

## INDEPENDENT REVIEW – SAMPLE BYLAWS LANGUAGE

The language provided below is offered as an aide to understand the IRP enhancements recommended by the CCWG. This language is not offered as final language, and has not been reviewed by counsel.

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### 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. Except as part of a settlement on a particular dispute, ICANN shall have no authority to require any party to waive its rights under this Section 3.
2. Any person materially affected by a decision or action by the Board or staff, including any decision or action taken in response to the recommendation of an advisory committee or supporting organization, that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws, including conflicting and/or inconsistent results of any "expert panel," 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~~ICANN'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~~ ICANN's action. The community Sole Member may also submit a request for independent review of any decision or action by the Board/ICANN that it asserts is inconsistent with the Articles of Incorporation or Bylaws. The Sole Member may bring an action arising under any rights of members granted by these 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~~ ICANN has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The standard of review for alleged violations of the Articles or Bylaws shall be a de novo, objective and independent one examining whether the Board or staff acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws. The standard of review for other claims shall be as required by law and/or as established in accordance with Paragraph 9 below. ~~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 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. THIS and other procedural rules to be determined by sub-group and panel members.~~

6. There shall be an omnibus standing panel (the "Standing Panel") of ~~between six and nine [seven]~~<sup>1</sup> no fewer than seven (7) members with a variety of expertise, including jurisprudence, international law, ~~constitutional law~~,<sup>2</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 ~~s~~Standing ~~p~~Panel 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 ~~s~~Standing ~~p~~Panel. In the event that ~~an omnibus~~ the

~~Standing Panel: (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~~The Independent Review Panel and process 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 acting through a cross community working group ("the "IRP Provider").<sup>3</sup> 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 nominated by the ICANN Board and confirmed by the community through a process selected by the ICANN community through a process coordinated by the IRP Provider, subject to approval by ICANN, not to be unreasonably withheld. The selection of the panelists should include reasonable efforts to assemble a diverse panel, including without limitation diversity of legal tradition, geography, culture, language and gender, including reasonable efforts to select {at least one and} no more than [two]<sup>4</sup>-panelists from any ICAN region.
8. Subject to the approval of the Board, the 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.
- ~~8-9.~~ The ICANN community, acting through a Cross-Community Working Group, may from time to time create rules, procedures and programs 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 programs shall only take effect after the explicit grant ofwith the consent of the Board, such consent not to be unreasonably withheld. Once adopted, these rules, procedures and programs 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.

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<sup>3</sup> NOTE: MH suggests that community involvement may be impractical

~~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.~~ b. Request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
- ~~b.c.~~ b.c. Request assistance from skilled technical, business, diplomatic, regulatory and/or other experts;
- ~~e.d.~~ d. Declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
- ~~e.~~ e. recommend Require that the Board stay any action or decision,
- ~~d.f.~~ 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.~~ g. Consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
- ~~f.h.~~ h. Determine the timing for each proceeding.

~~12.13.~~ 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.

~~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 five (5) ~~five~~ years, which may not be renewed ~~twice~~. Panel members may be removed or recalled only for cause, e.g., corruption or misuse of the position for personal gain. The compensation of panel members, which shall be born by ICANN, shall not be reduced. ~~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.~~<sup>[1]</sup>

~~13-15.~~ 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 ~~is~~ shall be published on ICANN.org and is incorporated into this Section 3 of Article IV of the Bylaws.

~~14-16.~~ Upon the filing of a request for an independent review, the parties are urged, but are not required, 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 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.

~~15-17.~~ ~~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~~ All matters discussed during the cooperative engagement and conciliation phases are to ~~will,~~ at the request of the

complaining party, remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.

18. The IRP Panel should strive to issue its written declaration as expeditiously as possible and no later than six months after the filing of the request for independent review. In the event this is not possible, the IRP Panel shall issue a report regarding the delay, including an estimated schedule for completion. 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.
- ~~16-19.~~ The [complainant /party not prevailing] 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].
20. 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].
- ~~17-21.~~ The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN's website when they become available.
- ~~18-22.~~ 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.
23. 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.

19-24. 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, excluding the cost of complainant's counsel.