN org considers that the CCWG-AP Recommendations # 4 (regarding safeguards) and # 12 (regarding reviews of the mechanism of choice and of the overall program) are dependent upon Recommendation # 7 (ICANN Org Assessment: Recommendations of the Cross Community Working Group on New gTLD Auction Proceeds (CCWG-AP), <https://www.icann.org/en/system/files/files/icann-org-assessment-ccwg-ap-recommendations-12jun22-en.pdf>, pp. 19-20; pp. 30-33). There may also be an interdependency between Recommendations #1 and #7, and potentially others.

Yes

No, this request is brought on behalf of the IPC with the caveat that others may join the present request (through an amended request or otherwise).

**11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.**

**12. Are you bringing this Reconsideration Request on an urgent basis pursuant to Article 4, Section 4.2(s) of the Bylaws?**

Yes

No

**12a. If yes, please explain why the matter is urgent for reconsideration.**

**13. Do you have any documents you want to provide to ICANN?**

Not as this juncture, as there is an information imbalance. The Requestor reserves its right to amend and supplement the present Request for Reconsideration.

### **Terms and Conditions for Submission of Reconsideration Requests**

Reconsideration Requests from different Requestors may be considered in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is substantially the same for all of the Requestors. Every Requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

The BAMC shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The BAMC may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The BAMC's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

Hearings are not required in the Reconsideration Process; however, Requestors may ask for the opportunity to be heard. The BAMC retains the

absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BAMC's decision on any such request is final.

For all Reconsideration Requests that are not summarily dismissed, except where the Ombudsman is required to recuse himself or herself and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request. The BAMC shall make a final recommendation to the Board with respect to a Reconsideration Request following its receipt of the Ombudsman's evaluation (or following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable).

The final recommendation of the BAMC shall be documented and promptly (i.e., as soon as practicable) posted on the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en> and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the BAMC's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the ICANN Reconsideration Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the BAMC's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

The ICANN Board shall not be bound to follow the recommendations of the BAMC. The ICANN Board's decision on the BAMC's recommendation is final and not subject to a Reconsideration Request.

By submitting my personal data, I agree that my personal data will be processed in accordance with the ICANN [Privacy Policy](#), and agree to abide by the website [Terms of Service](#).



November 22, 2023

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**Lori S Schulman**  
\_\_\_\_\_  
Print Name