

Topic 18: Terms & Conditions Briefing Document

Recommendation 18.1 (rejecting an application)

Recommendation 18.3 (covenant not to sue)

As a reminder, the small team plus has been tasked to develop proposed modifications that are focused on addressing the Board's concerns. This is not an opportunity to bring new issues to the table or reopen previous conversations.

Recommendation 18.1

SubPro [Final Report](#) Recommendation

Recommendation 18.1: Unless required by specific laws, ICANN Board members' fiduciary duties, or the ICANN Bylaws, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook. In the event an application is rejected, ICANN org must cite with specificity the reason in accordance with the Applicant Guidebook, or if applicable, the specific law and/or ICANN Bylaws for not allowing an application to proceed. This recommendation constitutes a revision to Section 3 of the Terms and Conditions from the 2012 round.

Board Concerns – [Scorecard 16 March](#)

The Board remains concerned, as previously voiced as part of its comment on the Draft Final Report, over this recommendation unduly restricting ICANN's discretion to reject an application in circumstances that fall outside the specific grounds set out in the recommendation.

Small Team's [initial consideration and assessment](#)

Deliberations:

- The SubPro PDP felt very strongly that allowing ICANN to reject an application at its sole discretion was a fundamental problem.
- There are carve outs that appear to be quite broad, including fiduciary duty, so it's unclear what would arise that wouldn't fit into the allowable reasons.

Assessment:

The small team appreciates that the Board has this concern but does not share it. The small team considers that this is a matter of balancing contractual risk. There are broad carve outs to allow the rejection of an application and that allowing ICANN to reject an application at its sole discretion is fundamentally problematic.

Board Statement following non-adoption ([Scorecard September 2023](#))

Recommendation 18.1 states that it constitutes a revision to Section 3 of the Terms and Conditions from the 2012 Applicant Guidebook. Section 3 of the Terms and Conditions in the 2012 Application Guidebook provides that, "Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant."

In the Board's comment on the Draft Final Report, the Board expressed its concern that Recommendation 18.1 may limit the Board's authority to act as needed, including in unforeseen circumstances. The Board explained that the revision proposed by the PDP WG could bind the Board unless one of the specific conditions is met, and such limitations could lead to unforeseen

challenges. In its comment, the Board stated that it would like to understand what problems the PDP Working Group identified 19 with regard to Section 3 of the Terms and Conditions.

The language in the SubPro Final Report regarding Recommendation 18.1 does not differ from what was proposed in the Draft Final Report. In the SubPro Final Report, the Working Group provided its rationale supporting Recommendation 18.1. The Working Group said, "...it must be clear to the applicant why an application was rejected and that any rejection must be justified under provisions of the Applicant Guidebook unless required by specific laws, ICANN Board members' fiduciary duties, or the ICANN Bylaws. The purpose of this recommendation is to guard against arbitrary rejection of an application and ensure that there is transparency when rejections occur. To protect the privacy of applicants, the Working Group believes that ICANN should not publish the detailed reason for rejecting an application if that reason is based on confidential information submitted by the applicant."

As stated in the Working Group's rationale, "[t]he purpose of this recommendation is to guard against arbitrary rejection of an application and ensure that there is transparency when rejections occur." The Board takes note of the Working Group's rationale and notes that these concerns are already addressed by the Bylaws. Article 3, 20 Section 3.1 of the Bylaws requires that, "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness..." and that, "ICANN shall also 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)." Additionally, Article 2, Section 2.3 mandates that, "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."

ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. Section 2.1 of the Bylaws establishes that "... the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1)." As discussed above, the Bylaws already seem to address the concerns noted by the Working Group, and the Board remains concerned that if it adopts Recommendation 18.1, it may unduly limit ICANN's discretion to reject an application in yet-to-be-identified future circumstance(s), and it may constrain ICANN from acting on an application unless one of the specific conditions is met. Given these reasons, the Board has determined that adoption of Recommendation 18.1 would not be in the best interests of the ICANN community or ICANN.

Clarifying Questions identified by Small Team

N/A

Responses to clarifying questions from the ICANN Board during the GNSO Council – ICANN Board joint session at ICANN78

* Note that the text below is from the Zoom transcript and as such, may not be precisely correct. Please review the recording when in doubt.

N/A

High level nature of the modification [per the small team](#)

The goal would be to make the recommendation more precise to address the Board's concerns. It may also be worth breaking the recommendation into two parts. The first part would be in respect of the valid reasons for the Board to reject an application and the second part would be in respect of the requirement to specify the rationale for rejection.

Proposed modification that is expected to serve as a starting point for the small team plus deliberations (note, this modification is intended to facilitate the small team plus deliberations, it is not intended to pre-empt additional or other suggestions)

[Draft text to be developed by small team and reviewed/amended by small team plus]

Recommendation 18.1: Unless required by specific laws, ICANN Board members' fiduciary duties, or the ICANN Bylaws, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook. In the event an application is rejected, ICANN org must cite with specificity the reason in accordance with the Applicant Guidebook, or if applicable, the specific law and/or ICANN Bylaws for not allowing an application to proceed. This recommendation constitutes a revision to Section 3 of the Terms and Conditions from the 2012 round.

In "redline" format (compared to the original version) - bold text is newly added text, strikethrough text is text proposed to be removed from the original

Recommendation 18.1: ICANN may only reject an application in accordance with the Applicant Guidebook, ~~Unless required by specific laws, ICANN Board members' fiduciary duties, or the ICANN Bylaws, or applicable laws, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook.~~ In the event an application is rejected, ICANN org must cite with specificity the reason(s) in accordance with the **above Applicant Guidebook,** ~~or if applicable, the specific law and/or ICANN Bylaws~~ for not allowing an application to proceed. This recommendation constitutes a revision to Section 3 of the Terms and Conditions from the 2012 round.

Recommendation 18.3

SubPro [Final Report](#) Recommendation

Recommendation 18.3: In subsequent rounds, the Terms of Use must only contain a covenant not to sue if, and only if, the appeals/challenge mechanisms set forth under Topic 32 of this report are introduced into the program (in addition to the accountability mechanisms set forth in the current ICANN Bylaws). This recommendation is in reference to Section 6 of the Terms and Conditions from the 2012 round.

Board Concerns – [Scorecard 16 March](#)

The Board remains concerned, as previously voiced as part of its comment on the Draft Final Report, that dissatisfied applicants or objectors might argue based on this policy recommendation that the covenant not to sue is not valid because they did not like the way the appeals/challenge mechanism was built or operated. Anything that could weaken the covenant not to sue might preclude the ability to offer the program due to an unreasonable risk of lawsuits.

Small Team's [initial consideration and assessment](#)

Deliberations:

- The SubPro PDP made clear that the covenant not to sue could remain only if an appeals/challenge mechanism was established.
- The SubPro PDP has already carefully considered the Board's concerns that recommendation 18.3 may be argued to be dependent upon the appeals/challenge mechanism being implemented precisely as Topic 32 dictates through policy recommendations and implementation guidance.

- The SubPro WG provided rationale in its review of public comments (see line 19 [here](#)). In brief, the purpose of the recommendation is not to give applicants grounds to allege that the appeal process did not meet their satisfaction, but rather to state the WG's view that a covenant not to sue in favor of ICANN is only palatable if an Appeals / Challenge mechanism is implemented.
- The provision not to sue cannot easily be argued away.

Assessment:

The small team does not agree with this concern as the SubPro WG has thoroughly considered the concerns in the context of public comments and concluded that the covenant not to sue can remain if AN appeals/challenge mechanism is established. The deliberations of the SubPro WG can be found at the link above regarding the WG's deliberations for public comments.

Board Statement following non-adoption ([Scorecard](#) September 2023)

The Board's adoption of this Recommendation would mean that the covenant not to sue could not be included in the Terms of Use unless the Board adopts and ICANN org "introduces" the recommended appeals/challenge mechanism "as set forth" in Topic 32.

During the 2012 round of the New gTLD Program, one of the guiding principles in developing the Applicant Guidebook was to address and mitigate risks and costs of ICANN and the global Internet community. (See <https://archive.icann.org/en/topics/new-gtlds/gac-board-legal-recourse-21feb11-en.pdf>). The same is true for the next round. The Board remains cognizant that as a non-profit public benefit organization, ICANN lacks the resources to defend against potentially numerous lawsuits in jurisdictions all over the world that might be initiated by applicants that might want to challenge the results of the community-designed next round of the New gTLD Program. The "covenant not to sue" included in the Terms and Conditions of the 2012 Applicant 22 to the appeals/challenge mechanism recommended in Topic 32. While the Recommendations in Topic 32 remain pending, they are unlikely to be adopted in their current form. Guidebook was one element designed to protect the New gTLD Program from such judicial challenges.

In the Board's comment on the Draft Final Report, the Board stated that it understood the intent behind Recommendation 18.3, but expressed its concern that "dissatisfied applicants or objectors might argue based on this policy recommendation that the covenant not to sue is not valid because they did not like the way the appeals/challenge mechanism was built or operated."

The Board notes that the language in the SubPro Final Report regarding Recommendation 18.3 does not differ from what was proposed in the Draft Final Report. As explained in the Board's rationale for Recommendation 18.1, ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. If adopted, Recommendation 18.3 could weaken the covenant not to sue by placing conditions on whether it could be included in the Program. This would lead to a level of risk that the Board is unwilling to accept. Additionally, providing funds for these increased legal risks would have an impact on application fees for the next round, which would not be consistent with the intent of this recommendation.

The Board has considered Recommendation 18.3 and its implications more broadly on the Program and determined that the condition attached to the inclusion of the covenant not to sue in the Program's Terms of Use creates legal risks that are not in the best interest of the ICANN community or ICANN.

Clarifying Questions identified by Small Team

N/A

Responses to clarifying questions from the ICANN Board during the GNSO Council – ICANN Board joint session at ICANN78

* Note that the text below is from the Zoom transcript and as such, may not be precisely correct. Please review the recording when in doubt.

N/A

High level nature of the modification [per the small team](#)

TBD - The small team paused consideration of this recommendation until it is clearer what the outcome will be for Topic 32.

Proposed modification that is expected to serve as a starting point for the small team plus deliberations (note, this modification is intended to facilitate the small team plus deliberations, it is not intended to pre-empt additional or other suggestions)

[Draft text to be developed by small team and reviewed/amended by small team plus]

[Proposal by Jeff Neuman]

In subsequent rounds, **there must be mechanisms in place whereby Applicants have the ability to have evaluation decisions and objection decisions substantively reviewed. This may be satisfied by implementing an appeals/challenge mechanism described generally under Topic 32. If there is an appeals / challenge mechanism or other process whereby those decisions can be substantively reviewed, ICANN may continue to have Terms and Conditions that contain a covenant not to sue.** ~~if, and only if, the appeals/challenge mechanisms set forth under Topic 32 of this report are introduced into the program (in addition to the accountability mechanisms set forth in the current ICANN Bylaws).~~ This recommendation is in reference to Section 6 of the Terms and Conditions from the 2012 round.

In "redline" format (compared to the original version) - bold text is newly added text, strikethrough text is text proposed to be removed from the original