

January 22, 2016

Comments on Review of CCWG-Accountability Draft Annexes 4 (Community IRP & Separation Powers) and 7

Draft Annexes	Suggested Edits
Global	Replace “Icann” with “ICANN”
Global	Consider replacing and/or supplementing the sections discussing “Changes from the Second Draft Proposal on Work Stream 1 Recommendations” with sections discussing changes from the Third Draft Proposal (where appropriate)
Global	Consider conforming references to “CWG-Stewardship proposal” and “IANA Stewardship Transition proposal” where appropriate; terms are currently used interchangeably
Global	After a name has been selected for the sole designator unincorporated association, references to “Sole Designator,” “Empowered Community” and “community” will need to be updated as appropriate; the name selected should be the only term used to refer to the sole designator unincorporated association
<p>Annex 4: Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers (Paragraph numbers refer to the 1st reading conclusions draft on community IRP and separation powers)</p>	
Generally	“SOs/ACs”
Key 1 st Reading Conclusions	<p>“A specific provision will be included in the Bylaws to require specific SO or AC concurrence in support of community IRP challenges against Board decisions that relate directly to certain SOs <u>or ACs</u>, such as Policy Development Process outcomes.”</p> <p>“Confirmed ICANN <u>ICANN</u> Board suggestion to clarify that <u>the</u> Separation p<u>P</u>rocess applies to <u>the IANA naming functions (CWG-Stewardship dependency)</u> domain name management function to IANA only”</p> <p>“The right to reject <u>ICANN</u> Board decisions ICANN Board decisions relating to reviews of IANA F<u>F</u>unctions can be <u>exercised</u> applied by the Empowered Community an unlimited number of times”</p> <p>“The relevant ICANN <u>ICANN</u> Bylaw drafting process and related Separation p<u>P</u>rocess will continue to include involvement by the CWG-Stewardship <u>(or a successor implementation group)</u>”</p>
Section 1	Clarify whether to modify or delete this phrase, in light of the proposed carve-out relating to the community IRP that would require concurrence from a single SO or AC under certain circumstances (e.g., relating to the policy development process): “under no circumstances would any individual section of the community be able to block the use of a power”

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	<p>“Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of any Post-Transition IANA (PTI) separation process.”</p>
Paragraph 1	<p>“Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of any PTI separation process for the IANA naming functions for IANA’s domain name management function”</p>
Paragraphs 4, 76	<p>“The Power to Reject ICANN Board Decisions Relating to Reviews of IANA Functions, including the Triggering of any PTI Separation Process.”</p>
Paragraph 5, Footnote 1	<p>“It is important to note that the above powers, as well as the launch of a Separation Cross Community Working Group¹, (as required by the CWG-Stewardship dependencies for the IANA naming functions for IANA’s domain name management function), can be enforced by using the community IRP or the power to recall the entire Board.”</p> <p>Footnote 1: “If the CWG-Stewardship’s IANA Function Review determines that a Separation Process for the IANA naming functions naming community is necessary, it will recommend the creation of a Separation Cross Community Working Group.”</p> <p>Clarify that the Empowered Community can seek enforcement by a court of the statutory power to remove directors, and that there is no requirement to use the IRP or recall the entire Board to enforce this power</p>
Paragraph 69	<p>“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 ICANN Bylaws (including any violation of the Articles of Incorporation or the Bylaws resulting from action taken in response to advice/input from any AC or SO).”</p> <p>“(subject to voting thresholds)”</p> <p>Add clarifying changes as appropriate to reflect that the scope of the IRP covers actions and inactions of PTI relating to the IANA naming functions</p>
Paragraph 70	<p>“A specific provision will be included in the Bylaws to require specific SO or AC concurrence in support of community IRP challenges against Board decisions that relate to specific SOs or ACs decisions, such as Policy Development Process outcomes...”</p>
Paragraph 75	<p>“The escalation and enforcement processes for initiating an IRP rejecting an IANA Functions Budget are detailed in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.”</p>
Paragraph 77	<p>“The IANA Functions Review, Special IANA Function Review, and the Separation Cross Community Working Group are all accountability mechanisms for the IANA naming functions structures that the CWG-Stewardship has requested the CCWG-Accountability constitute in the Fundamental Bylaws to oversee the operations of the IANA Functions Operator domain name</p>

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	management activities. ”
Paragraph 78	“The escalation and enforcement processes for rejecting an ICANN Board decision, action or inaction relating to reviews of IANA functions, including the triggering of any Post-Transition IANA Separation Process IANA Functions Budget are detailed in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.”
Paragraph 79	“The right to reject ICANN Board decisions relating to reviews of IANA F functions, including ICANN Board decisions relating to Special IANA Function Review and Separation Cross Community Working Group recommendations , can be exercised applied by the Empowered Community an unlimited number of times”
Paragraph 80	“The relevant ICANN ICANN Bylaw drafting process and related Separation p P rocess will continue to include involvement by the CWG-Stewardship (or a successor implementation group) ”
Annex 7: Recommendation #7: Strengthening ICANN’s Independent Review Process <i>(Paragraph numbers refer to the 2nd reading conclusions draft)</i>	
Generally	Add page numbers
Paragraph 4	<p>“Modify the Fundamental Bylaws to implement the following modifications to the IRP:</p> <ul style="list-style-type: none"> • ... • Adding a Sstandard of review. • ... • Adding sufficient due process to ensure courts respect IRP decisions as enforceable arbitration decisionsEnsuring the process results in a binding decision.
Paragraph 6	“Ensure that ICANN is accountable to the community and individuals/entities for actions outside its Mission or that otherwise violate its Articles or Bylaws.”
Paragraph 7	<p>“(subject to voting thresholds)”</p> <p>“subject to an d internal DIDP...”</p>
Paragraph 9	Clarify if a Request for Reconsideration is required before using the IRP and, if not, how the processes interrelate given they both relate to violations of Articles or Bylaws

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Paragraph 9 (Diagram)	“ICANN + Aggrieved Party Enter in Cooperative Engagement <u>or Mediation</u> ”
Paragraph 10	<p>“To the extent permitted by law, IRP decisions shall<u>should</u> be binding on ICANN.”</p> <ul style="list-style-type: none"> • “...intended to mitigate the potential effect that one key decision of the panel might have on several third parties; and to avoid...” • “IRP Panelists shall consider and give precedential effect to<u>will consider and may rely on</u> prior decisions of other Independent Review Processes that address similar issues.”
Paragraph 12	“They must do so within [365 number of days to be determined by the IRP Subgroup] days of becoming aware of the alleged violation and how it allegedly affects them.”
Paragraphs 17, 44	Consider using “re-delegation” instead of “revocation” if those terms refer to the same thing
Paragraph 19	“...Address Support <u>ing</u> Organization...”
Paragraph 23	“... and issue decisions based on those facts. <u>The IRP Panel shall consider and give precedential effect to prior IRP decisions.</u> ”
Paragraph 25	<p>Clarify what is meant by “[t]o 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” (e.g., would such a person be included on the review panel or must they be available for consultation)</p> <p>“Panelists should either already<u>also</u> possess expertise, developed over time, about the DNS and ICANN’s policies, practices, and procedures, <u>or commit to develop an expertise through.</u> At a minimum, panelists should receive training, <u>at a minimum,</u> on the workings and management of the Domain Name System (DNS).”</p>
Paragraph 30	<p>“...or other positions within ICANN will<u>would</u> be prohibited for a specified time period.”</p> <p>Mention that the panel will need a “clerk’s office” separate from ICANN in order to achieve independence</p>
Paragraph 34	Note that the “no removal” language is repetitive of language in Paragraph 30 and could be deleted here
Paragraph 35	Clarify whether mediation and/or Cooperative Engagement is mandatory – Paragraph 119 of the Third Draft Proposal stated “Require mediation before IRP begins” but Annex 7, Paragraph 35 provides that parties can enter into a Cooperative Engagement Process or mediation; Glossary definition of “Cooperative Engagement Process” provides that prior to initiating an IRP, complainants are “urged” to enter into a period of cooperative engagement with ICANN...”

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Paragraph 36	Note that processes must be designed to conform to international arbitration norms
Paragraph 37	“The CCWG-Accountability recommends that IRP decisions be precedential, meaning that IRP Panelists shall consider and give precedential effect to prior IRP decisions panelists should consider and may rely on prior decisions. ”
Paragraph 38	“The CCWG-Accountability recommends that ICANN would bear all the administrative costs of maintaining the system (including panelist salaries and the costs of technical experts), while each party should bear the costs of their own legal advice.” “... for community, non-profit complainants, and other complainants...”
Paragraph 42	Note that all proceedings will be conducted on the record, in public, except for settlement negotiations or other proceedings which could materially and unduly harm participants if conducted in public, such as by exposing trade secrets or violating rights of personal privacy
Paragraph 43	“outlined in the Second Draft Proposal Draft Two ...”
Paragraph 46	“... functioning of the organization.”
Paragraph 47	“... functioning of the organization.”