

Members Report on ccNSO Council Supplemental Recommendation

Executive Summary:

Proposed Supplemental Recommendation

Add a new paragraph (paragraph 3) to Article IX section 6 so that it states;

"Section 6. ccNSO POLICY-DEVELOPMENT PROCESS AND SCOPE

1. The scope of the ccNSO's policy-development role shall be as stated in Annex C to these Bylaws; any modifications to the scope shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

2. In developing global policies within the scope of the ccNSO and recommending them to the Board, the ccNSO shall follow the ccNSO Policy-Development Process (ccPDP). The ccPDP shall be as stated in Annex B to these Bylaws; modifications shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

3. Unless the Board determines it is not practicable, the Board shall provide reasonable notice of any proposed amendment to Article IX of the Bylaws and formally consult in good faith with the ccNSO before making such amendment; such consultation will be conducted in accordance with procedures to be agreed by the Board and the ccNSO.

Proposed members vote on ccNSO Council Supplemental Recommendation

The ccNSO Council Supplemental Recommendation: add a new, third paragraph to Article IX section 6 which reads:

3. Unless the Board determines it is not practicable, the Board shall provide reasonable notice of any proposed amendment to Article IX of the Bylaws and formally consult in good faith with the ccNSO before making such amendment; such consultation will be conducted in accordance with procedures to be agreed by the Board and the ccNSO.

Members Vote

Amendment of Article IX Section 6

1A In favour of proposed amendment

1B Against proposed amendment

1C Abstain from voting

The Council Recommendation is deemed to be accepted if:

- at least 50 % of the members of the ccNSO have lodged a vote before 16 June 2006, 12 AM Pacific Time; and

- of the votes lodged at least 66 % are in favour.

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1. Introduction

1.1 Background

On 26 June 2003, the ICANN Board at its public meeting in Montreal, Canada, discussed and adopted amendments to the ICANN Bylaws to include the country code Names Supporting Organization (ccNSO).

Initiation of ccPDP

On 6 June 2005, the ccNSO Council initiated a country code Policy Development Process (ccPDP). The process culminated in the ccNSO Council's adoption of the ccPDP Board Report in Vancouver. The Issue Manager submitted the Board Report on 2 December 2005 to the ICANN Board for consideration. The Initial, Final, Members and Board reports prepared as part of this process are available on the ICANN website.

ccNSO Recommendations

The ccNSO Recommendations (1-8) to the Board pertained to Article IX (ccNSO), Annex B (ccNSO Policy Development Process) and Annex C (the scope of the ccNSO) of the ICANN Bylaws. The ccNSO recommended that the Board amend the bylaws to clarify and improve the ICANN bylaws on the ccNSO and the country code Policy Development Process (ccPDP) in the interests of the members of the ccNSO, the Council and other stakeholders and to encourage ccTLD managers to become members of the ccNSO.

The Board directed staff to post the recommendations for public comment. The public comment document was published on the ICANN website on 21 December 2005 and closed on 16 January 2006.

Board Vote on ccNSO Recommendations

At its meeting on 28 February 2006 the ICANN Board of directors adopted ccNSO Recommendations 1,2 and 4-8. These Recommendations have been implemented and the changes to the bylaws have been published on the ICANN website.

At its meeting on 31 March 2006 the ICANN Board of directors unanimously rejected ccNSO Recommendation 3. However, the Board resolved that it was amenable to receiving further input from the ccNSO through its processes for a supplemental recommendation regarding good faith notice and consultation, before the amendment of any provision of Article IX of the ICANN Bylaws.

The Board resolution rejecting Recommendation 3 and statements made by Board members is available at Annex A. Details of Recommendation 3 is available at Annex B.

Supplemental Recommendation process

According to Annex B section 15.2 of the bylaws the ccNSO Council should discuss the Board Statement with the Board within 30 days after the Board Statement is submitted. In this case, taking into account the nature of ccNSO Recommendation 3, the Board statement, and the discussions that have taken place prior to the Board meeting of 31 March 2006, both the Board and the ccNSO Council have concluded that no further discussion of the Board Statement was necessary.

Council Decision Supplemental Recommendation

At its meeting on 11 May 2006 the ccNSO Council discussed the situation. It was decided to modify ccNSO Recommendation 3 as suggested in the Supplemental Recommendation. Through

an email vote the Council adopted the Supplemental Recommendation by 17 members voting in favour and 1 member not voting in time. Accordingly this decision is deemed to reflect the view of the Council. The recommendation adopted as such is the Supplemental Recommendation.

1.2 Process

Members vote

The Supplemental Recommendation is conveyed to the Members of the ccNSO in a Supplemental Members Report. This report includes an explanation for the Supplemental Recommendation.

The Members of the ccNSO will be given the opportunity to vote on the Supplemental Recommendation, in accordance with Annex B section 13. This vote of members shall be electronic and members shall be able to lodge a vote over a period of 21 days, starting on 26 May 2006 and ending 16 June 2006 at 12 AM Pacific Time.

In the event that at least 50% of the ccNSO members lodge votes within the voting period, the resulting vote will be employed without further process.

According to the current bylaws, as amended on 28 February 2006 (implementing ccNSO Recommendation 7), in the event that fewer than 50% of the ccNSO members lodge votes in the first round of voting, the first round will not be employed and the results of a final, second round of voting, conducted after at least thirty days notice to the ccNSO members, will be employed if at least 50% of the ccNSO members lodge votes.

In the event that more than 66% of the votes received at the end of a voting period shall be in favour of the Supplemental Recommendation, then that recommendation shall be conveyed to Board as the ccNSO Supplemental Recommendation.

Board Vote on Supplemental Recommendation

After submission of the ccNSO Supplemental Recommendation to the Board, the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that acceptance of such policy would constitute a breach of the fiduciary duties of the Board to the Company. The Board has to take into account its own processes and procedures in reaching a conclusion. It is therefore not clear at this stage in the process when the Board will adopt or reject the ccNSO Supplemental Recommendation.

1.3 Proposed Timeline

- a. Submission draft Supplemental Recommendation to Council: 16 May 2006
- b. ccNSO Council vote meeting on Supplemental Recommendation: concluded at 22 May 2006
- c. Preparation of Members vote: 16 May – 22 May 2006
- d. Conveying Supplemental Recommendation to Members: 24 May 2006
- e. Members Vote: start 26 May 2006- end 16 June 2006, 12 AM Pacific time.
- f. Submission of Supplemental Recommendation to the Board; 19 June 2006

1.4 Supplemental Recommendation

The ccNSO Supplemental Recommendation is outlined in section 2. The ccNSO (Supplemental) Recommendation is shown in **highlighted text**.

2 Supplemental Recommendation

2.1 Issue

Under the current bylaws there is a provision (Article IX section 6) that deals with changes to Annex B and Annex C of the bylaws¹.

Should the ICANN Board only be able to change or amend Article IX, Annex B and Annex C after consultation and the consent of the members of the ccNSO?

2.2 Proposed Supplemental Recommendation

Add a new paragraph (paragraph 3) to Article IX section 6 so that it states;

"Section 6. ccNSO POLICY-DEVELOPMENT PROCESS AND SCOPE

1. The scope of the ccNSO's policy-development role shall be as stated in Annex C to these Bylaws; any modifications to the scope shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.
2. In developing global policies within the scope of the ccNSO and recommending them to the Board, the ccNSO shall follow the ccNSO Policy-Development Process (ccPDP). The ccPDP shall be as stated in Annex B to these Bylaws; modifications shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.
3. Unless the Board determines it is not practicable, the Board shall provide reasonable notice of any proposed amendment to Article IX of the Bylaws and formally consult in good faith with the ccNSO before making such amendment; such consultation will be conducted in accordance with procedures to be agreed by the Board and the ccNSO.

2.3 Considerations for proposed changes to bylaws (Supplemental Recommendation)

The proposed Supplemental Recommendation ensures that ccNSO, the Council and the Members, will be informed in time of intended changes to Article IX of the bylaws, and will be involved in the process to amend Article IX of the ICANN bylaws. The proposal also ensures that the prerogative for changes to the Bylaws remains with the Board of ICANN. The wording used to reflect this is consistent with other parts of the bylaws. The suggested wording also allows for changes to the bylaws which are necessary to comply with applicable law.

¹ Relevant bylaw Section 6. ccNSO POLICY-DEVELOPMENT PROCESS AND SCOPE

1. The scope of the ccNSO's policy-development role shall initially be as stated in Annex C to these Bylaws; any modifications to the scope shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

2. In developing global policies within the scope of the ccNSO and recommending them to the Board, the ccNSO shall follow the ccNSO Policy-Development Process (ccPDP). The ccPDP shall initially be as stated in Annex B to these Bylaws; modifications shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

By introducing a reasonable notice period for amendments, one of the main concerns of some ccTLD managers (the unpredictability and lack of transparency of the current procedures to amend the ICANN Bylaws) is addressed. This enables members of the ccNSO to assess in time whether or not an intended change to the bylaws would have a detrimental impact on the carefully crafted balance of powers and responsibilities.

As the scope of this ccPDP was on changes to Article IX of the ICANN bylaws, the Supplemental Recommendation cannot be broadened by introducing reference to any other parts of the ICANN bylaws which affect ccNSO members.

It is suggested in the Supplemental Recommendation that the rules and procedure for the consultation between the Board and the ccNSO on any proposed amendments will be agreed upon at a later stage. This is a similar mechanism as introduced in the earlier stage of this ccPDP on the consultation between General Counsel and the ccNSO Council, where there is disagreement between them on whether or not an issue is within scope of the ccNSO (Annex B section 2). A mechanism like this allows for more flexibility to meet the needs of the stakeholders and at the same time practical issues can be taken into consideration.

2.4 Feasibility of Supplemental Recommendation

Based on discussion with ICANN staff there is a strong indication that the Supplemental Recommendation as proposed is feasible.

Annex A

Board Resolution on ccNSO's Recommendation 3

Whereas, the ccNSO Council has considered a number of issues which are understood to stand in the way of a number of ccTLD managers joining the ccNSO.

<snip>

Whereas, the ccNSO has conducted the ccPDP in accordance with Annex B of the ICANN Bylaws.

Whereas, the ccNSO Council resolved on 2 December 2005, to approve the Board Report containing eight ccNSO Recommendations for changes to improve and clarify the ICANN Bylaws on the ccNSO and the ccPDP in the interest of the ccNSO membership, the ccNSO Council and other stakeholders.

<snip>

Whereas, Recommendation 3 suggested the addition of a new subsection 3 to ICANN Bylaws Article IX, Section 6, which would require that "Any change of this article IX shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP as stated in Annex C to these bylaws, and shall be subject to approval by the Board."

Whereas, the General Counsel has advised the Board that adopting the ccNSO Recommendation 3 may raise issues regarding corporate governance and might adversely impact ICANN's organizational structure.

Whereas, the Board believes that it is essential that the Board maintain its role of independent oversight of the organization and its Bylaws, and that this independence is one of the key elements which makes ICANN free from capture by any particular interested party or industry sector.

Resolved (06.11), that the Board hereby rejects ccNSO Recommendation 3, and directs staff to communicate to the ccNSO that it is amenable to receiving further input from the ccNSO through its processes for a supplemental recommendation regarding good faith notice and consultation, before the amendment of any provision of Article IX of the ICANN Bylaws.

Statements of Board members on the resolution.

PETER DENGATE THRUSH: WELL, THE POINT OF THE RESOLUTION WOULD HAVE BEEN TO PUT THE CCNSO BYLAWS UNDER THE VETO POWER OF THE CCTLD ORGANIZATION. AND THAT'S PARTLY DRIVEN BY THE CONCERN OF SOME OF THE CCTLDS THAT THEY MAY WAKE UP ONE DAY AND SUDDENLY FIND THAT THE BYLAWS WHICH WE'VE CRAFTED SO LONG AND SO CAREFULLY TO CREATE A BALANCE OF POWERS WOULD SUDDENLY ONE DAY BE DESTROYED, TO THEIR SURPRISE.

FIRST OF ALL, MOST OF THEM TAKE A VIEW ABOUT THE LIKELIHOOD OF THAT. BUT THERE IS A CONCERN.

SO THE SUGGESTION CAME FORWARD THAT THE CCNSO SHOULD HAVE A VETO POWER OVER CHANGES TO THE BYLAWS AFFECTING THE CCNSO.

THE LEGAL AND BUSINESS AND POLITICAL REALITY IS THAT THE BYLAWS OF THE CORPORATION CANNOT BE HELD TO THAT KIND OF RANSOM BY ANY ONE OF THE ORGANIZATIONS, INCLUDING THE CCNSO. GENERAL COUNSEL'S GIVEN LEGAL ADVICE AND THE REST OF THE BOARD HAS CONSIDERED THAT IT NEEDS TO RETAIN ITS ABILITY TO REACT FOR THE GOOD OF THE CORPORATION IN ALL CIRCUMSTANCES. SO FOR THOSE REASONS, THAT APPROACH HAS BEEN REJECTED. AND IT MAY SEEM ADVERSARIAL TO SIMPLY DECIDE TO REJECT THE MOTION. BUT, IN FACT, THE WAY WE CAN MOVE TO THE OBVIOUS NEGOTIATION OF THIS ISSUE WITH THE CCNSO, TO BEGIN THAT NEGOTIATION, WE ARE ACTUALLY REQUIRED TO FIRST REJECT THE MOTION THAT THEY PUT FORWARD.

AND THEN AS THE RESOLUTION REFERS, THERE IS A SUPPLEMENTAL RESOLUTION WHICH WILL COME FROM THE CCNSO WHICH CAN BE NEGOTIATED. AND I'M SURE IT WON'T SURPRISE ANY MEMBERS OF THE AUDIENCE WHO KNOW THE RELATIONSHIP THAT THE BOARD HAS WITH THE LEADERSHIP OF THE CCNSO THAT INDICATIONS ARE THAT THAT NEGOTIATION IS LIKELY TO BE SUCCESSFUL AND SLIGHTLY DIFFERENT, BUT NEVERTHELESS MUTUALLY ACCEPTABLE TERMS.

ALEJANDRO PISANTY: VINT, I WHOLEHEARTEDLY SUPPORT THIS RESOLUTION. I'M GLAD THAT YOU AND PAUL HAVE ALREADY MENTIONED THE MANY OTHER ASPECTS OF THE OUTPUT OF THE CCPDP THAT HAVE BEEN TAKEN UP BY THE BOARD. AND I THINK PETER HAS BEEN VERY ELOQUENT ON THE VERY SPECIFIC POINT THAT WAS WRONG WITH THIS PROPOSAL FOR THE WHOLE BOARD. WE CONTINUE -- I MEAN, PERSONALLY, BUT I THINK I SPEAK FOR MANY -- WE CONTINUE TO BE COMMITTED TO THE DEVELOPMENT OF THE CCNSO, TO ITS FULL DEVELOPMENT, AND TO VERY INTENSE INTERACTION AND CONSTRUCTIVELY TRYING TO DO WHAT VERY SPECIFICALLY IS THE LIMITED RANGE OF THE FUNCTIONS OF THE CCNSO AND BOARD JOINT WORK. IT SHOULD BE -- THERE SHOULD BE NO READING, NO ANIMOSITY, NO READING THAT WE FAIL IN OUR COMMITMENT IN ANY WAY.

Annex B

ccNSO Recommendation 3 which was not adopted by the Board

The addition to Article IX Section 6 of a third paragraph:

'3. Any change of this article IX shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP as stated in Annex C to these bylaws, and shall be subject to approval by the Board.'

Further, the last full sentence of Annex B Section 2(e) amended to read:

'In all events, consideration of revisions **to Article IX of the bylaws**, to the ccPDP (this Annex B) or to the scope of the ccNSO (Annex C) shall be within the scope of ICANN and the ccNSO.'

Considerations by ccNSO which led to the submission of Recommendation 3

Under the current bylaws there is a provision (Article IX section 6) that deals with changes to Annex B and Annex C of the bylaws.

Should the ICANN Board only be able to change or amend Article IX, Annex B and Annex C after consultation and the consent of the members of the ccNSO?

In considering the suggested solutions one needs to take into account the following arguments:

1. The ccNSO is the organization under the ICANN umbrella that deals with ccTLD issues (see Clarification General Counsel, Question 1 (www.ccNSO.icann.org)). The ccPDP is an open and transparent process designed to deal with ccTLD policy issues. A change to the process itself or the scope for setting policies, both part of the bylaws, can only be made by using the ccPDP. It is only consistent to use the same mechanism for modifying the bylaws on the ccNSO itself.
2. As Article IX relates to the ccNSO and its members, a modification of this Article should for that reason involve the ccNSO and its members.
3. As to the consent of 66% of the ccNSO members this will be achieved if for all modifications of article IX, Annex B and Annex C because the ccPDP is used (Annex B section 13).

It is proposed that Article IX can only be changed by use of the procedure of the ccPDP as stated in Annex C of the bylaws.

Feasibility of Recommendation 3 as recorded in Members Report

In the Members Report, published 7 November 2005, it was noted that Recommendation 3 might not be feasible. This was based on input received by the Issue Manager from ICANN's General Counsel.

In the Members report it was stated:

ICANN is a non-profit Public Benefit Corporation incorporated under the laws of the state of California, USA. For various reasons one of the basic structuring principles underlying the bylaws of ICANN is that it is a non-membership organization although the term "members" is used in the bylaws. This is reflected in Article XVII of the ICANN bylaws: "ICANN shall not have members, as defined in the California Nonprofit Public Benefit Corporation Law ("CNPBCL"), notwithstanding the use of the term "Member" in these Bylaws, in any ICANN document, or in any action of the ICANN Board or staff."

According to the ccNSO Recommendation 3 it is proposed to add the following, new paragraph to Article IX section 6 of the ICANN Bylaws: "Any change of this article IX shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP as stated in Annex C to these bylaws, and shall be subject to approval by the Board."

Adding this paragraph would mean that any subsequent change to Article IX, on the ccNSO, could only be achieved by going through all stages of a policy development process, including a ccNSO members vote on such a change ((Annex B, section 13).

It is a prerogative and the responsibility of the Board of a non-membership corporation that it can amend the bylaws of that corporation. If the proposed language were to be adopted it would limit the principal powers of the Board to initiate and adopt changes of the Bylaws in general and relating to the ccNSO in particular. So, for example, in the event a change of the Bylaws is needed to accord with a change of the CNPBCL, the initiative and decision to amend the bylaws accordingly, is currently with the Board. However, if the proposed paragraph were added such an amendment of Article IX, would

have to go through a ccPDP. The Board's ability to amend the article would then depend on a) the ccNSO Council initiating a ccPDP and b) on a vote of 66 % of the ccTLD managers who are part of the ccNSO in favour of the proposed amendment. As the example signifies it is not reasonable from a perspective of corporate governance to expect a Board of an organization to be dependent on decisions of entities who are not accountable for these decisions.

Further the requirement in the ICANN bylaws (Annex B, section 13) for their to be a vote of ccNSO members on any amendment of article IX could be construed in such way to imply that ICANN has members and therefore is in effect a membership organization. Consequently, the proposal not only has an impact on the balance of powers within ICANN, but also could impact the nature of ICANN itself. It could turn ICANN from a non-membership into a membership organization.