

Independent Review Panel Enhancement

Question 5: Do you agree that the proposed improvements to the IRP would enhance ICANN's accountability? Do you agree with the list of requirements for this recommendation? If not, please detail how you would recommend amending these requirements.

#	Contributor	Comment	CCWG Response/Action
1 7 4	RH	"Third party international arbitral bodies would nominate candidates". That is too vague. The proposal would have to specify some specific bodies. But I propose that this provision be deleted entirely. I doubt that any arbitral body has enough knowledge and experience to be able to propose candidates. I would propose instead that ICANN itself ask for nominations, as it did for the PIC DRP.	<p>New Idea</p> <p>Summary / Impression: Do not seek nominations from international arbitral bodies; rather ICANN to call for nominations.</p> <p>Actions suggested: See above.</p> <p>CCWG response: The CCWG appreciates this input.</p> <p>The 2nd Draft Proposal addresses this concern on page 41. 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.</p> <p>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.</p> <p>The community would nominate a slate of proposed panel members.</p> <p>Final selection is subject to ICANN Board confirmation.</p>
1 7 5	Jan Scholte (JS) comment 1	- How can the costs of non-compliance be made sufficiently high that parties will follow the rulings? For example, the Dispute Settlement Mechanism of the World Trade Organization has binding rulings, but	<p>Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Consider how to make cost of non-compliance high enough to incentivize

		<p>sometimes rich and powerful states can pay the (for them relatively modest) fine and continue with the violating behavior.</p> <p>- Is some more precise definition of 'independence' wanted? The concept is given no specification. If someone were to challenge the 'independence' of a proposed panelist on the IRP, how would the validity or otherwise of the objection be determined? Is it sufficiently specific to say the person is not ' beholden to ICANN ' (para 125); how would that beholden-ness be concretely assessed?</p>	<p>compliance</p> <ul style="list-style-type: none"> - Define "independence" more precisely to avoid unnecessary challenges <p>Actions suggested: Provide definition of "independence".</p> <p>CCWG response: The CCWG appreciates this input.</p> <p>The IRP process does not involve the imposition of fines or penalties. Rather, the 2nd Draft Proposal anticipates that decisions of the IRP will be binding to the maximum extent permitted by law, and enforceable by a court of competent jurisdiction. In addition, the Community Powers, including the power to recall the Board, provides additional support for the integrity of the process.</p> <p>The 2nd Draft Report provides that members of the Standing Panel must be independent of ICANN, including ICANN SOs and ACs. 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.</p> <p>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 (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. Provisions to permit a party to object to a member of the proposed decisional panel on the basis of prejudice could be explored in this process.</p>
1	auDA	Bolstering the process for Independent Review to hold ICANN to a	Agreement

7 6		<p>"substantive standard of behaviour rather than just an evaluation of whether or not its action was taken in good faith". That these review processes are proposed by the CCWG to be binding upon the ICANN Board, is a welcome improvement.</p>	<p>Summary / Impression: Supports general approach</p> <p>Actions suggested: None.</p> <p>CCWG response: CCWG appreciates this input</p>
1 7 7	<p>DBA</p>	<p>New and improved appeal mechanisms: An IRP Panel that is binding, affordable, more accessible, broadened in scope as well as a reformed Reconsideration Process.</p>	<p>Agreement</p> <p>Summary / Impression: Supports general approach</p> <p>Actions suggested: None.</p> <p>CCWG response: The CCWG appreciates this input.</p>
1 7 8	<p>WC comment 1</p>	<p>Reforming the way in which the Independent Appeals mechanisms function enables those affected by the Board's decisions to have the basis for such decisions to be tested in a fair and accessible process.</p>	<p>Agreement</p> <p>Summary / Impression: Supports general approach</p> <p>Actions suggested: None.</p> <p>CCWG response: The CCWG appreciates this input.</p>
1 7 9	<p>WC comment 2</p>	<p>The question of whether the community should resolve disputes over its powers by arbitration or recourse to the courts is a very interesting question in the sense that it may be that the executive of the US government in the form of Department of Commerce is handing over oversight and accountability in a proposal to the community of ICANN, but the courts - the legal or judicial accountability- still remains in terms of the courts in California and legislative accountability remains in terms of what's in the non-profit corporation legislation. So are we left with the argument that the community should not be seen to be going to the courts for enforcement, and therefore arbitration is a better solution, or is it really a way of perhaps avoiding the fact that there still is judicial accountability for ICANN even after the transition? I obviously haven't been party to all of the discussions so I'm really not fully able to assess this.</p>	<p>Summary / Impression: We are left with the argument that the community should not be seen to be going to the courts for enforcement, and therefore arbitration is a better solution, or is it really a way of perhaps avoiding the fact that there still is judicial accountability for ICANN even after the transition?</p> <p>Actions suggested: None.</p> <p>CCWG response: The CCWG appreciates this input. The 2nd Draft Proposal reflects a recognition of the need for a dispute resolution panel that understands ICANN and has the ability to create guiding precedent over time to reduce disputes.</p>

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- The Independent review process is a very important redress mechanism for the users of ICANN's services; the ICANN's existing Independent Review Process (IRP) could be having some limitations as have been identified by the panels that are currently handling different IRP's of the new gTLD process.
- The Independent Review Process (IRP) panels need to be more empowered to be able to do its duties as an independent yet judicial mechanism that can propose or produce declarations without the fear of a veto by a disagreeing ICANN Board.
- The IRP Panels ought to feel well empowered to perform it duties transparently and with the confidence that a resulting ruling will carry the day. Therefore it is important that the rulings from the IRP are binding rather than merely advisory.
- On accessibility, applicants have shied away from accessing these services due to the expensive nature of the IRP. Thus the IRP should be made more be accessible, both financially and from a standing perspective, transparent, efficient. Therefore the burden of the legal fees would be on ICANN
- Results from the IRP should not make ICANN to immunize or insulate itself more to 'WIN' in future rather it should take into account the recommendations of the IRP panels and be used to enrich the operation of ICANN in the foreseeable future.
- The time limits set for filing IRPs should be extended to at least 9 months from the date of the decision that is being challenged, having taken into account the additional (elapsed) time expended on Reconsideration and Cooperative Engagement Processes (CEP). The point is that delays in preliminary/exploratory processes might affect a final decision to institute an IRP, if the preliminary processes prove unsatisfactory, and time limitation should not stop an aggrieved party from seeking accountability through the IRP procedure.
- Since the purpose of an IRP is to contest ICANN board or staff actions against policy, an IRP should focus really on accountability and should not be dismissed on a flimsy technicality. An adjudicating IRP Panel should allow a plaintiff to re-file or amend an IRP filing if it is deemed to have been filed incorrectly.
- An IRP Panel should be able to determine financial claims and

Agreement – New Idea

Summary / Impression:

- Supports general approach
- IRP needs to be more empowered
- IRP needs to be more accessible
- IRP decisions should have precedential value
- Time limits should be relaxed
- Permit re-filing and/or amending
- Permit complaining party to go to court as well as IRP
- Panelists should have necessary expertise
- Each IRP panel should be constituted "afresh"

Actions suggested:

Consider proposed amendments.

CCWG response: The CCWG appreciates this input and considered these suggestions. For example, although the 2nd Draft Report does not extend the filing deadline to 9 months, the proposal would require filing from the time an affected party becomes aware of the alleged violation and how it allegedly affects them. 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 (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.

		<p>damages and make such awards accordingly.</p> <ul style="list-style-type: none"> - A party that institutes an IRP against ICANN should also be allowed to exercise the option of seeking redress and relief in a regular court of Law within the judicial system if the IRP is seen as restricted. The overall aim is to seek justice for any wrongful action. - Composition of Panel; Expertise: Most of ICANN's activities are rendered by volunteers, however there is need for significant training for anybody deemed fit to offer a consultancy or legal expertise, particularly international arbitration expertise and expertise, developed over time, about the DNS and ICANN's policies, practices, and procedures. - Anyone who renders advisory services to ICANN that shall be admitted as evidence or expert must be able to understand the operations of the DNS to be able to provide relevant and actionable advice. - A Standing IRP Panel should not be normative. Each IRP Panel should be constituted afresh for any IRP to ensure that the neutrals are not influenced to take the details and procedures of a particular IRP proceeding and use that in trying to decide a different IRP Process. 	
1 8 1	AFRALO	<p>AFRALO members appreciate the reinforcement of the Independent review Process.</p>	<p>Agreement</p> <p>Summary / Impression: Supports general approach</p> <p>Actions suggested: None.</p> <p>CCWG response: The CCWG appreciates this input.</p>
1 8 2	Afnic	<ul style="list-style-type: none"> - Afnic is of the opinion that the IRP is an answer long awaited by the community, to have an independent, affordable and binding decision making body that allows affected parties to challenge ICANN's decisions. - Afnic is also convinced that the existence of such an IRP has to be included in the fundamental bylaws, along with the obligation for ICANN to fund adequately this process. - However, in the spirit of enhancing the Community powers, and of 	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - IRP should be independent, binding, affordable, and accessible to affected parties - IRP should be a Fundamental Bylaw - Diversity requirements should be strengthened

		<p>recognizing the international nature of this IRP, Afnic suggests the following amendments: 11: The geographical diversity shouldn't be achieved only by "reasonable efforts". Here like in other parts of the proposal (see below) Afnic recommends to strengthen this diversity, by including the following provision: no more than 2 members of the panel from the same region (5 regions); 14. a.: Prior to the submission by "third party international bodies" it should be stated the ICANN has to launch an international public tender; 14. b: Ican Board should send to the "community mechanism" not only the list of candidates it has selected, but the full list of eligible candidates, in which it should isolate the candidates proposed by the board; 19: as for pro bono representation, the complainants should ask for it from the start directly to the panel. The panel (and not ICANN) would allow the complainant to have free access, after examining the non-frivolous nature of its complaint, and the impossibility to afford the expense of the IRP. There's no reason why only community and non for profit complainants should access this pro bono representation, as some SME's (small or medium size enterprise) or individuals can be affected by decisions ICANN makes. In order to avoid the multiplication of complaints by individuals, collective complaints should also be considered as eligible.</p>	<ul style="list-style-type: none"> - Provide for pro bono representation for all - Consolidate multiple complaints <p>Actions suggested: Include it as a Fundamental Bylaw and consider proposed amendments.</p> <p>CCWG response: The CCWG appreciates this input. The 2nd Draft Report implements the goal of capping the number of members of the panel from the same region, and significantly modifies the selection process to reflect these suggestions. It provides for the consolidation of similar complaints, in a manner to be determined as part of Work Stream 2.</p>
<p>1 8 3</p>	<p>DP-DK</p>	<ul style="list-style-type: none"> - We enthusiastically support the CCWG Draft Proposal's efforts to overhaul and reform ICANN's existing Independent Review Process (IRP). Independent review is the final piece of the constitutional puzzle – a third "branch," independent of the other two (<i>i.e.</i>, both the Board <i>and</i> the community/members), with neither a policy-making nor a policy-implementation role, which can serve as a neutral arbiter in disputes regarding the exercise of those powers by the other components of the institution. We agree that the IRP should possess the main structural features set forth in the CCWG Draft Proposal. - We have alternative proposals that can strengthen the Independent Review Process by defining its core mission more precisely, consolidating references to the IRP's powers in one place in the Bylaws, giving the Board an "override" or "veto" power, exercisable only upon supermajority or unanimous vote, over IRP decisions, and adding several features that will help the IRP develop the institutional weight 	<p>Agreement – New Idea</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - Define IRP core mission more precisely; Board to have "override" or "veto" only upon supermajority or unanimous vote - Substantive standard to determine whether ICANN is complying with Bylaws, most importantly Mission; should not become a catch-all institution - Specific additional/refined language proposed - SEE DETAILED PROPOSALS AND SUGGESTIONS <p>Actions suggested: Consider proposed amendments.</p>

	<p>and institutional power it will need to perform its critical task adequately.</p> <p>- The Substantive Standard of IRP Review. Like the Board of Directors, the IRP will function most effectively if its powers are confined narrowly to its core mission, which in the IRP’s case is <i>to determine whether ICANN is complying with the provisions of the Bylaws</i> – including, importantly, the provisions regarding ICANN’s Mission and powers. The IRP should <i>not</i> become a general-purpose catch-all institution to which anyone who might claim that ICANN has acted badly towards them, or has harmed them in some way, has recourse. Defining the IRP’s mandate too broadly will embroil the institution in any number of ordinary commercial disputes, distracting and deflecting it from its core mission. ICANN, of course, is and will continue to be enmeshed in a complex web of contracts between and among registries, registrars, and registrants, and the disputes that inevitably arise concerning performance under those contracts are already subject to commercial arbitration (see, e.g., § 5.2 of the Base Registry Agreement); we have no reason to believe that that system has been inadequate for that task, or that the IRP is meant to supplant or augment it. The IRP’s powers need to be carefully delineated so that it excludes this class of disputes from the scope of its jurisdiction.</p> <p>- the power that the IRP <i>does</i> require to achieve its narrow but critical mission – the power to overturn and invalidate Board action that is inconsistent with the Bylaws – is itself subject to abuse, and the IRP’s exercise of <i>its</i> powers, like the corresponding powers of the Board, needs to be kept within narrow constraints. As is the case with the Board’s powers, a careful and precise enumeration of the IRP’s power will help to achieve that goal.</p> <p>- We believe the language in the CCWG Draft Proposal can be tightened up considerably in this regard. At various points in the draft, the IRP’s duties are deemed to include resolving the question of “whether ICANN is staying within its limited technical Mission”; whether it is “abiding by policies adopted by the multistakeholder community”; whether “in carrying out its Mission and applying consensus policies it is acting in accordance with ICANN’s Articles of Incorporation and/or Bylaws, including commitments spelled out in the</p>	<p>CCWG response: The CCWG appreciates this input.</p> <p>The 2nd Draft Report incorporates a number of these suggestions. For example, it clarifies the IRP’s mandate to limit it to violations of ICANN’s Bylaws and/or Articles of incorporation. It also provides that decisions should be binding “to the maximum extent permitted by law,” and includes measures to distinguish this process from standard commercial arbitration as suggested. With regard to the latter suggestion, the 2nd Draft Proposal recognizes that 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 (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.</p> <p>Although the 2nd Draft Proposal does not incorporate the recommendation that all decisions be made by the full Standing Panel, it does provide for institutional weight, memory, and power through the ability to appeal the conclusion of a 3 member decisional panel to the full Standing Panel.</p>
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	<p>proposed Statement of Mission, Commitments & Core Values, or ICANN policies”; whether “in carrying out that Mission, [it] acts in a manner that respects community-agreed fundamental rights, freedoms, and values”; whether its actions “violate community-approved standards of behavior, including violations of established ICANN policies”; and whether it has complied with “policies established to hold ICANN accountable to legal requirements applicable to non-profit corporate and charitable organizations.” We believe these formulations are much broader than necessary for the IRP to serve its “constitutional” function. We would propose consolidating references to the IRP’s powers in one place in the Bylaws, and stating them more directly:</p> <p>The Independent Review Panel shall have the power to determine whether ICANN has acted (or has failed to act) in violation of these Bylaws. Any person materially harmed by action or inaction by ICANN in violation of these Bylaws may file a claim with the IRP to remedy that violation.</p> <p>- Binding decision. The CCWG Draft Proposal states that “the intent is that IRP decisions should be binding on ICANN.” The draft is not entirely clear, however, as to how that will be accomplished, and there appears to be some confusion about how that principle will be implemented in the Bylaws and how it will operate in practice. In particular, there appears to be an open question as to whether, or the extent to which, California law permits the Board to agree, in advance and via a specific provision in the Bylaws, to comply with the decisions of an Independent Review Panel. The Proposal notes that that “the IRP could not address matters that are <i>so material to the Board that it would undermine its statutory obligations and fiduciary roles to allow the IRP to bind the Board,</i>”¹ without any indication of the matters that might fall into that category (and therefore outside of IRP review/control). The legal memorandum attached to the CCWG Draft Proposal has a discussion of this question, though it does not provide much clarity on this question.</p> <p>- Here as well there is no explanation of what powers are part of the</p>	
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	<p>Board's "core powers" that would not be subject to independent review. It is, potentially, a very troubling restriction on the IRP's ability to carry out its mission, which is to help ensure that the Board does not exercise <i>any</i> of its powers beyond the confines set forth in the Bylaws. An IRP that cannot examine the exercise of the Board's "core powers" might – depending on the definition of "core powers" – be an ineffective and toothless check on improper Board action. It is very difficult, without a better understanding of this constraint, to evaluate the likely effectiveness of the IRP as an accountability mechanism, and we strongly urge the CCWG to obtain additional clarification from counsel on this question.</p> <p>We also would propose the following, as a possible means of implementing the principle that IRP decisions bind the corporation without running afoul of the requirement that "all corporate powers shall be exercised by or under the direction of the Board": In addition to an explicit requirement that that the Board shall comply with IRP decisions, giving the Board the power to refuse to comply – an "override," or "veto," power – exercisable <i>only</i> upon supermajority (or even unanimous) action by the Board. This has a number of features to recommend it. It could serve as a useful check on the IRP's powers and the possibility of "rogue decision-making" by the IRP; the combination of a high voting threshold (which could be as high as 100%) and the representation of the various ICANN communities on the Board will help ensure that resisting an IRP directive in any particular matter has broad community support; and it would appear to comply with the requirement that the Board retains direction and control over corporate action, insofar as it retains the ability to "decide for itself" whether or not to comply with IRP directives (though the non-compliance option is one that can only be exercised by a extraordinary Board action).</p> <p>- Independence, Transparency, and Precedent. We are concerned that in a number of crucial features, the IRP, as described in the CCWG Draft Proposal, appears to be modeled along the lines of ordinary commercial arbitration. The IRP's mission is far removed from ordinary commercial arbitration, and will require a different structure, modeled more closely on the constitutional courts common in civil law countries – institutions whose task, like the IRP's, is to determine whether the</p>	
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	<p>terms and limitations set forth in the relevant foundational documents have been complied with - than on commercial arbitration systems. This is a task that ordinary commercial arbitrators are never called upon to undertake.</p> <ul style="list-style-type: none">- There are many reasons why ICANN's existing IRP process – which has been a feature of ICANN's structure since its inception – has failed, in the eyes of virtually all observers, to serve as an effective check on ICANN's powers. The Bylaw modification, adopted in 2012, authorizing the IRP to evaluate only whether a narrow class of Board <i>procedural</i> misconduct had occurred – “did the Board act without conflict of interest in taking its decision? did the Board exercise due diligence and care? did the Board members exercise independent judgment in taking the decision?” – rather than applying a <i>substantive</i> standard (did the Board act in compliance with all provisions of the Bylaws, including the substantive restrictions on its power?) certainly played a very significant part.- But we would suggest that an additional cause of the failure of the process is that it, too, has been modeled far too closely on ordinary commercial arbitration. The IRP process is, in its current configuration, outsourced to a third party “international dispute resolution provider” chosen by the ICANN Board – currently, the International Center for the Settlement of Investment Disputes (ICSID)), an institution with long-standing experience in providing arbitration and mediation services for complex international commercial disputes. The outside provider has the responsibility for choosing the members of the IRP “standing panel”, designating a “Chair” of the Standing Panel, determining the size (1-person or 3-person) of the IRP panel that will hear any individual dispute, and assigning individual members of the standing panel serve as panelists. <p>This is a familiar arbitration mechanism that functions quite effectively for ordinary commercial disputes. But it is ill-designed for the fundamental purpose the IRP is meant to serve. It is not reasonable to give a single arbitrator, chosen by a third-party provider, who may have little or no prior contact with or understanding of the complex world of DNS policy-making, who may never again be called upon to examine any aspect of ICANN's operations or to consider its role in the</p>	
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	<p>management of DNS resources, who has no body of prior precedential decisions to use as a guide to decision-making and little or no incentive to add to the stock of well-reasoned and persuasive decisions, the power to decide (with no appeal of the decision permitted) that Board action contravened fundamental principles embodied in the corporation's foundational documents and was therefore invalid. The Board's reluctance, over the years, to allow <i>this</i> process to exercise <i>that</i> power is, in a sense, entirely understandable.</p> <p>- Unlike an ordinary "standing panel" of available arbitrators, the IRP "Standing Panel" needs to be an independent <i>institution</i>, with institutional weight, institutional memory, and institutional power, if it is to perform its central task with the requisite degree of seriousness and gravity that is required.</p> <p>While we believe that much of the CCWG's Draft Proposal is consistent with this notion, we do not believe that the proposal goes far enough in this direction. We would propose, to begin with, that the CCWG reconsider its decision to have members of the IRP "Standing Panel" nominated by "international arbitral bodies." We do not believe those institutions, as skilled as they may be in handling commercial disputes, are appropriately tasked with finding persons with the combination of "legal expertise and a strong understanding of the DNS" that will make them successful IRP members. Appointment by the Board of Directors subject to supermajority Community confirmation should be sufficient for that task.</p> <p>- More importantly, we suggest that the IRP should not be structured as a "standing panel" comprising a number of arbitrators who are available for service on individual 1- or 3-person panels for the purpose of resolving individual disputes before being returned to the available "pool." The IRP should hear and decide cases <i>as an institution</i>, with all members participating in all cases. The institution, speaking as an institution with a single institutional voice, needs to develop and stand behind its decisions, which will make them harder to ignore. It will also make the development of a true precedential system far more likely. By placing the weight of the entire institution, and not merely the views of a small subset of members of a largely anonymous pool of available arbitrators, behind the decisions it makes, it makes it</p>	
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		<p>more likely that prior decisions will be respected and that decisions that will serve as prior precedent in the future are explained and justified in a reasonable manner, as required for a precedential system to function effectively.</p>	
<p>1 8 4</p>	<p>IA</p>	<ul style="list-style-type: none"> - Improvements to the Independent Review Panel will be among the most important tools to enhance ICANN’s accountability - IA generally agrees with the proposed requirements. - IA agrees that the scope of the IRP should include actions or inactions possibly 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. - IA supports the independence of IRP Panelists from the ICANN board, staff, SOs, and ACs. - IA has a concern that the IRP process would allow parties to bring new arguments to the IRP without first vetting them through the community’s policy development channels. That the process does not create the right incentives: it invites parties to stand on the sidelines during the policy development process and bring their concerns to the IRP after policy development has concluded. - IA suggests that the CCWG carefully consider whether additional safeguards—such as requiring parties or their trade associations to participate in a public comment process for instances in which there is a challenge to an existing community-developed policy or where ICANN has sought public comment on implementation of an existing policy—could prevent these eventualities while still preserving an accessible IRP process. The requirement to comment publicly would not apply to instances where ICANN simply contravenes existing policy or pursues implementation without seeking public comment. - Under a strengthened IRP process, the Internet Association agrees that parties should be able to seek review of both substance and procedure. However, ICANN’s decision-making should be accorded deference, and overturned only if a decision is arbitrary or not based on a reasonable interpretation of the relevant documents and factors. Under this standard, ICANN’s failure to follow its own processes would be both arbitrary and unreasonable. - IA believes that further consideration and clarification is needed 	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - Issues for review should be raised in policy development process – not raised after the fact - Substantive and procedural review should be permitted – but ICANN should be afforded deference - Clarification is needed regarding when decisions are and are not binding. - Support for precedential decision-making with some limitation. Application in only closely analogous cases, otherwise just “guideposts” - Provision for review of clearly erroneous decisions <p>Actions suggested: Consider additional safeguards. Clarify what decisions are binding and upon whom.</p> <p>CCWG response: The CCWG appreciates this input. The 2nd Draft Proposal seeks to clarify that the IRP decisions are to be binding “to the maximum extent permitted by law.” On the other hand, the 2nd Draft Proposal provides that 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</p>

		<p>regarding what decisions are binding and whom they are binding upon. We suggest that disputes within ICANN should be made binding and thus enforceable in courts of law. Outside parties that are involved in a dispute with ICANN should be able to seek legal recourse outside of ICANN.</p> <p>- IA supports having IRP panels making precedential decisions with some restrictions. Future panels should be permitted to apply precedent, but only in closely analogous cases. Otherwise, prior decisions should serve only as guideposts. Consider a fallback mechanism in situations where the panel finds that a prior panel decision appears to be clearly incorrect based on new circumstances or evidence or was wrongly decided.</p>	<p>case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts. We propose that IRP panelists may rely on prior decisions in rendering their decisions. However, we have provided a mechanism for appealing the decisions of a 3 member decisional panel to the full Standing Panel in order to minimize the risk of clearly erroneous decisions. The proposal permits panelists to consider prior decisions to the extent that they address similar factual situations. Clearly erroneous decisions may be appealed to the full Standing Panel.</p> <p>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 (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.</p>
<p>1 8 5</p>	<p>eco</p>	<p>- The proposed improvements to the IRP and reconsideration process would definitely enhance ICANN's accountability.</p> <p>- However, the CCWG does not seem to have reached out to experts on the subject matter. Suggest reach out to experts in the field and rely on their suggestions when it comes to details of the revised IRP.</p> <p>- As long as the basic principles, such as accessibility, independence, binding nature of decisions and decisions on the merits of the case (and not only on process) are preserved, internationally recognized standards or best practice could and should be followed when it comes to fleshing out the details.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - Consult with subject matter experts - Internationally recognized standards or best practice could and should be followed <p>Actions suggested: Reach out to experts on the matter.</p> <p>CCWG response: The CCWG appreciates this input. 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 (assisted by counsel, <i>appropriate experts</i>, and the Standing</p>

			Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.
1 8 6	Govt-FR	<p>Just as many other stakeholders, the French government have been a long-time advocate of more effective and affordable means of appeal and redress at ICANN, with adequate guarantees of independence. We consider that the proposed overhauling of the IRP in part 4 of the CCWG initial draft proposal definitively addresses such concerns. Our responsibility as government is nevertheless to stress that the new IRP has to remain an internal mechanism within ICANN and we would particularly insist on: 1. Avoiding the creation of a legal arbitration court on the basis of the CCWG- accountability initial draft proposals for the new IRP. On that basis, stakeholders would hardly be supplied with: either the guarantees of independence that, on the one hand, international arbitration usually does provide; or the guarantees of affordability that, on the other hand, international arbitration usually does not provide. In addition, stakeholders would also risk being prevented from going to other courts to have their complaints examined once they submitted them to the new IRP; 2. Having the ICANN community itself, through the "SO/AC Membership Model", select the IRP panellists, and not only confirm the selection of the IRP panellists by the Board, for better guarantees of independence; 3. Also giving the ICANN community only, through the "SO/AC Membership Model" (and with a very high degree of support e.g. 3/4), the power of remove an IRP panellist, for even better guarantees of independence.</p> <ul style="list-style-type: none"> - One of the innovations that we deem most important is that the new IRP will no longer be limited in its capacity to judge of the merits of a complaint by an aggrieved party. This will greatly expand the standard of review of the current IRP - Govt-FR support the expansion of the standard of review for the IRP. - Govt-FR approve that the new IRP's ability to judge on the merits just came from the expansion of its standard of review to ICANN policies. - However, the issue of enforcement of the new IRP's decisions remains, however, unclear. It seems that the maximum expansion of the standard of review for the new IRP is intended to remain within ICANN's limited competencies. We therefore understand why the power to enforce or bind the Board with the new IRP's decisions would 	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - Should remain "internal mechanism within ICANN" - Trade-offs with respect to affordability and independence - Community to select panelists - Community power to remove panelists - Supports expanded scope of review - Enforcement issues are unclear – why would language in current bylaws regarding court enforcement remain? Isn't ability to recall Board sufficient for enforcement? - New IRP should judge on the merits of future complaints but we cannot legally have only the new IRP do that in the future. This is the "fork in the road" clause permitted by law on international arbitration, which stipulates that an aggrieved party must have the opportunity to choose to go before other competent courts in order to have their complaints examined, before losing that opportunity by agreeing to go to arbitration. - There is no legal certainty of enforcement. - Gaps between common legal practices with regard to choosing international arbitrators and the new IRP. - Affordability of the new IRP should certainly not come at the expense of the independence of the panelists. - Are all stakeholders, including governments, expected to legally recognize the IRP as an international court of arbitration whenever they want

	<p>be sought within the ICANN community. We are unclear, however, why it would also be sought outside of ICANN (Draft prop., section 4.1, §133, item 18.c: "in the court of the US and other countries that accept international arbitration results").</p> <p>- Recognizing the IRP as an international court of arbitration would be a major issue because arbitration is strictly regulated by law. In France as in many other countries, two parties can agree on arbitration only after one party feels that the other party fails to respect the terms of an existing contract. Furthermore, the two parties have to waive their right to go before courts of other jurisdictions. For those stakeholders who do not currently have a contract with ICANN, such as governments, there might be room for an agreement with ICANN on arbitration by the new IRP on the basis of other existing documents (Bylaws etc), so it might be possible for us to consent to arbitration by the new IRP on the decision-making procedures followed by the Board, simply because such procedures already exist and are well-documented. However, as a party that might be aggrieved by future ICANN policies, we would have a legal problem consenting to arbitration by the new IRP on the merits of a complaint. As a matter of fact, law would not allow us to already consent to arbitration with ICANN, and waive our right to go before other courts than the new IRP, on the basis of non-existing, or yet-to-be documented policies. We want the new IRP to judge on the merits of future complaints but we cannot legally have only the new IRP do that in the future. This is the "fork in the road" clause permitted by law on international arbitration, which stipulates that an aggrieved party must have the opportunity to choose to go before other competent courts in order to have their complaints examined, before losing that opportunity by agreeing to go to arbitration. In the case of the new IRP, this clause would give way to the possibility, for those stakeholders who could feel aggrieved by ICANN policies in the future, to go before other competent courts in order to have the merits of their complaints examined. It would also imply that ICANN should be ready to recognize the competency of alternative courts for merits of complaints by stakeholders aggrieved by its future policies.</p> <p>This legal entanglement makes the solution to stress test #12 (forcing</p>	<p>to file a complaint? If so, does ICANN understand that it has to acknowledge the competency of alternative courts for merits of complaints by stakeholders aggrieved by its future policies?</p> <p>- Would it not be sufficient that the power to enforce the new IRP's decisions would lie only within ICANN community's power to recall the entire Board, and not "in the court of the US and other countries that accept international arbitration results"? In other words, that the new IRP remains an internal mechanism within ICANN and does not become a legal arbitration court?</p> <p>Actions suggested: Clarify enforcement of IRP decisions and concept of standing panel. Elaborate on independence of panel.</p> <p>CCWG response: The CCWG appreciates this input. In particular, the 2nd Draft Proposal clarifies that the role of the IRP will be to determine whether or not an action or inaction violates ICANN's Bylaws/Articles. Although certain actions of the Single Member will be required to use the IRP, in general, ICANN does not have the ability to limit the authority of the courts in jurisdictions where ICANN does business. Accordingly, outside of this context, ICANN cannot prevent individuals or entities (including governments) with standing to seek the assistance of a court of competent jurisdiction.</p> <p>As the government of France suggests, the 2nd Draft Report provides that the community will select IRP panelists, subject to Board confirmation.</p> <p>The 2nd Draft Proposal provides that IRP decisions will be binding "to the extent permitted by law." Complainants would have the right to seek the</p>
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	<p>resignation of ICANN Board member(s) if they were to ignore binding IRP decisions) all the more important to us. The “fork in the road” clause has consequences in terms of enforcement of decisions taken on the merits of complaints with respect to future ICANN policies. Its very existence implies that stakeholders cannot be provided with legal certainty of enforcement of such decisions through the new IRP alone. Legal certainty of enforcement would come only with additional guarantees for decisions by other competent courts. In other words, since ICANN is based in the US, the US authorities themselves should give stakeholders guarantees on the exequatur for decisions taken by alternative courts regarding future ICANN policies. Should legal certainty of enforcement not be obtained through the new IRP alone, we would recommend stakeholders to content themselves with practical certainty of enforcement of decisions taken on the merits of future complaints. This seems achievable indeed, if (and almost only if) the Board were automatically spilled after ignoring a binding decision of the new IRP. An interim Board would have to be chosen and charged with enforcing the IRP decision which was ignored by the former Board. We finally feel compelled to point out gaps between common legal practices with regard to choosing international arbitrators and the new IRP.</p> <p>- It should be pointed out that it is not common legal practice to decide what party should support the costs of international arbitration, which are usually rather high, before it even takes place. Although we understand that ICANN’s financial support would provide stakeholders with more affordable appeal mechanisms, the affordability of the new IRP should certainly not come at the expense of the independence of the panellists.</p> <p>The idea of a standing panel for the new IRP therefore needs to be clarified (Draft prop., section 4.1, §133, item 17). In the case of a 3-member panel, it is indeed common practice that each party, the defending party and the aggrieved party, freely chooses an arbitrator and that the two selected arbitrators choose the third, which gives both parties adequate guarantees of independence of the arbitrators. Yet in the case of the new IRP, ICANN and the party aggrieved by a decision of its Board would have to draw the panellists from a standing panel of</p>	<p>assistance of a court of competent jurisdiction to enforce – but not to second guess – binding IRP decisions.</p> <p>The 2nd Draft Report continues to provide that ICANN would support the costs associated with the operation of the Standing Panel. It provides, however, that filing fees may be imposed to limit abuse of the process. As the government of France points out, however, financial support intended to make the IRP more accessible should not come at the expense of panelist independence. As suggested, the 2nd Draft Proposal provides that each party in an IRP would choose one panelist (from among the members of the standing panel), who would then select the third panelist.</p> <p>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.</p> <p>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 (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.</p>
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<p>1 8 7</p>	<p>Govt-ES</p>	<p>We applaud the enhancements put forward for the refurbished IRP (and RR), which will contribute to improve the community's power to appeal ICANN's decisions.</p> <ul style="list-style-type: none"> - Standing: The fact that only already "materially affected" parties have 	<p>Agreement – Concerns Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - Must protect "prospectively affected" party that demonstrates likelihood of harm done to

	<p>a standing in the IRP could prevent stakeholders from using the IRP (or the RR) in case that damage or harm has not been produced yet (i.e.: approval of new gTLDs in highly regulated sectors without adequate safeguards). This loophole should be filled. Govt-ES suggest to expand the scope of legitimacy to file an IRP to a “prospectively affected” party which demonstrates that severe harm will likely be done to the interests it defends, although this damage is not suffered yet. The government as such is not materially harmed and will never be, but they have a duty to preserve the applicability of their national laws and should have the chance of doing so through ICANN accountability mechanisms.</p> <ul style="list-style-type: none"> - Panel composition: Although the rule should be to appoint panelists from the standing panel, there may be situations where the complexity, local impact of the decision or specialized nature of the conflict require more than technical advisory and would warrant the appointment of a panelist that does not belong to the standing panel. The procedure should provide for this appointment to be made as an exception to the rule. - Language and diversity: The selection of English as primary working language (page 33) may hamper the implementation of the diversity principle that drives the IRP. More flexibility should be allowed in the selection of the language to be used. Rules of procedure for organizations like WIPO (http://www.wipo.int/amc/en/arbitration/rules/newrules.html) or the International Chamber of Commerce (http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/), that allow the parties to choose the working language, could be taken into account in this regard. In addition, the selection of panellists coming from the affected area and with a better understanding of the issue should be foreseen. - Selection of panelists: The appointment process outlined in the CCWG proposal, in which the ICANN Board would select panellists for the standing panel, subject to community confirmation, affords little community involvement and control over this process. We suggest the Board open a public consultation before selecting the panellists and take into account views expressed. Alternatively, the community group 	<p>interest it defends</p> <ul style="list-style-type: none"> - Language and diversity issues are key. Consider allowing parties to choose the working language; ensure panelists from affected areas - Board should open public consultation before selecting panelists to be confirmed by community or vice versa. - 2 month deadline for lodging challenges of ICANN action; no filing deadline for inaction <p>Actions suggested: Consider proposed process enhancements.</p> <p>CCWG response: The CCWG appreciates these comments, and notes that the 2nd Draft Proposal incorporates a number of the suggested improvements.</p> <p>For example, Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff action where a complainant can demonstrate:</p> <ul style="list-style-type: none"> *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; *Either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits; and *A balance of hardships tipping decidedly toward the party seeking the relief. <p>Under the 2nd Draft Proposal, 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. ICANN will then issue a call for expressions of interest from potential panelists; work with the community and Board to identify</p>
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		<p>could make the selection to be confirmed later on by the Board.</p> <ul style="list-style-type: none"> - Timeline: A deadline for lodging challenges should be set in the rules of procedure. In the current IRP, it is 1 month. We propose that it is fixed at a minimum of 2 months in general, and no deadline in cases of inaction of the Board. The same periods could be set as well for the Reconsideration Request process. 	<p>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. The community would nominate a slate of proposed panel members. Final selection is subject to ICANN Board confirmation.</p> <p>The 2nd Draft Proposal also provides that the deadline for filing will run for a fixed period (to be determined) running from the time the affected party becomes aware of the violation.</p>
<p>1 8 8</p>	<p>RySG</p>	<ul style="list-style-type: none"> - Provide further clarify about how panel determinations would be implemented, The Draft proposal states that “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.” We believe that it would be useful to further explain how this would work in practice. - Review and refine standing requirements to address the possibility of frivolous complaints. The requirements for standing establish that the IRP may be used by “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.” While we agree that the IRP should be more accessible, we have concerns that these requirements could make the IRP vulnerable to frivolous requests that could be time consuming and costly. As an alternative, we recommend that the IRP could be made available to parties directly affected by a decision. For parties that are not directly affected parties the Supporting Organizations and Advisory Committees could be the parties given standing to file; this would in effect allow these community groups to provide a screening function in determining whether complaints met the materiality threshold. - Provide further detail about the fee structure for using the IRP_ Define whether restrictions on post-term appointments are term-limited_ We support the introduction of term limits and limitations on post-term 	<p>Agreement – New Idea</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - Clarification needed regarding determinations; binding; implementation - Mechanisms to prevent abusive resort to IRP are needed; particularly standing to bring community challenge. This is an important area for accountability but is also subject to abuse so care is needed. - Details on fee structure - Term limits and limits on post term appointments are critical <p>Actions suggested: Clarify determinations. Provide detail about cost structure.</p> <p>CCWG response: The CCWG appreciates this input.</p> <p>The 2nd Draft Proposal addresses many of these issues. It clarifies, for example, that decisions will be binding “to the maximum extent provided by law.” It also provides for a single, non-renewable five year term, and indicated that post term limits on engagement with ICANN will be established.</p>

		<p>appointments. We ask that the CCWG-Further clarify the restrictions on post-term appointments</p> <ul style="list-style-type: none"> - RySG strongly supports a binding IRP and a membership structure to ensure the enforceability of any decisions. - The community must have standing to ensure the ICANN Board abides by and implements any binding IRP decision. A standing panel of experts will help. - Enabling a supermajority of ICANN members to file an IRP without burdensome fees will add an important and effective mechanism for community empowerment - RySG supports further community work on examining the issue of a super-majority of the membership being able to veto certain key Board decisions, so the community could avoid being forced to engage in a lengthy IRP process. 	<p>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 (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.</p>
<p>1 8 9</p>	<p>CCG</p>	<ul style="list-style-type: none"> - The proposal suggests IRP panelists will be compensated by ICANN. This could affect the independence of the arbitrator. Even though the proposal maintains the panelist will be independent of ICANN, its SOs and ACs, he/she would draw remuneration from ICANN. To cite a widely followed practice, this could be an instance under the "Non-waivable Red list" in IBA Guidelines on Conflicts of Interests in International Arbitration. - Geographical diversity will purportedly be taken into consideration while forming the panel for IRP. Given that the panel would consist of only 7 members, more details on how such diversity would be accommodated will be welcome. - Initiation of an IRP: Matters specifically reserved to any "Members" of ICANN in the Articles or Bylaws would be excluded from 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." ☐The last two sentences need further clarification. Will Stress Tests be required to understand the consequences of the last two instances in this paragraph? - IRP can be initiated also cover actions of ICANN board/staff that are against ICANN policies. ICANN policies have been defined as "legal requirements applicable to non-profit corporate and charitable 	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - If ICANN pays, panelists will not be sufficiently independent (See IBA guidelines on "Non-waivable Red List" conflicts of interest) - Geo diversity must be considered - Standing issues require clarification; including interplay with statutory rights of members - Exhaustion of remedies and mediation? What is required. <p>Actions suggested: Provide detail on how diversity will be accommodated. Clarify role of Courts.</p> <p>CCWG response: The CCWG appreciates this input.</p> <p>The CCWG agrees that independence is of paramount importance. At the same time, one of the major complaints about the current IRP is that it is very costly and therefore inaccessible. To balance this, the 2nd Draft Proposal provides that Members should be compensated at a rate that</p>

		<p>organizations". Therefore ICANN policies would include only local California laws. Can an IRP be initiated when an action of ICANN does not adhere to any international convention that the complainant is a party to?</p> <p>- The proposal requires that parties amicably try to resolve the dispute before arbitration is commenced. There is no clarity on the role of courts which have jurisdiction with respect to applicable California law. Will these avenues have to be exhausted first? If an IRP is initiated, does that prevent parties from approaching the courts? The only mention of courts in the proposal has been made with respect to enforcement of the IRP awards.</p>	<p>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. These are standard provisions used to ensure an independent judiciary.</p> <p>The 2nd Draft Proposal provides that the IRP has the authority to determine (a) whether an action/inaction violates ICANN's Bylaws and Articles and (b) to address issues within the rights of the Single Member. Decisions are intended to be binding to the maximum extent permitted by law. We have modified the Constructive Engagement Process to permit any party to invoke formal mediation, or to terminate informal resolution efforts if it concludes in good faith that further efforts are likely to produce agreement.</p>
<p>1 9 o</p>	<p>JH</p>	<p>- According to the existing design, IRP Panel is the judge to determine. The independence of IRP is very important. IRP Panel should not belong to ICANN Board, and should not only report to the ICANN Board (I think there is a translation problem in Chinese version. According to the current Chinese translation, IRP Panel only reports to ICANN Board. I see English is different) and should be binding upon the ICANN Board. To emphasize again, the mechanism should ensure that IRP must make independent and impartial decisions. Moreover, the Panel should make clear decision, including pointing out who is wrong, as well as the reasons. In addition, it is necessary to have re-appeal procedure.</p> <p>- Even if the IRP determined that ICANN is wrong, how to deal with the wrong decision? The existing proposal did not clarify this part. There are two options to solve this problem: First option is to develop a set of punishment measures and be written into Bylaws by the communities. Second, do not develop a set of punishment measures. ICANN Bylaws only includes the ground of the two extreme cases. For specific cases,</p>	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Independence of panelists is critical (translation issue?) - Mechanism for reviewing clearly erroneous decisions <p>Actions suggested: Clarify how to deal with wrong decisions.</p> <p>CCWG response: The CCWG appreciates this input and agrees that independence is critical, and has proposed a number of measures to ensure that members of the Standing Panel are sufficiently independent. 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</p>

		<p>communities propose specific solutions and then vote.</p>	<p>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. It also provides that decisions of a 3 member panel may be appealed to the full Standing Panel sitting <i>en banc</i>. The panel will determine whether an action or inaction of the Board or Staff violates ICANN's Bylaws or Articles of Incorporation, and to require ICANN to address any violation, but is not empowered to tell ICANN <i>how</i> to address a particular violation.</p>
<p>1 9 1</p>	<p>BC</p>	<ul style="list-style-type: none"> - In general, BC supports the proposed improvements to the IRP. A standing committee of independent compensated experts with ICANN experience will lead to better decisions. - BC agrees that redress should be available when a particular action or inaction "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 Statement of Mission, Commitments, and Core Values or ICANN policies." However, we believe that ICANN's decision-making should be reviewed under an abuse-of-discretion, rather than a de novo standard: The panel should ask whether a decision was based on a consideration of the relevant factors and whether ICANN committed a clear error of judgment. Under this standard, ICANN's failure to follow its own processes would constitute an abuse of discretion. - BC is particularly supportive of allowing the community to have standing to file an IRP and relief from having to pay legal fees (p.32). If a supermajority of ICANN Members votes to initiate an IRP, we must ensure they have standing and access to the mechanism. This would have been useful, for example, in example challenging ICANN's decision to allow both singular and plural forms of the same string as new gTLDs. - BC supports having IRP decisions be precedential and enforceable in US courts. (p.34) - BC has some concern that the IRP process proposed by the CCWG 	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - Substantive and procedural review supported; but reviewed under an "abuse of discretion" standard - Support for precedential weight - Parties must not be permitted to stand by the sidelines and then complain once policy development processes have been completed <p>Actions suggested: Consider additional safeguards.</p> <p>CCWG response: The CCWG appreciates this input. After extensive discussion, the CCWG felt that Panel decisions should be based on each IRP panelist's assessment of the merits of the claimant's case. Under the 2nd Draft Proposal, 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.</p> <p>The CCWG also extensively discussed the concerns expressed by the BC about incentives to "sit on the</p>

		<p>would allow parties to introduce new arguments without first vetting them through the community's policy development channels.</p> <ul style="list-style-type: none"> - BC is concerned that the process does not create the right incentives: it invites parties to stand on the sidelines during the policy development process and bring their concerns to the IRP after policy development has concluded. Such an approach could create operational inefficiency and could undermine the bottom-up, consensus-based process for developing policy within ICANN. - BC suggests that the CCWG carefully consider whether additional safeguards, such as requiring parties or their trade associations to participate in a public comment process for instances in which there is a challenge to an existing community-developed policy or where ICANN has sought public comment on implementation of an existing policy -- could prevent these eventualities while still preserving an accessible IRP. The requirement to comment publicly would not apply to instances where ICANN simply contravenes existing policy or pursues implementation without seeking public comment. 	<p>sidelines" during a policy development process. The group concluded, on balance, that barring parties from bringing IRPs on the basis of failure to participate in a PDP was unworkable. Some potential complainants may be totally unaware that there is a policy development process. On the other hand, those who are aware of ICANN would appear to have little incentive to sit out a PDP on issues that concern them.</p> <p>The CCWG is concerned about potential abuse of the IRP process, and propose to address this issue as part of Work Stream 2.</p> <p>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 (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.</p>
<p>1 9 2</p>	<p>.UK</p>	<p>This process, of necessity, is complicated and heavy. Hence we welcome the statement in paragraph 16 (page 34) in favour of informal resolution. This could be usefully given more visibility early in the section.</p> <p>We would also encourage some responsibility within ICANN for identifying who might be affected by the organisation's decisions and increased outreach to those communities which are not involved in ICANN should be part of the public interest commitment. This is particularly important when time-limits for submitting an appeal are short.</p> <p>We welcome more effective appeals procedures. It is obviously important to ensure due process is respected to underpin ICANN</p>	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support for more effective dispute resolution. - More focus on informal resolution - More thought needs to be given to the interests of those not directly involved in ICANN <p>Actions suggested: Clarify process.</p> <p>CCWG response: The CCWG welcomes this input and agrees that these processes must be designed</p>

		<p>decisions. It is also reasonable that decisions can be challenged and to allow such processes to be well informed and effective. ICANN needs to have robust, clear and fair mechanisms to give credibility to its processes. Not least important would be to ensure that disputes do not drag on, undermining the organisation's credibility.</p> <p>However, we do believe that some more thought needs to be given to the interests of parties that are not directly involved in ICANN, particularly those who might be seriously impacted by policy developed without their knowledge. It is fundamental to serving the public interest that mechanisms should include processes for receiving, understanding and responding to wider interests even when they come in late in processes. Appeals and reconsideration processes do not appear to provide affected parties any clear process and this favours decisions focussed on the ICANN community's own interests.</p>	<p>to protect anyone materially affected by ICANN's action or inaction in violation of its Bylaws/Articles – whether or not they are aware of and participate in ICANN's work.</p> <p>Accordingly, the 2nd Draft Proosal provides that any filing deadline should run from the time a party becomes aware of the violation. At the same time, it requires speedy resolution of any IRP, once commenced. As proposed, 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.</p> <p>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 (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.</p>
<p>1 9 3</p>	<p>USCIB</p>	<p>In general, USCIB agrees with the proposed improvements. Specific comments:</p> <ul style="list-style-type: none"> - USCIB supports the creation of a standing pool of arbitrators, although we would urge that the pool of potential candidates be broadened to ensure participants have the requisite international arbitration expertise combined with an understanding of ICANN and the DNS. 	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support - Balance access and potential for abuse - Strong support for expanded scope of review - Process should encourage participation in bottom up policy development process; do not reward standing on the sidelines

	<ul style="list-style-type: none"> - A liberal approach to who may petition the panel, coupled with the ability of the Panel to provide for loser pays/fee shifting in the event it identifies a challenge as frivolous, seems a good balance between open access to due process, and mitigating delay tactics. The independent nature of the panel also is a crucial element. - Strongly supports the proposed scope of review. Parties should be able to seek review of both substance and procedure. Redress should be available when a particular action or failure to act “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 Statement of Mission, Commitments, and Core Values or ICANN policies.” - Be mindful that IRP procedures should encourage parties to participate in the bottom-up ICANN policymaking process in an active and timely way so that issues can be addressed and resolved at an earlier stage of the process if at all possible. We would appreciate the CCWG-Accountability’s proposals for how to strike this balance in the next version of this proposal, seeking to ensure that the IRP is not abused by those seeking to override community-developed and approved policies. - There appears to be a risk that one party could file an IRP to a 1-person panel and overturn community-led policy if the IRP panel decided in its favor. There is some fear that this could put too much power in the hands of few people and create binding precedent that is impossible to overturn. Thus, a new stress test should be considered for this situation, and if the result is unsatisfactory, consideration of a community-based override with a high voting threshold. - With respect to enhancements for both the <i>Independent Review Panel</i> and the Reconsideration Process, provide definitions of “materially affected” and “materially harmed” to clarify if such terms refer to economic harm or would include broader concepts of harm to an entity. 	<ul style="list-style-type: none"> - Stress tests should be considered for erroneous decisions by panel – community override? - Need to define “materially affected” and “materially harmed” <p>Actions suggested: Consider new stress test and define “materially affected” and “materially harmed”.</p> <p>CCWG response: The CCWG appreciates this input. After extensive discussion, the CCWG felt that Panel decisions should 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.</p> <p>The CCWG also extensively discussed the concerns about incentives to “sit on the sidelines” during a policy development process. The group concluded, on balance, that barring parties from bringing IRPs on the basis of failure to participate in a PDP was unworkable. Some potential complainants may be totally unaware that there is a policy development process. Others, who are aware of ICANN, would appear to have little incentive to sit out a PDP on issues that concern them.</p> <p>We are concerned about potential abuse of the IRP process, and propose to address this issue as part of Work Stream 2. The 2nd Draft Proposal does, however, eliminate to possibility of single member IRP decisions.</p> <p>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</p>
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			<p>the ICANN community through a CCWG (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.</p>
<p>1 9 4</p>	<p>LINX</p>	<ul style="list-style-type: none"> - Broadly, we support the changes proposed by the CCWG to the IRP. - In particular, we emphasise the importance of the following changes, which we consider essential to support NTIA transition: Empowering both the community and individuals to bring an IRP case alleging ultra vires activity by ICANN, to prevent mission creep, enforce compliance with established multistakeholder policies, provide redress for due process violations, and protect the multistakeholder process through meaningful, affordable, access to expert review of ICANN actions. We cannot stress the importance of this strongly enough. - We do question the following: a. The reservation of certain issues to “Members of ICANN” alone; b. While we recognise that we cannot, in law, allow the IRP to “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”, we consider the aim should be to minimise the range of matters to which this can apply, including by taking steps that would place the Board under a legal duty to follow the IRP; c. The IRP, not the Board, should determine what is excluded from its remit on this heading. If the Board disagrees with an IRP decision to rule on these grounds, it will disapply the IRP’s ruling: this will discourage the Board from making excessive and unreasonable (and unreviewable) claims regarding its fiduciary duties. - The Bylaws incorporate a duty on ICANN to appoint additional members to the Standing Panel as needed in order to prevent undue delay in IRP cases being heard. - Geographic and cultural diversity of panellists is desirable in order to achieve confidence in the legitimacy of the IRP, but not at the expense of effectiveness. Especially given the very limited number of panellists proposed, we would caution against any hard rules in this regard. 	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support – importance of meaningful access to provide redress for due process violations and protect the multistakeholder process through meaningful, affordable access to expert review - Careful attention to what is excluded from binding nature of review - Need to provide for appointment of additional members of standing panel to prevent undue delay - Diversity of panelists is critical; not at the expense of effectiveness - Ensure independence through longer terms with no re-appointment - Review filing deadlines. <p>Actions suggested: Consider proposed enhancements.</p> <p>CCWG response: The CCWG appreciates this input. The 2nd Draft Proposal clarifies that IRP decisions are intended to be binding “to the maximum extent permitted by law.” The proposal does provide for a community IRP on the grounds that ICANN violated its Bylaws (including by exceeding its mission).</p> <p>The 2nd Draft Proposal provides for a minimum (but not a cap) of 7 panelists. This number could</p>

		<p>However, we do support a provision that geographic diversity should be taken into account when making panel selections.</p> <ul style="list-style-type: none"> - Prospective panellists should only be eligible for appointment if they are willing to confirm their commitment to the Core Values. This would allay any (no doubt unwarranted, but nonetheless corrosive) suspicions that cultural diversity would lead to a lessened commitment to those Core Values. - To preserve the independence of IRP panellists, we recommend that their term should be quite long (e.g. seven years) –they can of course resign early if they so wish – and that they be barred from reappointment. The bar on future appointments to positions within ICANN should be designed to prevent them taking other remunerated work from ICANN, during or after the conclusion of their term (e.g. consultancy work), with a savings clause permitting them to undertake (after their term concludes) paid review of the effectiveness and sufficiency of the IRP process itself. - Timeliness of IRP complaints: Rules introducing time bars for IRP complaints should not prevent parties from bringing a complaint promptly when they are first affected by an ICANN action merely because that action occurred long ago. - Community Powers: The proposed changes to the IRP would achieve the goal of creating a credible and enforceable mechanism to limit ICANN's activities to its intended scope, provided that the Board abides by IRP decisions. This gives rise to a requirement for two things, both of which are essential: <ul style="list-style-type: none"> - A mechanism by which the Board becomes legally obliged to abide by IRP decisions, as opposed to having a fiduciary duty to prefer its own opinions of what is best for ICANN over IRP rulings; and - A mechanism whereby a Board that failed to abide by IRP rulings (or other specifically enumerated community powers, such as a Board spill), for any reason, could be challenged in court and a decision enforced upon it 	<p>increase depending on need.</p> <p>The 2nd Draft Proposal provides that panelists 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.</p> <p>Finally, the CCWG has recommended that the filing deadline run from the time a harmed party <i>becomes aware</i> of the alleged violation.</p>
1 9 5	JPNIC	<p>- Overall, we agree that improvements to the IRP would enhance ICANN's accountability. However, we recommend to review whether all requirements listed for IRP must be in WS1 or can be considered as further improvements in WS2. For example, we see geographic</p>	<p>Agreement – Concerns Summary / Impression:</p> <ul style="list-style-type: none"> - General support for more effective dispute resolution. - Concern whether this can be

		<p>diversity as an improvement but it may not be critical before the transition and there may be a few other elements which is not a must to agree as WS1.</p> <p>- We further recommend that if its implementation becomes a delaying factor in the IANA Stewardship Transition, to consider its implementation post transition, given there is assurance from the ICANN Board to implement the proposal on IRP. The CWG-Stewardship has identified that ccTLD delegation and re-delegation as outside the scope of ICANN Accountability CCWG. The budget, which is another core related to the IANA function will be addressed by the community empowerment mechanism.</p>	<p>encompassed within Work Stream 1 and without delaying CWG – Stewardship implementation</p> <p>Actions suggested: Consider some requirements in WS2</p> <p>CCWG response: The CCWG appreciates this input. 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 in Work Stream 2 by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.</p>
<p>1 9 6</p>	<p>IPC</p>	<p>- In our view, the IRP as a whole should continue to take on an ever-greater role in ensuring ICANN’s accountability to the community, and the Proposal represents a significant first step in helping to achieve this.</p> <p>- While we concur with the vast majority of points raised in the Proposal, certain items seemed worthy of additional comment, either because: (1) we consider them to be especially important and potentially deserving of an even greater level of treatment in the Proposal; or (2) we disagree, in whole or in part, with the suggestions of the CCWG with respect to that particular item, and feel that it should be worth a “second look.”</p> <p>1. Impact of IRP declarations: We strongly agree with other commenters (see ¶ 131) as well as the interlocutory “Declaration on the IRP Procedure” issued by the Panel in DCA Trust v. ICANN (see https://www.icann.org/en/system/files/files/irp-procedure-declaration-14aug14-en.pdf) that the process should be deemed “binding” upon the Board to the fullest extent possible, and should not be merely “advisory” in nature. We also concur with the CCWG’s recommendation (see ¶ 133, sub. 18b) that IRP decisions be “precedential,” with a certain degree of “weight” given to prior decisions.</p> <p>2. Matters excluded from IRP: Assuming the “membership” organizational model is adopted according to the CCWG’s Proposal</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Concur with most points - Strongly agree that declarations of the IPR should be binding on the Board to the fullest extent possible - Agree that prior decisions should receive a certain degree of weight - More clarification is needed on what items are “so material to the Board” that it would undermine its statutory obligations - Members should be trained on the workings and management of the domain name system - Allow for panel expertise to be supplemented on an as needed basis by qualified experts - Diversity is important but subsidiary to a meritocratic desire for excellence - Welcome expanded scope of review - Concerns about accessibility must be balanced with the need for a truly unbiased and impartial decision-making

(see ¶ 180), it would seem reasonable to the IPC that a great many — if not all — matters “specifically reserved” to the “members” (e.g., recall of the Board or individual directors, budgetary approvals, etc.) should be deemed to be outside the scope of IRP review when exercised by the members. See ¶ 133, sub. - However, the additional exclusion of items “so material to the Board that it would undermine its statutory obligations and fiduciary roles” is vague and demands additional clarification. Ibid. Prior to moving forward, objective standards for determining what matters would undermine the Board’s statutory obligations and fiduciary roles should be developed. A mechanism for making such a determination, including consideration of a procedure for allowing members to have the final say in making such a determination, should be adopted.

3. Panel expertise/training: The IPC considers “training on the workings and management of the domain name system” (see ¶ 133, sub. 10) to be a very welcome addition.

- Candidates with both significant legal and technical expertise to be highly attractive, and that each skill be represented by at least one individual panelist may cause considerable delay in panel appointments, as has happened in past IRP. Allowing for panel expertise to be supplemented, on an as needed basis, by qualified experts with specialized knowledge makes a good deal of practical sense.

4. Geographic diversity: We generally agree with the CCWG that IRP panels should strive to have “diversity in geographic and cultural representation.” See ¶ 133, sub. 11. However, this desire for diversity must be subsidiary to a meritocratic desire for excellence.

5. Standard of Review: The CCWG’s efforts to expand the applicable standard of review to also include “substantive limitations on the permissible scope of ICANN’s actions” (see ¶ 133, sub. 9) are highly commendable and should be fully supported.

6. Decision Methodology: According to the CCWG, IRP panels should be permitted to “undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts.” See ¶ 133, sub. 17b. We concur with this approach, and would also direct the CCWG’s attention to the language found in the IRP decision *Booking.com v.*

Actions suggested:

Clarify material exclusion of items. Expand on independence.

CCWG response: The CCWG appreciates this input and has incorporated many of these suggestions into the 2nd Draft Proposal 2nd Draft Proposal. The proposed language now states that IRP decisions will be binding “to the maximum extent permitted by law.” It contemplates training for panelists, and for experts to be available to any panel upon request.

Based on community input, the CCWG proposes that the IRP would be authorized to hear complaints that involve the specified rights of the Single Member.

IRP panelists must be independent of ICANN, including ICANN SOs and ACs. The Proposal provides that 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.

We are concerned about potential abuse of the IRP process, and propose to address this issue as part of Work Stream 2. 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 (assisted by counsel, appropriate experts, and the Standing Panel when

		<p>ICANN:</p> <p>7. Panel Independence: While we agree that the “independence” — both real and perceived — of an IRP panel is highly desirable, we think additional consideration is needed on how best to achieve this in actuality if, as recommended by the CCWG, “panelist salaries” or other forms of compensation are borne completely by ICANN. Admittedly, ensuring broad access to the procedure for as many interests as possible (including non-profits and others with limited financial resources) is itself a laudable goal. CCWG is encouraged to consider that concerns over accessibility should be balanced with the need for truly unbiased and impartial decision-making, which can often only be achieved through various types of cost- sharing and allocation.</p>	<p>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.</p>
1 9 7	Govt-BR	<ul style="list-style-type: none"> - Welcomes the suggestion of establishing an appeal's mechanism within the ICANN structure that is capable of settling disputes between parties in a truly independent manner. - Decisions made by the IRP should be binding to the ICANN organization and should not be overruled by national courts where ICANN is legally established. It is our understanding that the autonomy of the IRP would be seriously undermined if this condition cannot be met. - Supports a standing panel of 7 independent members and decisional panels comprised of 3 members. Brazil considers that geographic, cultural and gender diversity is a key element and should be a mandatory criterion in the selection of IRP panelists. - Similarly to the Dispute Settlement mechanism of the World Trade Organization (WTO) – which is regarded as highly efficient and predictable – ICANN's IRP should be comprised of clearly defined steps with firm deadlines. 	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Brazil welcomes an enhanced independent review mechanism. - Its decisions should be binding and not overruled by courts where ICANN is domiciled. - Geographic, cultural, and gender diversity are critical - IRP should establish clearly defined steps and firm deadlines. <p>Actions suggested: Include clearly defined steps.</p> <p>CCWG response: The CCWG appreciates this input and the suggestions have been incorporated into the 2nd Draft Proposal. IRP decisions are intended to be binding “to the maximum extent permitted by law.” Diversity is a priority, and special outreach will be undertaken to identify qualified candidates from around the world. We agree that clear rules are critical to the success of the enhanced IRP, and these will be developed as part of Work Stream 2.</p>
1 9 8	MPAA	<ul style="list-style-type: none"> - MPAA supports the proposed enhancements to the Independent Review Process including the call for a fully independent judicial/arbitral function and the intent that IRP decisions are not only binding on ICANN but will set precedent for future decisions. However we feel 	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - MPAA generally supports this idea but believes clarification is needed with

	<p>greater clarity is needed on several points: Standard of Review (p. 32) currently places the burden to demonstrate a violation on the party challenging an action or inaction. More clarity around the level of evidence required by the offended party is needed. A set of requirements should exist that ensure the standard of evidence is not unnecessarily high, but high enough to ensure an effective IRP.</p> <ul style="list-style-type: none"> - MPAA supports the CCWG proposal that any person/group/entity, including 3rd parties, has standing to participate in the IRP process however to ensure an IRP that is truly accessible to the community we suggest that continued discussion is needed to define exactly what constitutes "material harm" (p.31). - MPAA suggests that the CCWG clarify if the notion of a right-of-review is available in the current plan, ensuring an independent and objective review of all parties in the IRP process. 	<p>respect to standard of review; level of evidence required, etc.</p> <ul style="list-style-type: none"> - Broader standing is appropriate to ensure community accessibility, but "material harm" standard requires clarification - Is a "right of review" available under the current plan? <p>Actions suggested: Clarify Standard of Review and level of evidence required. Expand on "material harm". Clarify whether right-of-review.</p> <p>CCWG response: The CCWG appreciates this input.</p> <p>The 2nd Draft Proposal provides that Panel decisions will be based on each IRP panelist's assessment of the merits of the claimant's case. 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. 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.</p> <p>The decision of any 3-member panel may be appealed to the full Standing Panel, sitting <i>en banc</i>.</p> <p>Implementation of these enhancements will necessarily require additional, detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure – including elaboration on the material harm standard) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.</p>
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199	CDT	<p>- Supports the enhancements proposed for the Independent Review Process. The IRP is in need of an overhaul and the proposed enhancements – a binding, accessible and independent process that would hold ICANN to a substantive standard of behavior – will contribute significantly to ICANN’s overall accountability and to ensuring that ICANN does not stray from its mission and its commitment to its multistakeholder community.</p>	<p>Agreement Summary / Impression: CDT supports enhanced IRP; binding, accessible, and independent process is needed.</p> <p>Actions suggested: None.</p> <p>CCWG response: The CCWG appreciates this input.</p>
200	CIRA	<p>In general, I agree that the powers of the IRP should be enhanced. I would support an IRP that is independent of ICANN, low cost has decisions that are binding, and is streamlined in its processes. I would also like to go on record as stating that any proposed appeal mechanism should not include ccTLD delegation and/or re-delegation issues.</p>	<p>Agreement Summary / Impression:</p> <ul style="list-style-type: none"> - General support. - Should not include ccTLD delegation and/or re-delegation issues <p>Actions suggested: None.</p> <p>CCWG response: The CCWG appreciates this input. The 2nd Draft Proposal specifically excludes disputes related to ccTLD delegation and redelegation from the scope of the IRP.</p>
201	USCC	<p>-The changes to IRP are a step in the right direction, but many more details regarding due process and standard of review need to be added. Any final accountability plan must feature widely accepted principles on transparency, due process, and fundamental fairness, as well as incorporate well-settled international adjudicatory norms. The decisions of the IRP should be binding and not subject to rejection by the ICANN Board as they currently are.</p> <ul style="list-style-type: none"> - this section is one in need of further development and we plan to engage further as the draft plan continues to develop. - We support that the CCWG seeks to strengthen and expand the use of the IRP – including for review of not only procedural difficulties, but substantive problems as well. - While we agree that review should be available for both substantive and procedural concerns, we believe that actual decisions should be 	<p>Agreement Summary / Impression:</p> <ul style="list-style-type: none"> - General support. - Decisions should be binding. - Expanded scope of review is supported but actual decisions should be reviewed under an abuse of discretion standard rather than a de novo standard as that would permit individuals to “end run around the policy process and undermine decisions made by the community.” - Process should require/encourage participation in policy development process and not permit “standing on the sidelines.” - Basic transparency and due process

		<p>reviewed under an abuse of discretion standard rather than the de novo standard currently contemplated by the Proposal. In this model, failure to follow processes would qualify per se as an abuse of discretion. Pure de novo review would arguably allow individuals to end run around the policy process and undermine decisions made by the community.</p> <p>- The Chamber further supports encouraging active participation during the policy development process as the best means to solve stakeholder concerns. Therefore, we suggest changes to the proposal that ensure parties cannot bring new arguments to the IRP without availing themselves of the community's well-established policy development processes.</p> <p>- suggests adding these basic transparency and due process improvements to other ICANN review processes, such as the pre-IRP Cooperative Engagement Process, requests for reconsideration of staff action, and petitions to the Ombudsman.</p>	<p>requirements are needed.</p> <p>Actions suggested: Consider transparency requirements.</p> <p>CCWG response: The CCWG appreciates this input.</p> <p>After extensive discussion, the CCWG felt that Panel decisions should 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.</p> <p>The CCWG also extensively discussed the concerns about incentives to "sit on the sidelines" during a policy development process. The group concluded, on balance, that barring parties from bringing IRPs on the basis of failure to participate in a PDP was unworkable. Some potential complainants may be totally unaware that there is a policy development process. Others, who are aware of ICANN, would appear to have little incentive to sit out a PDP on issues that concern them.</p> <p>The CCWG has proposed changes to the Cooperative Engagement Process, Reconsideration, and Ombudsman function to improve transparency and due process.</p>
202	INTA	<p>- Agrees with the proposed IRP improvements, especially those regarding the effect of the decisions as being binding and not merely advisory and precedential. The IRP should have authority to review and prevent "mission creep" or actions in derogation of the Statement of Mission, Commitments & Core Values, the bylaws (both Fundamental and regular), as proposed, as well as grievances concerning</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support. - Decisions should be binding. - Approve standard of review. - "Materially affected" standing requirement should be low.

		<p>appointment and removal of Board members.</p> <ul style="list-style-type: none"> - INTA recommends a low threshold of the “materially affected” standing requirement. - With respect to the selection and appointment of panelists (subsection 14), we recommend that an aggrieved party shall have the right to move to recuse a panelist if there is a credible basis for bias. - Regarding enforcement of judgments of the IRP, we recommend that the parties agree in advance to be bound by the decision of the Panel, which agreement shall be enforceable in a California court with jurisdiction over ICANN. - We believe that the review of IRP decisions should include a request for reconsideration, as well as an en banc review, at the discretion of the IRP. - The IRP should elect a chief administrator/arbitrator. 	<ul style="list-style-type: none"> - Ability to recuse panelist for bias. - Exhaustion of remedies should be required. <p>Actions suggested: Consider proposed process amendments.</p> <p>CCWG response: The CCWG appreciates this input. The 2nd Draft Proposal provides that IRP decisions should be binding “to the maximum extent permitted by law.” As proposed, the IRP would be authorized to review ICANN actions or inactions alleged to be in violation of ICANN’s Bylaws and Articles, including any actions that exceed the scope of ICANN’s Mission. The proposal does provide for an en banc review of any t-member panel decision.</p>
2 0 3	.NZ	<p>We broadly support the direction set out but have not scrutinised the proposal in depth. We offer the following comments:</p> <ul style="list-style-type: none"> - It is important to ensure that the IRP process cannot be used in a frivolous or vexatious way, and we will review more detailed proposals in the next Public Comment with that concern in mind. - We suggest a “first cab off the rank” approach to the allocation of panellists – both for one-member and three-member panels (in the latter case, the third panellist). A guaranteed rotation of panellists avoids any panellist or subset having undue influence in the development of the precedentiary body of case work the system will create, and avoids complainants choosing a particular panellist for any reason. - We also query the interaction of the Ombudsman with the IRP and suggest the CCWG give further thought to this. There must be clarity for the community as to when each (IRP or Ombudsman) is the right forum to use. 	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support. - Need to control abusive and frivolous resort to IRP - “First cab off the rank” approach to establishing panels. - Further thought needed regarding interaction of Ombudsman and IRP. <p>Actions suggested: Consider how to control abusive resort and expand on Ombudsman-IRP interaction.</p> <p>CCWG response: The CCWG appreciates this input. It is concerned about potential abuse of the IRP process, and proposes to address this issue as part of Work Stream 2. 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 (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such</p>

			approval not to be unreasonably withheld. The CCWG will review the role and independence of the Ombudsman as part of Work Stream 2.
204	HR2251	- ICANN has an external, independent process for reviewing and resolving disputes between ICANN and external parties, including members of the multistakeholder community, in all matters related to the operations and policy decisions of ICANN. Such process includes the ability to reverse decisions of the board of directors.	<p>Agreement</p> <p>Summary / Impression: General support.</p> <p>Actions suggested: None.</p> <p>CCWG response: The 2nd Draft Proposal provides for independent review and dispute resolution, which would have the authority to issue binding decisions as to whether a complained of action or inaction violates ICANN's Bylaws and/or Articles.</p>
205	NCSG	<p>- NCSG believes that a strong independent appeals mechanism is critical to enhancing ICANN's accountability. We strongly support the binding nature of the proposed process and the accessibility of this mechanism, particularly in relation to the cost burden of the mechanism.</p> <p>- ICANN has a limited Mission, and it must be accountable for actions that exceed the scope of its Mission. This suggest that IRP should provide a means of challenging actions that exceed ICANN's scope simply because they exceed its scope, not just because they have a negative "material affect" on the challenger. Either that, or ICANN-created restrictions on fundamental rights such as freedom of expression or privacy, must be considered "material affects" and so specified in the proposal.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support. - IRP should provide a means of challenging actions that exceed Mission – whether or not they have a "material affect" on the challenger. <p>Actions suggested: None.</p> <p>CCWG response: The CCWG appreciates this input.</p> <p>The authority of the IRP would extend to actions/inactions alleged to be in violation of ICANN's Bylaws and/or Articles. The proposal provides for a Community IRP, and permits prospective and injunctive relief. In addition, the community, acting through the Single Member, has authority to bring IRPs addressing issues within its authority (as specified in the Bylaws) without a need to demonstrate "material affect."</p>
2	MM	I agree very strongly with the purposes of the IRP as enumerated in 133.	Agreement

<p>o 6</p>	<p>I also agree with a standing IR Panel, though I am concerned about the selection of the standing panel by ICANN itself. The mechanisms of community approval need to be better specified, and I would suggest a veto process, similar to <i>voir dire</i> challenges in U.S. jury selection, that allows minority interests to reject judges they view as biased or inimical to their interests. We need to know more about what kind of challenges would be reserved to members and which would be open. My biggest concern here is that the CCWG proposal presents the IRP as something that can prevent mission creep and other violations of ICANN’s mission and core values. To make ICANN accountable for actions that exceed the scope of its Mission, the CCWG should consider having the IRP provide a means of challenging actions that expand or deviate from ICANN’s mission simply because they exceed its scope, not just because they have a negative “material affect” on the challenger. Either that, or ICANN-created restrictions on fundamental rights such as freedom of expression or privacy, must be considered “material effects” and so specified in the proposal.</p>	<p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support. - More clarity on selection – veto or voir dire process? - More clarity on members and derivative rights - IRP should provide a means of challenging actions that exceed Mission – whether or not they have a “material affect” on the challenger. - Human rights as auto “material effect” standard? <p>Actions suggested: Clarify selection process and provide a means of challenging actions that expand or deviate from ICANN’s mission.</p> <p>CCWG response: The CCWG appreciates this input. The scope of the IRP includes allegations regarding violations of ICANN’s Bylaws or Articles, including actions that exceed the scope of ICANN’s Mission.</p> <p>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.</p> <p>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.</p> <p>The community would nominate a slate of proposed panel members.</p>
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			Final selection is subject to ICANN Board confirmation.
2 o 7	GG	<p>- GG supports creating a process for meaningful review of ICANN Board or staff actions through a standing, independent group of expert.</p> <p>- We support the creation of a binding IRP mechanism, but the procedures governing that mechanism should more explicitly encourage clear, informed, and participatory decision-making.</p> <p>- While we agree with the need to create a binding IRP mechanism, we encourage the CCWG-Accountability to modify its proposal in two respects. First, we believe that parties participating in the IRP ought to have previously participated, if applicable, in the public comment process by either submitting their own comments or being members of a trade association, stakeholder/constituency group or some other associated group that submitted a comment on its members' behalf. While some may view this as overly restrictive or burdensome, Google believes that this policy is analogous to the requirements imposed by other rulemaking proceedings and will encourage greater participation by the community – 9 at an earlier stage in ICANN's decision-making process, when many issues can be more proactively identified and resolved. In our view, this requirement would not pose a substantial burden for appellants because participating in ICANN's public comment process does not require specialized expertise or lengthy submissions. The only requirement would be for the appellant to have presented its arguments informally when given an opportunity to do so. Second, we believe that actual decisions should generally be reviewed under an abuse of discretion standard rather than the de novo standard currently contemplated by the Proposal. In this model, failure to follow processes would qualify per se as an abuse of 10 discretion. Pure de novo review would arguably allow individuals to end run around the policy process and undermine the finality of decisions made by the community. It is critical for the stability and efficiency of the Internet ecosystem for ICANN decisions, properly taken and subject to a transparent and accountable review process, to have a degree of finality and predictability. For similar reasons, we appreciate the Proposal's clarification that delegation and re-delegation (with the exception of the ccTLDs) will be handled through a unitary process. 11 However, we</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support. - Parties to IRP must have previously participated in any applicable public comment or policy development process. - Concern about pure “de novo” review and use of IRP to end run around policy development process - “conc of discretion” standard may make it unreasonably difficult for community members to challenge certain decisions taken by ICANN – should there be a different standard for challenges brought by the community rather than individual entities? <p>Actions suggested: Expand on procedures governing mechanism and consider proposed modifications.</p> <p>CCWG response: The CCWG appreciates this input.</p> <p>After extensive discussion, the CCWG felt that Panel decisions should 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.</p> <p>The CCWG also extensively discussed the concerns expressed by the BC about incentives to “sit on the sidelines” during a policy development process. The group concluded, on balance, that barring parties from bringing IRPs on the basis of failure to</p>

		<p>recognize that the abuse of discretion standard for review of ICANN staff and board decisions, combined with the limited veto powers we discuss below, may make it unreasonably difficult for ICANN community members to challenge decisions taken by ICANN in the rare instance that they are overwhelmingly opposed by the community. While there might be several ways to address this concern, one approach would be to adopt a different standard of review for IRP challenges brought by the community as a whole, as opposed to an individual entity. In such situations, the CCWG-Accountability could consider mandating that panels to review ICANN’s decisions de novo. We look forward to working with the CCWG-Accountability to ensure that a united ICANN community can provide a meaningful check on major ICANN decisions without unduly impeding operational efficiency.</p>	<p>participate in a PDP was unworkable. Some potential complainants may be totally unaware that there is a policy development process. Others, who are aware of ICANN, would appear to have little incentive to sit out a PDP on issues that concern them.</p> <p>The CCWG discussed potential abuse of the IRP process, and proposes to address this issue as part of Work Stream 2. 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 (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.</p>
<p>2 o 8</p>	<p>Board</p>	<p>- We agree that the Independent Review Process needs to be refined; with the standard better defined to meet the needs of the community, and that it is important to have binding decisions arising out of that process, as appropriate.</p> <p>- The proposed enhancements to the Independent Review Process (IRP) still appear to require further detail, including issues such as standing and remedies, as well as definitional work. What steps are in place to avoid overloading the seven-person IRP panel with frivolous or vexatious complaints? We anticipate further questions after more details are provided.</p>	<p>Agreement</p> <p>Summary / Impression: We agree the process needs to be refined. More detail is needed.</p> <p>Actions suggested: Details needed on standing and remedies. Definitional work is also needed.</p> <p>CCWG response: The CCWG appreciates this input. The 2nd Draft Proposal expands on and clarifies a number of the details of the enhanced IRP. Nonetheless, implementation of these enhancements will necessarily require additional, detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure – including elaboration on the material harm standard) are to be created by the ICANN community through a CCWG (assisted by counsel,</p>

			appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld.
209	CENTR	<p>- We agree that the proposed improvements to the Independent Review Process would enhance ICANN’s accountability, however having ICANN shouldering all the administrative costs of maintaining the system (including the panelist salaries) might undermine its independence. We invite the CCWG to investigate possible alternatives, including the option of having the IRP managed by an internationally recognized body. That might simplify the appointment procedure which in the draft CCWG paper appears to be extremely complex and, to a certain degree, incomplete.</p> <p>- The panelists must be as independent as possible. Furthermore, we support the notion that panelists must have international arbitration expertise, additionally, but not exclusively, in the DNS environment. We would also like to highlight the importance of having multicultural, multinational and multilingual panelists.</p> <p>- Concerning the recommendation that IRP decisions should be based on precedents, we do not support this principle as any decision must always be duly substantiated and based on policies that might have evolved over the years.</p> <p>- Last but not least we reiterate the requirement that any appeal mechanism must not cover ccTLD delegation and/or re-delegation issues.</p> <p>- CENTR agrees that the proposed improvements to the Independent Review Process would enhance ICANN’s accountability, however having ICANN shouldering all the administrative costs of maintaining the system (including the panelist salaries) might undermine its independence; invites the CCWG to investigate possible alternatives, including the option of having the IRP managed by an internationally recognised body; reiterates the requirement that any appeal mechanism must not cover ccTLD delegation and/or re-delegation issues.</p>	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support for more effective dispute resolution. - Independence is key; so is diversity - Decisions should not have precedential weight. - Should not cover ccTLD delegation and/or re-delegation issues. <p>Actions suggested: Investigate alternatives to ICANN shouldering costs, including IRP managed by internationally recognized body.</p> <p>CCWG response: The CCWG appreciates this input. As previously indicated, issues related to ccTLD delegation and redelegation are outside the scope of the IRP’s authority.</p> <p>We agree that independence and diversity are of paramount importance, and have enhanced those discussions in the Second Proposed Draft.</p> <p>While the 2nd Draft Proposal does permit panelists to consider previous decisions, any material change in policy would likely render a prior decision less relevant – if not irrelevant - in a new setting.</p>
210	NIRA	<p>NIRA agrees with the proposed improvements and requirements. However, NIRA notes that the provision that ICANN Board bears the burden of legal fees specified in 6 (in reference to 5.1) sounds unfair and</p>	<p>Agreement Concerns Confusion</p> <p>Summary / Impression:</p>

		<p>should be reconsidered though there is a disclaimer in the proposal. NIRA would follow the development of this recommendation. Proposed timeframes and deadlines are sufficient.</p>	<ul style="list-style-type: none"> - NIRA notes that the provision that ICANN Board bears the burden of legal fees specified in 6 (in reference to 5.1) sounds unfair and should be reconsidered though there is a disclaimer in the proposal. <p>Actions suggested: Reconsider Board to bear legal fees.</p> <p>CCWG response: The CCWG appreciates this input. The 2nd Draft Proposal provides that ICANN should bear costs associated with the Standing Panel and any 3 member decisional panels. It provides, however, that filing fees may be considered to discourage abuse of the process.</p>
2 1 1	ALAC	<p>Para 133, Section 13: The ALAC notes that although independence from ICANN is required, there is no such requirement with respect to independence from other parties related to the dispute. Such parties could be contracted parties, or local, national or international entities related to the dispute.</p>	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Independence from other parties including contract parties, local, national, or international entities, etc. <p>Actions suggested: None.</p> <p>CCWG response: The CCWG appreciates this input and the 2nd Draft Proposal reflect the views presented. 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.</p>
2 1 2	LAB	<p>- My principal criticism of the draft proposals relates to the interrelationship of the IRP and RPE. The relationship between the two review processes is not explained; nor is it self-evident. The CCWG-Accountability ought to clarify the extent to which each procedure</p>	<p>Confusion</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Clarify inter-relationship between IRP and RPE - Face to face meeting or just e-doc

		<p>necessarily deals with different types of complaints. At present, there seems to be a possibility for overlap – i.e., that a matter could be treated under the RPE and then the IRP. Yet, from the draft proposals, there is no firm indication that the CCWG-Accountability intends the RPE to be a preliminary “light-touch” form of review that is ordinarily initiated before embarking on an IRP. If it has not already done so, the Working Group ought to consider the pros and cons of integrating RPEs into the IRP scheme.</p> <p>- Regarding the IRP, it is unclear whether or not this will permit face-to-face meetings or only involve electronic document exchange. The issue ought to be clarified.</p>	<p>exchange?</p> <p>Actions suggested: Clarify inter-relationship between IRP and RPE.</p> <p>CCWG response: The CCWG appreciates this input. Detailed rules regarding the operation of the IRP will be developed as part of Work Stream 2, to date there has been no decision regarding hearings or the need to initiate a request for reconsideration prior to initiating an IRP.</p>
2 1 3	ZR	<p>It is suggested that the Proposal should develop a mechanism to ensure the whole IPR and related procedures are transparent and open. It is also necessary to set up a review mechanism to check how ICANN implement the IPR’s results or suggestions, and what to do if ICANN fails to make improvement. Meanwhile, the geographical and professional diversity should be taken into consideration while forming the panel for IRP.</p>	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Concerns transparency and openness - Geographical and professional diversity should be considered in forming panels. <p>Actions suggested: Concerns transparency mechanism.</p> <p>CCWG response: The CCWG appreciates this input. The 2nd Draft Proposal stresses the need to review and reform the transparency of dispute resolution processes, as part of Work Stream 2. If ICANN fails to implement a binding decision of an IRP decisional panel, a complainant would have the right to seek the support of a court of competent jurisdiction to enforce the panel’s decision. The report also stresses the need for diversity among the members of the Standing Panel.</p>
2 1 4	RIR	<p>- In principle there is no objections to the proposed amendments to the Independent Review Panel and the Reconsideration Process. However, the RIR community expresses their concern regarding the time needed to implement all proposed requirements and whether the time required for implementation of some of the requirements would be a delaying factor for the IANA stewardship transition. It is suggested that while implementation of these measures should start as soon as possible, the IANA transition should be allowed to proceed while that</p>	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support for more effective dispute resolution. - Concern whether this can be encompassed within Work Stream 1 and without delaying CWG – Stewardship implementation - Notes availability of alternative dispute

	<p>implementation is underway. A more detailed timeline of tasks within the implementation process, relative to the IANA transition timeline, would be helpful to clarify which are expected to precede the IANA transition, and which to follow.</p> <p>- Furthermore the RIR community stresses that there are separate, well-established appeal mechanisms for disputes relating to Internet number resources. In particular there is:</p> <ol style="list-style-type: none"> 1. An arbitration process described in the ASO MoU for disputes relevant to the global policy development process 2. An arbitration process described in the draft Service Level Agreement between the five RIRs and IANA Numbering Services Operator for disputes relevant to the IANA numbering services. 3. A bottom-up process for any concerns that a third party may have relating to Internet number resources issues. <p>- Imposing different appeal procedures than the ones agreed upon and used by the numbers community would be contradictory to the bottom-up principle. Therefore, it is strongly suggested that disputes relating to Internet number resources be excluded from the scope of the proposed appeal mechanisms.</p>	<p>resolution mechanisms for numbering</p> <p>Actions suggested: None.</p> <p>CCWG response: The CCWG appreciates this input and notes that 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 (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.</p>
<p>2 1 5</p>	<p>DotMusic</p> <p>- DotMusic agrees with the "Declaration on the IRP Procedure" issued by the Panel in DCA Trust v. ICANN[1] that the process should be deemed binding upon the Board and should not be merely "advisory". We also agree with the CCWG's recommendation that IRP decisions be precedential and consistent with appropriate "weight" given to prior decisions.</p> <p>- Furthermore, the statement that additional exclusion of items "so material to the Board that it would undermine its statutory obligations and fiduciary roles" is too vague and requires additional clarification.</p> <p>- DotMusic believes that "training on the workings and management of the domain name system" is meaningful, especially in light of the inconsistent New gTLD Program's Community Objection process that has harmed DotMusic materially as well as other community members. As such, with respect to panel appointments, it is critical that candidates be selected based on their expertise on the related subject-matter, excluding those with merely peripheral expertise. Allowing for panel expertise to be enhanced as deemed appropriate by qualified</p>	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Agrees with "Declaration on IRP Procedure" issued by DCA Trust v. ICANN and with CCWG's recommendation that IRP decisions be precedential and consistent with appropriate weights given to prior decisions - Statement about exclusion material items requires clarification - Training on management of DNS is meaningful especially in light of gTLD program's community objection process - Critical to have candidates selected based on subject-matter expertise - Panels should be permitted to undertake a de novo review of case, make findings of fact and issue decisions based on fact. - Consider incorporating appropriate controls in Cooperative Engagement

		<p>experts with specialized knowledge in the subject-matter is a practical and meaningful measure.</p> <p>- With respect to decision-making, IRP panels should be permitted to "undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts" [2] consistent with the IRP decision <i>Booking.com v. ICANN</i>:</p> <p>"Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, as explained below, the IRP Panel is charged with "objectively" determining whether or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness." [3]</p> <p>- Furthermore, ICANN should consider the incorporating appropriate controls in the Cooperative Engagement Process (CEP) and IRP to prevent anti-competitive behavior by certain actors. For example, in the New gTLD Program both the CEP and IRP processes have been used extensively as an anti-competitive tool by a few gTLD applicants if they failed to prevail in their contention set.</p> <p>[1] See https://www.icann.org/en/system/files/files/irp-procedure-declaration-14aug14-en.pdf</p> <p>[2] See ¶ 133, 17b</p> <p>[3] See https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf, P.32-33, ¶ 111</p>	<p>Process and IRP to prevent anticompetitive behavior by certain actors.</p> <p>Actions suggested: Clarify exclusion material items and consider incorporating control in CEP and IRP.</p> <p>CCWG response: The CCWG appreciates this input. The 2nd Draft Proposal reflects many of these suggestions. The Draft provides an alternative (mediation) to the CEP, at the choice of either party.</p> <p>The CCWG discussed potential abuse of the IRP process, and propose to address this issue as part of Work Stream 2. 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 (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.</p>
2 1 6	<p>Siva</p>	<p>IRP by these proposals, is somewhat enhanced. But it requires a larger Judicial process within, that would be unlimited in its scope. Just to define unlimited, such a Judicial process would bring even the organization's core values and fundamental bylaws within its Judicial remit. Such a body could hear challenges against the constitution of NomCom, Board, hear a challenge against the appointment of a Board Member or against the balance prevailing between ACs and SOs. ICANN requires an internal judicial process way above the existing redressal mechanisms.</p>	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support for more effective dispute resolution. - Concern whether this can be encompassed within Work Stream 1 and without delaying CWG – Stewardship implementation - Notes availability of alternative dispute resolution mechanisms for numbering <p>Actions suggested:</p>

Consider larger Judicial process.

CCWG response: The CCWG appreciates this input and notes that 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 (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.

The 2nd Draft Proposal also provides that the Standing Panel will have a minimum of seven members, but that number is not a cap.