

IPC COMMENTS ON THE PROPOSED FUNDAMENTAL BYLAWS AMENDMENT TO LIMIT ACCESS TO ACCOUNTABILITY MECHANISMS

The Intellectual Property Constituency (IPC) appreciates the opportunity to comment on the Proposed Bylaws Amendment, the effect of which would be to provide a mechanism for limiting access to Accountability Mechanisms when certain criteria are met, without the need for a future Fundamental Bylaws amendment specific to the case in question.

The IPC **does not support** this Bylaws change, for reasons set out more fully below. If a Bylaws change in substantially this form is pursued and put to the GNSO for a vote, in its role as a decisional participant of the Empowered Community, the IPC will urge the GNSO to reject it.

The IPC is pleased to note that the ICANN Board has now accepted, both in writing¹ and at the meeting between the GNSO Council and the Board at ICANN 79², that limiting or removing access to Accountability Mechanisms must be achieved by means of a Fundamental Bylaws change and that contractual terms and conditions are not a suitable mechanism for doing so. We also appreciate that this has now further been confirmed in the BAMC's decision on the IPC's Request for Reconsideration 23-2³ (RFR), since this was a significant issue of concern that led to that RFR being filed.

Although the IPC appreciates and supports the Board's intent to now give effect to Recommendation 7 of Final Report of the new gTLD Auction Proceeds Cross-Community Working Group (CCWG-AP) by means of a Fundamental Bylaws change, as the CCWG-AP recommended, the IPC does not support the Bylaws change which is currently proposed for the following reasons:

1. The proposed Bylaws amendment is unacceptably broad and exceeds what is necessary to give effect to Recommendation 7. Even assuming that it is amended as proposed in the letter from Tripti Sinha to the CCWG-AP Chartering Organizations⁴ Recommendation 7 proposes that ICANN accountability mechanisms, such as IRP, or other appeal mechanisms should not be available to challenge decisions

¹ Letter Tripti Sinha to Chartering Organizations of the new gTLD Auction Proceeds Cross-Community Working Group (CCWG-AP) at p3: "The ICANN Board confirms that the update to Recommendation 7 and the successful completion of the Fundamental Bylaws Amendment Process on Article 4, Sections 4.1 of the ICANN Bylaws are joint dependencies to the Board's approval of any slate of successful applications within the first application cycle of the ICANN Grant Program." <https://www.icann.org/en/system/files/correspondence/sinha-to-clemente-et-al-02mar24-en.pdf>

² Meeting of the ICANN Board and GNSO Council at ICANN79 on Monday 4 March 2024, p6 -13 https://static.sched.com/hosted_files/icann79/84/TRANSC_179SJU_Mon04Mar2024_Joint%20Sess%20ICANN%20Board%20and%20GNSO%20Council-en.pdf

³ RFR 23-2, 22 November 2023 <https://www.icann.org/en/system/files/files/reconsideration-23-2-ipc-request-redacted-22nov23-en.pdf>

⁴ Letter Tripti Sinha to Chartering Organizations of the new gTLD Auction Proceeds Cross-Community Working Group (CCWG-AP), as above

under the Auction Proceeds Grant Program. By contrast, the proposed Bylaws amendment seeks to set criteria for the future removal or limitation of access to accountability mechanisms in other cases.

2. In particular, the proposed Bylaws amendment would allow the future disapplication of ICANN’s accountability mechanisms following a recommendation by a CCWG, without the community safeguard afforded by following a formal Fundamental Bylaws amendment, which requires the affirmative approval of the Empowered Community.
3. Although there has been an attempt to build in some community safeguards, by setting criteria for such CCWG decisions, and Board approval, CCWGs are not a formal ICANN structure, their status under the Bylaws is not clear, and they have no formal, standardized operating procedures. While there are some guidelines for CCWGs, they are not binding, and essentially each CCWG sets its own rules of procedure, including what constitutes consensus.
4. No reasonable explanation has been given for why there is a need for such a broad Bylaws change, rather than the much narrower recommendation from the CCWG-AP to remove access to the accountability mechanisms just in the context of the auction Grants Program. In the almost eight years since the “new” Bylaws were adopted post-IANA Transition, they have been amended a handful of times. This current situation (Recommendation 7) is the first time in eight years that there has been a proposal to remove access to accountability mechanisms. This is not, and should not be, a regular occurrence. There is currently no need for such a broad change that would outweigh the potential harm that the proposed Bylaws change would do to ICANN’s accountability and transparency.
5. The IPC is also concerned that making such a broad Bylaws amendment could have the consequence of normalizing the idea of removing access to accountability mechanisms, rather than this being an exceptional event. This is not something that should be encouraged.
6. It is argued in the explanatory document that proceeding in this way will ensure clarity within the Bylaws, rather than potentially having a series of exceptions listed out individually. The IPC disagrees that this provides a justification for making the amendment in the manner proposed:
 - a. As argued above, such a situation should be the exception, not the rule.
 - b. To the extent this situation might arise again, Bylaws clarity could readily be achieved in some other way, such as by adding an annex to the Bylaws that lists out any exceptions as they are adopted, without needing to clutter the main Bylaws text.
 - c. The Bylaws already do list out a small number of exceptions both for the RFR⁵ and the IRP⁶ in any event. Adding additional exceptions directly into the Bylaws would not have a significant impact on clarity.
7. We also question whether the proposed Bylaws amendment would even serve to give effect to Recommendation 7. Recommendation 7 arises out of a CCWG Final Report submitted to the Chartering Organizations on 29 May 2020 and adopted by them shortly thereafter. Can a Bylaws change in 2024 of the type being proposed, really be considered to apply retroactively to a recommendation made by a CCWG four years previously? The IPC does not believe so.

⁵ ICANN Bylaws Article 4.2(d)

⁶ ICANN Bylaws Article 4.3(c)

In short, it was a considered decision of the CCWG-Accountability to ensure that Fundamental Bylaws could only be changed via a deliberate and rigorous process. This deliberate process should not be removed for short-term expediency, notwithstanding the importance of progressing the Auction Grant Program. Indeed the IPC understands that there is adequate time to obtain approval for the more narrow ByLaws amendment prior to the anticipated time for actually making any grants under the program.

For the avoidance of doubt, the IPC would support a narrow Fundamental Bylaws amendment targeted at giving effect to Recommendation 7 (in its current form or as proposed to be amended pursuant to the Board's letter to the Chartering Organizations to facilitate application of the more narrow amendment to all phases of the grant decision-making process).

Respectfully submitted,

Intellectual Property Constituency