

### Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in [Section 2 of this Article](#), ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws, [in procedure or in substance](#).
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action. [The Sole Member may also submit a request for independent review of any decision or action by the Board that it asserts is inconsistent with the Articles of Incorporation or Bylaws.](#)
3. ~~A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party becoming aware of the action that it contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.~~ Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.
4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The [standard of review shall be a de novo, objective and independent one examining whether the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws](#)<sup>1</sup>. ~~IRP Panel must apply a defined standard of review to the IRP request, focusing on:~~
  - ~~a. did the Board act without conflict of interest in taking its decision?;~~
  - ~~b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and~~
  - ~~c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?~~
5. Requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument. ICANN's response shall not exceed that same length. Parties may submit documentary evidence supporting their positions

<sup>1</sup> This is the standard the IRP adopted in .africa, with the language taken directly from the final decision (paragraph 65).

**Commented [MSAH1]:** Why the Sole Member, rather than a more responsive community structure? The only reason the Sole Member exists is to have legal personality, which is not required to bring an IRP case.

Is this a case of having created it, we are now looking for more things to give it to do?

**Commented [MSAH2]:** A person with no particular engagement with ICANN may only discover a problem when they are personally harmed by ICANN. At that time, they should have the opportunity to allege that what ICANN has done is inconsistent with its Mission or Core Values.

**Commented [MSAH3]:** This restriction is obsolete by our proposal that the IRP should consider the substance of the claim as well as the process.

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without limitation. In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence.

6. There shall be an omnibus standing panel (the “Standing Panel”) of ~~between six and nine~~<sup>[seven]<sup>2</sup></sup> members with a variety of expertise, including jurisprudence, international law, [constitutional law],<sup>3</sup> judicial experience, alternative dispute resolution and knowledge of the DNS and ICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the ~~sStanding pPanel~~ shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the ~~sStanding pPanel~~. In the event that an omnibus ~~Sstanding Ppanel~~: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience or the requisite number of panelists needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

7. All IRP proceedings shall be administered by an international dispute resolution provider to be selected through a tender process appointed from time to time jointly managed by ICANN and the ICANN community (“the “IRP Provider”). ~~ICANN shall publish a draft tender document, and solicit and consider comments from the ICANN community, before finalizing the terms of the tender.~~ The membership of the standing panel (including any stand-by panelists) shall be ~~selected by the ICANN community through a process~~ coordinated by the IRP Provider, subject to approval by ICANN, not to be unreasonably withheld. [The IRP Provider shall consider the diversity selection of the panelists in matters of should include reasonable efforts to assemble a diverse panel, including without limitation diversity of legal tradition, geography, culture, language and gender, and regional origin when appointing panelists. including reasonable efforts to select [at least one and]<sup>4</sup> no more than [two]<sup>5</sup> panelists from any ICAN region.

8. ~~Subject to the approval of the Board, tThe ICANN community, through a process coordinated by the~~ IRP Provider, shall establish operating rules and procedures, ~~which shall implement and be~~ consistent with this Section 3.

**Commented [MSAH4]:** I think it's simply impractical for the community to jointly manage a tender process with the staff.

It should be sufficient that ICANN consults the community in advance on the terms of the tender.

**Commented [MSAH5]:** This amounts to the same thing in practice, but is more clear and less likely to invite spurious challenges to panelist selection.

<sup>2</sup> Note that I believe that is too small a group, especially if we anticipate multiple 3-member sitting panels running simultaneously.

<sup>3</sup> Note that I believe this is a mis-statement of the expertise. Consider “corporate governance” instead.

<sup>4</sup> My suggestion.

<sup>5</sup> Depending on the size of the panel (including stand-by panelists, this number may be too low.

~~8-9.~~ The ICANN community, acting through a Cross-Community Working Group, may from time to time create rules, procedures and programmes for the purpose of ensuring that the IRP is a fair and accessible form of independent review capable of holding ICANN to compliance with its bylaws for the benefit of the community as a whole. Such rules, procedures and programmes shall only take effect after the explicit grant of the consent of the Board, such consent not to be unreasonably withheld. Once adopted, these rules, procedures and programmes shall have the same status and effect as these bylaws, save only that in case of conflict between any of them and these bylaws, these bylaws shall take precedence.<sup>6</sup>

~~9-10.~~ Either party may request that the IRP be considered by a [one- or] three-member sitting panel (each, an "IRP Panel") [; the Chair of the standing panel shall make the final determination of the size of each IRP pPanel, taking into account the wishes of the parties and the complexity of the issues presented]. Each IRP Panel shall have a Chair, who shall not be a stand-by panelist. At the complainant's discretion, the IRP may be considered by a one-member IRP Panel; the decisions of any such IRP Panel shall not be binding on ICANN.

~~10-11.~~ The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP ~~panels~~ Panels.

~~11-12.~~ The IRP Panel shall have the authority to:

- a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
- b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
- ~~b.c.~~ request assistance from skilled technical, business, diplomatic, regulatory and/or other experts;
- ~~e.d.~~ declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

<sup>6</sup> This creates a necessary community power to make further improvements to the IRP process. The power is limited in two ways: firstly, it can only be used "for the purpose of ensuring that the IRP is a fair and accessible form of independent review capable of holding ICANN to compliance with its bylaws for the benefit of the community as a whole"; secondly, it is subject to Board approval (with Board consent not to be unreasonably withheld). If the community exercised this power inappropriately, the Board could withhold its consent. Rules made under this provision shall be subordinate to Bylaws, but otherwise would have the same power as bylaws (but have a much more limited scope of what they cover). The adoption of this power would enable us to move certain provisions from the bylaws to this "subordinate bylaw" status, to enable those aspects to be developed by the community more flexibly over time. Examples of things that might usefully be made more flexible include the size and composition of IRP panels, provisions on conflicts, the structure of appeals, maximum submission size, and deadlines.

<sup>7</sup> If we are eliminating one-member panels, the bracketed language in clause 9 will be deleted.

**Commented [MSAH6]:** A community power to further develop the IRP is needed, as we have left many issues for WS2, and identified others that could also be left for WS2 if this power is created.

An explanation of how this power will work is in the footnote.

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~~e. recommend~~ require that the Board stay any action or decision,

~~d.f. require or~~ that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;

~~e.g.~~ consolidate requests for independent review if the facts and circumstances are sufficiently similar; and

~~f.h.~~ determine the timing for each proceeding.

~~42.13.~~ In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone or in person. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance, unless the IRP Panel determines otherwise.<sup>8</sup>

~~13.14.~~ All panel members shall adhere to a conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, and to an ICANN IRP conflicts-of-interest policy (including without limitation references to pre- and post-term engagements with ICANN and financial conflicts of interest with ICANN or its Stakeholder Organizations and Advisory Committees) as developed by the community and approved by the Board. Panel members shall serve for a fixed term of [fiveseven] years, which may not be renewed [twice]. Panel members may be removed or recalled<sup>9</sup> only for cause, e.g., corruption or misuse of the position for personal gain. The compensation of panel members shall not be reduced.

~~15.~~ Prior to initiating a request for independent review, the complainant shall have made documented, reasonable, good faith efforts to participate in any policy development or other ICANN process that would have the authority to resolve complainant's issues.

~~44.16.~~ Prior to initiating a request for independent review, the complainant is urged to enter into a period of mediation or cooperative engagement, at the complainant's choice, with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The mediation and cooperative engagement processes are published on ICANN.org and is incorporated into this Section 3 of Article IV of the Bylaws.

~~45.17.~~ Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the

**Commented [MSAH7]:** This needs to be made consistent with the binding nature of the IRP

**Commented [MSAH8]:** Consistent with the binding nature of the IRP this "until such time" should only qualify "interim action" and not quality "stay".

**Commented [MSAH9]:** A key means of preserving independence is to remove the hope of re-appointment.

The world is not so short of retired judges that this would pose any a practical problem.

**Commented [MSAH10]:** This additional would seriously undermine the purpose of the IRP.

An affected non-contracted party should not have to suffer violation of their interests in contravention of ICANN's Bylaws merely because they were unaware of ICANN's action (or indeed, its existence).

**Commented [MSAH11]:** We should not give the current CEP the status of a Fundamental Bylaw.

<sup>8</sup> In light of the .africa decision, this may need to be re-written.

<sup>9</sup> Does this mean removed from a sitting IRP Panel or from the overall Standing Panel?

Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.

~~16-18.~~ Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

~~17-19.~~ All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.

~~20.~~ The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

~~18-21.~~ The [complainant /party not prevailing]<sup>10</sup> may appeal the IRP Panel's decision to the Standing Panel sitting *en banc*. A notice of appeal must be filed within 30 days of the issuance of a decision. The decisions of the Standing Panel shall be final and binding on [ICANN/the parties]<sup>11</sup>.

~~22.~~ The decisions of all three-member IRP Panels (unless appealed) shall be final and binding on [ICANN/the parties], ~~except to the extent that the decision involves matters so material to the Board that it would undermine the Board's statutory obligations and fiduciary duties [to the extent permitted by law]~~<sup>12</sup>.

~~19-23.~~ The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN's website when they become available.

~~20-24.~~ The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets. ~~Subject only to this, the IRP Panel shall publish reasoned decisions for its findings.~~

<sup>10</sup> [Need to decide this.](#)

<sup>11</sup> [Need to decide this.](#)

<sup>12</sup> [Standard to be defined and clarified based on the advice of counsel.](#)

**Commented [MSAH12]:** Our aim here is that it should be binding, and our only fear is that at the utmost this may become incompatible with legal restrictions on binding the fiduciary responsibilities of the Board.

If our only concern is to act within legal restriction, let's just say so.

**Commented [MSAH13]:** .africa shows the need for the IRP panel to publish its own decisions, not to rely on ICANN to do so.

Setting aside any suggestion of wrongdoing or inappropriate choices by ICANN in either the redaction of the .africa decision or in the prior promise of confidentiality, it still looks awful to have one party in a dispute redacting the decision before publication. Such a process inevitably raises suspicions even where such suspicions are unwarranted, and so brings the IRP and ICANN into disrepute.

25. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.

~~24.~~26. Except where otherwise indicated in these Bylaws or the IRP rules and procedures, ICANN shall be obligated to fund all aspects of the Independent Review Process.

**Commented [MSAH14]:** What does this mean? Is this intended to include the legal costs the applicant incurs in preparing and arguing their case?