

## 4) Appeals Mechanisms

### 4.1 Independent Review Process Enhancement

#### INTRODUCTION

The consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN's existing Independent Review Process (IRP). Commenters called for ICANN to be held to a *substantive standard of behavior* rather than just an evaluation of whether or not its action was taken in good faith. Commenters called for a process that was *binding* rather than merely advisory. Commenters also strongly urged that the IRP be *accessible*, both financially and from a standing perspective, transparent, *efficient*, and that it be designed to produce *consistent and coherent results* that will serve as a guide for future actions.

#### COMMENTS FROM PUBLIC CONSULTATION

Commenters expressed support for the general idea of strengthening ICANN's Independent Review process; none expressed a contrary view. The Board declined to comment on the grounds that it could not respond to the IRP proposal without more detail. Regarding the overall structure of the IRP, two commenters urged that it "has to remain an internal mechanism within ICANN," i.e. that it not be designed as a "traditional court of international arbitration" or "international commercial arbitration panel." We have attached a detailed summary of comments as Appendix [ ] and revised the text from the Initial Draft Report (4 May 2015) based on community input and further discussions.

The process described below calls for a standing, independent panel of skilled jurists/arbitrators who are retained by ICANN and can be called upon over time and across issues to resolve disputes regarding whether ICANN is staying within its limited technical Mission, ~~whether it is abiding by policies adopted by the multistakeholder community, and whether in carrying out its Mission and applying consensus policies it is and~~ acting in accordance with ICANN's Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed *Statement of Mission, Commitments & Core Values*, or ICANN policies. ~~(See, Statement of Mission, Commitments, and Core Values.)~~

The proposal calls for a fully *independent* judicial/arbitral function. The purpose of a standing panel is to ensure that panelists are not beholden to ICANN or any of its constituent bodies – but a core skill of this IRP's panelists is the need to build a thorough and detailed understanding of how ICANN's Mission is implemented, and its commitments and values applied – over time and across a variety of situations.

Implementation of these enhancements will necessarily require additional, detailed work as part of Work Stream 2. A CCWG-ACCT sub group (the "IRP Sub Group"), assisted by counsel and appropriate experts, will continue to work on implementation details and will work with the members of the initial Standing Panel and the IRP provider (described below) on rules of procedure and other details. Such rules will be subject to public consultation. In

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addition, to ensure that the IRP functions as intended, we propose to subject the IRP to periodic community review, in a manner similar to ATRT.

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1. **Purpose of the IRP:** The overall purpose is to ensure that ICANN does not exceed the scope of its limited technical Mission and, ~~in carrying out that Mission, acts in a manner that respects community-agreed fundamental rights, freedoms, and values~~ complies with its Articles of Incorporation and Bylaws.
  - a. Empower the community and affected individuals/entities to prevent "mission creep," enforce compliance with ~~established multistakeholder policies, provide redress for due process violations, and protect the multistakeholder process~~ the Articles and Bylaws through meaningful, affordable, access to expert review of ICANN actions.
  - b. Ensure that ICANN is accountable to the community and individuals/entities for actions outside its Mission or that violate ~~community-approved standards of behavior, including violations of established ICANN policies~~ its Articles or Bylaws.
  - c. Reduce disputes going forward by creating precedent to guide and inform ICANN Board, staff, SOs/ACs, and the community in connection with policy development and implementation.

2. **Role of the IRP:** The role of the Independent Review Process (IRP) will be to:

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- Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any advisory committee or supporting organization);
- Reconcile conflicting decisions of process-specific "expert panels"; and
- Hear and resolve claims involving rights of the Sole Member under the Articles or Bylaws (subject to voting thresholds)

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- 2-3. **A Standing Panel:** The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially harmed by ICANN's action or inaction in violation of ~~commitments made in ICANN's~~ the Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed Statement of Mission, Commitments & Core Values, and ICANN policies established to hold ICANN accountable to legal requirements applicable to non-profit corporate and charitable organizations. This reflects proposed changes and enhancements to ICANN's existing Independent Review Process.

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~~3-4.~~ **Initiation of an IRP:** An aggrieved party would trigger the IRP by filing a complaint alleging that a specified action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed *Statement of Mission, Commitments & Core Values* or ICANN policies. Matters specifically reserved to any "Members" of ICANN in the Articles or Bylaws would ~~be excluded from IRP~~ also be subject to IRP review. ~~Likewise, the IRP could also not address matters that are so material to the Board that it would undermine its statutory obligations and fiduciary roles to allow the IRP to bind the Board.~~

~~4-5.~~ **Possible Outcomes of the IRP:** ~~An IRP will result in a declaration Decision~~ that an action/failure to act ~~complied or did not comply with in violation of~~ ICANN's Articles of Incorporation and/or Bylaws, ~~including commitments spelled out in the proposed Statement of Mission, Commitments & Core Values or ICANN policies. The intent is that~~ To the extent permitted by law, IRP decisions should be binding on ICANN.

- a. Decisions of ~~a three-member subpanel will be appealable to the full IRP Panel sitting en banc, based on a clear error of judgment or the application of an incorrect legal standard. The standard may be revised or supplemented via the IRP Sub Group process. are not subject to appeal (except for review of very limited issues such whether the outcome exceeded the permissible scope of the arbitration or was procured by fraud or corruption.~~ However, the panel may not direct the Board or ICANN on how to amend specific decisions, it shall only be able to make decisions that confirm a decision by ICANN, or cancel a decision, totally or in parts.
- b. This balance between the absence of appeal and the limitation to the type of decision made is intended to mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid that the panel's outcome overcomes the Board in its fiduciary duties.
- c. The limited right to appeal is further balanced by the community powers, relevant policy development process, advice from ACs, each as set forth in the Bylaws.
- ~~b-d.~~ IRP panelists will consider and may rely on prior decisions of other IRPs addressing similar

~~5-6.~~ **Standing:** Any person/group/entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed *Statement of Mission, Commitments & Core Values* or ICANN policies. ~~The Sole Member has standing to bring claims involving its rights under the Articles and Bylaws. Issues relating to joinder and intervention will be determined by the IRP Sub Group, assisted by experts and the initial Standing Panel, based on consultation with the community.~~

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- a. Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff action where a complainant can demonstrate:

- ~~b.i.~~ Harm that cannot be cured once a decision has been taken or for which there is no adequate remedy once a decision has been taken;

- ~~b.ii.~~ Either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits; and

- ~~b.iii.~~ A balance of hardships tipping decidedly toward the party seeking the relief.

~~6-7.~~ The CCWG-Accountability recommends giving the community, as described in Section 5.1, the right to have standing with the IRP. In such ~~a case~~cases, ~~the burden of the legal fees would be on ICANN~~ will bear the full cost of the proceeding. The precise process for such a case is still under development. In general, ICANN will bear the costs associated with the Standing Panel, although the IRP Sub Group may recommend filing or other fees to the extent necessary to prevent abuse of the process.

~~7-8.~~ In their letter dated 15 April 2015, the CWG-Stewardship-Stewardship indicated "As such any appeal mechanism developed by the CCWG-Accountability should not cover ccTLD delegation/re-delegation issues as these are expected to be developed by the ccTLD community through the appropriate processes". As requested by the CWG-Stewardship, decisions regarding ccTLD delegations or revocations would be excluded from standing, until relevant appeal mechanisms have been developed by the ccTLD community, in coordination with other parties.

~~8-9.~~ In case of including the global number resources policy in its scope, further considerations should be made of its implications. The bottom up policy development process and its forum for the number resources is outside the ICANN, even though the ICANN Board approves its global policies, and the same mechanisms as the names related policies may not be applicable. The Address Supporting Organization has likewise indicated that disputes related to Internet number resources should be out of scope for the IRP. As requested by the ASO, decisions regarding numbering resources would be excluded from standing, unless and until relevant appeal mechanisms have been developed by the ASP, in coordination with other parties.

~~9-10.~~ **Standard of Review:** A party challenging an action or inaction would have the burden to demonstrate that the complained-of action exceeds the scope of ICANN's Mission and/or violates either (a) substantive limitations on the permissible scope of ICANN's actions, or (b) decision-making procedures, in each case as set forth in ICANN's Bylaws, Articles of Incorporation, or

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~~Statement of Mission, Commitments, and Core Values or ICANN policies Articles and Bylaws.~~

~~10-11.~~ **Composition of Panel; Expertise:** Significant legal expertise, particularly international ~~arbitration expertise~~ law, corporate governance, and judicial systems/dispute resolution/arbitration. ~~Panels should also possess and~~ expertise, developed over time, about the DNS and ICANN's policies, practices, and procedures. At a minimum, Panelists should receive training on the workings and management of the domain name system. Panelists must have access to skilled technical experts upon request. In addition to legal expertise and a strong understanding of the DNS, panelists may confront issues where highly technical, civil society, business, diplomatic, and regulatory skills are needed. To the extent that individual panelists have one or more of these areas of expertise, the process must ensure that this expertise is available upon request.

~~a. While most of the working group was comfortable with this formulation, some participants prefer to require that the panelists themselves possess the requisite skill sets—of course, individual panelists need not possess every kind of expertise; rather, they suggest that taken together the panel should possess the requisite skills.~~

~~11-12.~~ **Diversity: Geographic diversity.** English as primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal tradition diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole). The Standing Panel members should have diversity in geographic and cultural representation. Diversity of experience will be considered in completing the composition of the Panel. Reasonable efforts should be undertaken to achieve such diversity.

~~12-13.~~ **Size of Panel**

- a. Standing Panel – a minimum of 7
- b. Decisional Panel – ~~1 or~~ 3 Panelists

~~13-14.~~ **Independence:** Members must be independent of ICANN, including ICANN SOs and ACs. Members should be compensated at a rate that cannot decline during their fixed term; no removal except for specified cause (corruption, misuse of position for personal use, etc.) To ensure independence, term limits should apply (5 years, no renewal), and post-term appointment to Board, NomCom, or other positions within ICANN would be prohibited for a specified time period. Panelists will have an ongoing obligation to disclose any material relationship with ICANN, SOs/ACs, or any other party in an IRP.

**14.— Selection and Appointment:** The selection of panelists would follow a 3-step process:

- a. ICANN, in consultation with the community, will initiate a tender process for organization to provide administrative support for IRP, including to issue a call for expressions of interest; work with the community and Board to identify and solicit applications from well-qualified candidates with the goal of securing diversity; initial review and vetting of applications; working with ICANN and community to develop operational rules for IRP
- b. The community would nominate a slate of proposed panel members
- c. Final selection is subject to ICANN Board confirmation
  - a. Third party international arbitral bodies would nominate candidates
  - b. The ICANN Board would select proposed panelists subject to community confirmation.
  - c. The community mechanism (see Section 5.1) would be asked to confirm appointments.

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15. **Recall or other Accountability:** Appointments made for a fixed term of five (5) years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed via the IRP Sub Group.

16. **Settlement Efforts:**

- a. Reasonable efforts, as specified in a public policy, must be made to resolve disputes informally prior to/in connection with filing an IRP case.
- b. Parties to cooperatively engage informally, but either party may inject independent dispute resolution facilitator (mediator) after initial CEP meeting. Either party can terminate informal dispute resolution efforts (CEP or mediation) if, after specified period, that party's concludes in good faith that further efforts are unlikely to produce agreement.
- c. The process must be governed by clearly understood and **pre-published rules applicable to both parties** and be subject to strict time limits. In particular, the CCWG-ACCT will review the CEP process as part of Work Stream 2.

17. **Decision Making:**

- a. In each case, a ~~single or~~ 3 member panel will be drawn from ~~the Standing Ppanels. In single member panel, ICANN and complaining party agree on panelist.~~ In 3-member panel cases, each party selects one panelist, and those panelists select a third. We anticipate that the Standing Panel would draft, issue for comment, and revise procedural rules. Focus on streamlined, simplified processes with rules that are easy to understand and follow.
- b. Panel decisions will be based on each IRP panelist's assessment of the merits of the claimant's case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts. All decisions will be documented and made public and will reflect a well-reasoned application of the standard to be applied (i.e., Bylaws, the *Statement of Mission, Commitments, and Core Values*, and ICANN policies).

18. **Decision:**

- a. Panel decisions (~~where there is more than one panelist~~) would be determined by a simple majority. Alternatively, this could be included in the category of procedures that the IRP Panel itself should be empowered to set.
- b. The CCWG-Accountability recommends that IRP decisions be "precedential" – meaning, that ~~deference should a panel~~ ~~panelists should consider and may rely on~~ ~~give to~~ prior decisions<sup>52</sup>. By conferring precedential weight on panel decisions, the IRP can provide guidance for future actions and inaction by ICANN decision-makers, which is valuable. It also reduces the chances of inconsistent treatment of one claimant or another, based on the specific individuals making up the decisional panel in particular cases. But this makes it more likely that a "bad" decision in one case affects other cases going forward.
- c. It is expected that judgments of the IRP Panel would be enforceable in the court of the US and other countries that accept international arbitration results.

19. **Accessibility and Cost:**

- a. The CCWG-Accountability recommends that ICANN would bear the administrative the costs of maintaining the system (including Panelist salaries). The Panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access

to pro bono representation for community, non-profit complainants.

- b. The Panel should complete work expeditiously; issuing a scheduling order early in the process, and in the ordinary course should issue decisions within a standard time frame (six months). The Panel will issue an update and estimated completion schedule in the event it is unable to complete its work within that period.

- 20. **Implementation:** The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws.
- 21. **Transparency:** The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust independent review process. We recommend reviewing and enhancing the Documentary Information Disclosure Policy (DIDP) as part of the accountability enhancements in Work Stream 2.