

## 4) Appeals Mechanisms

### 4.1 Independent Review Process Enhancement

#### INTRODUCTION

- 01 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." The CCWG-Accountability revised the text from the Initial Draft Report (4 May 2015) based on community input and further discussions.

- 02 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 and acting in accordance with ICANN's Articles of Incorporation and/or Bylaws.
- 03 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.
- 04 The proposal does not establish a new international court or a new body of international law: it is not a Treaty function, and is internal to ICANN. It reviews

application of rules for ICANN established by the ICANN multistakeholder community. Those rules remain under the control of the ICANN multistakeholder community, so this IRP remains a mechanism the community is using to ensure that its policies and processes are followed, and does not become a means to replace or subordinate the multistakeholder community to some other entity.

- 05 Implementation of these enhancements will necessarily require additional, detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a Cross Community Working Group (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. They may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, we propose to subject the IRP to periodic community review.

1. **Purpose of the IRP:** The overall purpose is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.

- a. Empower the community and affected individuals/entities to prevent “mission creep” enforce compliance with the Articles and Bylaws through meaningful, affordable, accessible 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 its Articles or Bylaws.
- c. Reduce disputes going forward by creating precedent to guide and inform ICANN Board, staff, SOs and 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:

- 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).
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 the Articles of Incorporation and/or Bylaws.
  4. **Initiation of an IRP:** An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN’s Articles of Incorporation and/or Bylaws. Matters specifically reserved to the Sole Member of ICANN in the Articles or Bylaws would also be subject to IRP review.
  5. **Possible Outcomes of the IRP:** An IRP will result in a declaration that an action/failure to act complied or did not comply with ICANN’s Articles of Incorporation and/or Bylaws. To the extent permitted by law, IRP decisions should be binding on ICANN.
    - a. Decisions of a three-member decisional panel 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.
    - b. This balance between the limited right 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 an outcome that would force the Board to violate its fiduciary duties.
    - c. The limited right to appeal is further balanced by the community powers, relevant policy development process, and advice from ACs, each as set forth in the Bylaws.

- d. IRP panelists will consider and may rely on prior decisions of other IRPs addressing similar issues.
  - e. Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff action where a complainant can demonstrate:
    - 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;
    - ii. Either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits; and
    - iii. A balance of hardships tipping decidedly toward the party seeking the relief.
- 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 shall have the right to file a complaint under the IRP and seek redress. They must do so within [number of days to be determined by IRP Sub Group] days of becoming aware of the alleged violation and how it allegedly affects them. 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.
- 7. **Community IRP:** The CCWG-Accountability recommends giving the community, as described in Section 5.1, the right to have standing with the IRP. In such cases, 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.
- 8. **Exclusions; ccTLD Delegation/Redelegation:** In their letter dated 15 April 2015, the CWG-Stewardship indicated that, “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 the ccTLD community, in coordination with other parties, has developed relevant appeals mechanisms.

9. **Exclusions; Numbering Resources:** 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.
10. **Standard of Review:** The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on their own independent interpretation of the ICANN Articles and Bylaws in the context of applicable governing law. The standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN's Mission and/or violates ICANN's Articles and Bylaws. 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.
11. **Composition of Panel and Expertise:** Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration. Panelists should also possess 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.
12. **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).
13. **Size of Panel:**
  - a. Standing Panel – a minimum of 7 panelists

b. Decisional Panel – 3 panelists

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 and ACs, or any other party in an IRP.

a. Selection and Appointment: The selection of panelists would follow a 4-step process: ICANN, in consultation with the community, will initiate a tender process for an organization to provide administrative support for IRP, beginning by consulting the community on a draft tender document.

b. ICANN will then issue a call for expressions of interest from potential panelists; work with the community and Board to identify and solicit applications from well-qualified candidates with the goal of securing diversity; conduct an initial review and vetting of applications; and work with ICANN and community to develop operational rules for IRP.

c. The community would nominate a slate of proposed panel members.

d. Final selection is subject to ICANN Board confirmation.

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 published 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 (Cooperative Engagement Process 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-Accountability will review the Cooperative Engagement Process as part of Work Stream 2.

17. **Decision Making:**

- a. In each case, a 3-member panel will be drawn from the Standing Panel. Each party will select one panelist, and those panelists will select the 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.

18. **Decisions:**

- a. Panel decisions 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 panelists should consider and may rely on prior decisions. 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.

- c. The CCWG-Accountability intends that if the Panel determines that an action or inaction by the Board or staff is in violation of the Articles or Bylaws, that decision is binding and the Board and staff shall be directed to take appropriate action to remedy the breach. However, the Panel shall not replace the Board's fiduciary judgment with its own judgment.
- d. It is intended that judgments of a decisional panel or the Standing Panel would be enforceable in the court of the U.S. and other countries that accept international arbitration results.

19. **Accessibility and Cost:**

- a. The CCWG-Accountability recommends that ICANN would bear all the administrative the costs of maintaining the system (including Panelist salaries), while each party should bear the costs of their own legal advice. 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, for example by access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded form utilizing the process.
- 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. Implementation of these enhancements will necessarily require additional, detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG-Accountability (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. They may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, we propose to subject the IRP to periodic community review.
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.