Summary of Comments on Enhanced Independent Review

We reviewed the following 61 comments for their expressed views (if any) on the provisions of the CCWG Proposal dealing with Independent Review:

- Ratified: ALAC Statement on the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) - Proposed Accountability Enhancements (Work Stream 1) ICANN At-Large Staff
- SAC071: SSAC Comments on Cross Community Working Group Proposal on ICANN Accountability Enhancements Julie Hedlund
- FW: Comments on CCWG proposal Adam Peake
- REVISED ALAC Comment on CCWG-Accountability Initial Draft Proposal Alan Greenberg
- Comments from RSSAC. Lars-Johan Liman
- FW: [Acct-Staff] CCOMMENTS FROM NIGERIA INTERNET REGISTRATION ASSOCIATION Alice Jansen
- Fwd: Comments about CCWG reports from Jia He, CAICT Jia He
- CCAOI's comments to Cross Community Working Group on Enhancing ICANN Accountability
- (CCWG-Accountability) on Proposed Accountability Enhancements (Work Stream 1) Amrita
- CCAOI i2Coalition ICANN Comments on accountability proposal Christian Dawson
- ENTR BoD Statement Peter Van Roste
- NCSG comments Rafik Dammak
- ICANN Board Comments on CCWG-Accountability Initial Draft Proposal Michelle Bright
- ALAC Comment on CCWG-Accountability Initial Draft Proposal Alan Greenberg
- Google Comments on CCWG-Accountability Initial Draft Proposal for Public Comment Will Hudson
- Comments on the CCWG report Milton L Mueller
- NCSG Comment: Input Needed on its Proposed Accountability Enhancements (Work Stream 1) Joy Liddicoat (via Google Docs)
- U.S. Rep. Mike Kelly Comments on CCWG-Accountability Initial Draft Proposal Fong, Isaac
- ITI comment re CCWG-Accountability proposal Salaets, Ken

- InternetNZ comments for CCWG Jordan Carter INTA Comments - CCWG Accountability Lori Schulman
- USCC Comments on CCWG Accountability Proposal Schlosser, Adam
- French Government
- Roberto Bissio
- eco
- Internet Association
- David Post-Danielle Kehl
- German Ministry of Economic Affairs and Energy
- NORID
- Government of Argentina
- Afnic
- DotConnectAfrica Trust
- Government of India
- AFRALO
- Carlos Raúl Gutiérrez
- Nell Minow
- Jan Aart Scholte
- William Currie
- Danish Business Authority
- auDA
- Richard Hill
- RIR Community [late addition]
- Comments Sue Randel
- Comments on the Cross Community Working Group on Enhancing ICANN Accountability Byron Holland
- CDT comments on the CCWG Accountability's proposal Matthew Shears
- MPAA comments on the CCWG-Accountability Initial Draft Report Deacon, Alex
- Comments of the Government of Brazil on the document "Cross Community Working Group (CCWG) Accountability Initial Draft Proposal for Public Comment" Jandyr Ferreira dos Santos Junior
- IPC Comments on the CCWG-Accountability Initial Draft Proposal Greg Shatan
- From co-chairs of the cross community working group on IANA Stewardship (CWG-Stewardship) Jonathan Robinson
- IT comments on CCWG-Accountability Initial Draft Proposal Rita Forsi
- JPNIC's Input for CCWG-Accountability Draft Proposal MAEMURA Akinori
- ISPCP Comments on CCWG-Draft-Proposal olivier.muron
- LINX - the London Internet Exchange - submission to CCWG-Accountability First Public Comment Malcolm Hutty

- USCIB Comments: CCWG Proposed Accountability Enhancements (Work Stream 1) Barbara Wanner
- IAB comments on CCWG-Accountability Draft Report IAB Chair
- ICANN Cross Community Working Group Accountability Initial Draft Proposal - Comments from Nominet UK Simeon Foreman
- Business Constituency (BC) comment on CCWG proposal for enhancing ICANN accountability Steve DelBianco
- Comments about CCWG reports from Jia He, CAICT Jia He
- Comments from CCG Arun Sukumar
- gTLD Registries Stakeholder Group (RySG) Comments -- Enhancing ICANN Accountabiltiy CCWG Draft Proposal Drazek, Keith
- Spanish Government comments on CCWG Accountability draft proposal Campillos Gonzalez, Gema Maria
- Violations of the CCWG Accountability Charter Dr Eberhard W Lisse

Sixteen of them had no comments at all on the subject. Here is a summary of the remainder, organized into the following categories:

General comments on IRP enhancement
IRP Powers (scope of powers; ability to bind the Board; standing to bring claims)
IRP Composition and Membership
IRP Procedures
Miscellaneous

Finally, several commenters posed specific questions for the CCWG to consider; these are discussed at the end.

General

Twenty-four comments expressed their support for the general idea of strengthening ICANN's Independent Review process; none expressed a contrary view, with the exception of the Government of Italy which suggested that these efforts should not hold up the IANA functions transition.

- i-2 Coalition – "We strongly agree" with a binding appeal process that allows review of "actions or failures to act that violate either a) substantive limitations on the permissible scope of ICANN's activity or b) decision making procedures."
- NCSG – "The 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. 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.

- auDA (urging CCWG to make "bolstering the process for Independent Review to hold ICANN to a 'substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith' a "primary focus as it finalizes its recommendations")
- AFRALO ("AFRALO members appreciate the reinforcement of the Independent review Process, as well as the reconsideration mechanism proposed in the report")
- Post-Kehl ("we enthusiastically support the CCWG Draft Proposal's efforts to overhaul and reform ICANN's existing Independent Review Process (IRP)" and "agree that the IRP should possess hold ICANN to a substantive standard of behavior and be binding")
- Dot Connect Africa ("Independent review is a very important redress mechanism for the users of ICANN's services [and] needs 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")
- AFNIC ("[T]he 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 [and] has to be included in the fundamental bylaws, along with the obligation for ICANN to fund adequately this process.
- Internet Association ("improvements to the Independent Review Panel will be among the most important tools to enhance ICANN's accountability [and we] generally agree with the proposed requirements")
- French government ("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")

- eco (proposed IRP enhancements "would definitely enhance ICANN's accountability," though "it might be advisable to reach out to experts in the field and rely on their suggestions when it comes to details of the revised IRP")
- Susan Randell, CDT, MPAA, Brazil, IPC, ISPCP, LINX, USCIB,NOMINET, BC, CCG, RySG and the Government of Spain were all supportive overall of the proposed improvements to IRP.

One commenter (the ICANN Board) suggested that it could not respond to the IRP proposal without more detail: "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."

Regarding the overall structure of the IRP, two commenters urged that it "has to remain an internal mechanism within ICANN," i.e. that it not be designed as a "traditional court of international arbitration" or "international commercial arbitration panel."

> French Government:
> "We would particularly insist on 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; [and] stakeholders would also risk being prevented from going to other courts to have their complaints examined once they submitted them to the new IRP.
> "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, such as ICANN's Bylaws and Articles of Incorporation. In other words, 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."

Post-Kehl:
"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 . . . One cause of the failure of ICANN's current IRP process is that it "has been modeled far too closely on ordinary international commercial arbitration [which] functions quite effectively for ordinary commercial disputes but 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 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.

IRP Powers

Scope of powers. Five commenters expressed support for empowering the IRP to determine whether the corporation has acted or failed to act in violation of procedural and substantive limitations set forth in ICANN's Articles of Incorporation and/or Bylaws (including commitments spelled out in the proposed Statement of Mission, Commitments & Core Values).

- The Internet Association "The Internet Association agrees that 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.'

- auDA Approving of "bolstering the process for Independent Review to hold ICANN to a 'substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith'."

- French Government "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 which [is] limited in its capacity to judge on anything but the decision-making procedures followed by the Board. We therefore support the expansion of the standard of review for the IRP to 'ICANN's Bylaws, Articles of Incorporation, or Statement of Mission, Commitments, and Core Values or ICANN policies'."

- Post-Kehl Proposing "consolidating references to the IRP's powers in one place in the Bylaws, and stating them more directly: The Independent Review Panel shall have the power to determine whether ICANN has acted (or has failed to act) in violation of these Bylaws."

- eco Approving of "IRP decisions on the merits of the case (and not only on process)"

One commenter proposed a separate limitation on the IRP's powers, excluding "disputes relating to Internet number resources":

> RIRs "The RIR community stresses that there are separate, well-established appeal mechanisms for disputes relating to Internet number resources. . . . 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."

- Peake (for Bygrave) – Questions "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 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."

- Jia He – "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.
- CENTR Board – "Last but not least we reiterate the requirement that any appeal mechanism must not cover ccTLD delegation and/or re-delegation issues."

Binding decisions. Eleven commenters (Internet Association, Dot Connect Africa, auDA, Post-Kehl, Suzanne Randell, CDT, MPAA, Brazil, BC, IPC and eco) expressed support for the idea that IRP decisions must be binding on the Board none expressed a contrary view (although one commenter suggested that "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") (Internet Association).

One commenter sought additional clarification regarding "what decisions are binding and whom they are binding upon," and two commenters suggested that disputes within ICANN should be made binding and thus enforceable in courts of law, enabling outside parties that are involved in a dispute with ICANN to seek legal recourse outside of ICANN." (Internet Association); Dot Connect Africa. The Government of Brazil expressed concern that IRP decisions could be overruled by American courts.

One commenter sought additional clarification on the manner in which the principle identified by CCWG legal counsel (regarding the need for Board direction of the corporation's affairs) might interfere with the binding nature of IRP decisions, and

proposed solving that problem by giving the Board "an 'override,' or 'veto,' power over IRP decisions, exercisable *only* upon supermajority (or even unanimous) action by the Board (Post-Kehl p. xxx); one commenter took the opposite view, approving of IRP decision-making "without fear of veto by the Board" (Dot Connect Africa).

Standing. One commenter (Post-Kehl) approved of including a provision allowing "any person materially harmed by action or inaction by ICANN in violation of its Bylaws" standing to bring a claim before the IRP. Several commenters suggested that parties bringing claims before the IRP should be required first to "vet[ ] them through the community's policy development channels." Internet Association, USCIB, BC, RySG.

MPAA, USCIB, and Spain argue that the standard for review is too restrictive and should be broadened and that "material harm" requires better definition. MPAA suggests a "right of review" while the BC suggests an "abuse of discretion" standard rather than a de novo standard.

IRP Composition/Membership

Two commenters suggested that the role of international arbitral bodies in the nomination of IRP candidates be eliminated. Post-Kehl p. xxx; Richard Hill p. xx.

One commenter proposed that the 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. Afnic.

Three commenters supported the principle of independence of IRP panelists from ICANN board, staff, SOs, and ACs (post-Kehl, Internet Association, French Government); several of them expressed concern about the independence of IRP panelists given that IRP panelists would be both financially supported and selected by the ICANN Board. French Government, Jiah He, CCG and IPC. The government of Spain suggested the community should be more involved in panel selection.

One commenter urged that geographical diversity among IRP panelists shouldn't be achieved only by "reasonable efforts," and proposed that no more than 2 members of the panel could come from the same region. Afnic. Both Brazil and the CCG supported the notion that Geographic diversity was paramount while others (IPC, LINX) suggested that while preferable, diversity should not overtake meritocracy or efficiency as a priority.

- ALAC – Noted that IRP members must be independent from ICANN; suggested a requirement of independence from other parties (e.g. contracted parties)

- CENTR Board – "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."
- LINX suggested achieving greater independence through longer terms for standing panelists

The Government of Spain made the case that non-English proceedings should be possible much the way they are at WIPO.

IRP Procedures

On the fees for bringing a claim before the IRP, one commenter suggested that "the burden of the legal fees would be on ICANN." Dot connect Africa. That same commenter suggested that IRP proceedings should "focus 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," and 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)." Dot Connect Africa p. xxx.

A second commenter suggested that the IRP panel (and not ICANN) should be allowed to decide whether to give any particular complainant "free access to the process, after examining the non-frivolous nature of its complaint, and the impossibility to afford the expense of the IRP." Afnic.

The government of Spain suggested expanding the pro-bono applicant pool to include governments and IGOs.

One commenter suggested 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,' but that *all* IRP members should hear and decide all cases, speaking with a single institutional voice. Post-Kehl.

- Jia He – "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."

- i-2 Coalition – Suggests need for exhaustion requirement. Don't allow "parties to bring new arguments to the IRP without first vetting them through the community's policy development channels."
- i-2 Coalition – Suggests that IRP review be under abuse of discretion standard rather than "de novo." Failure to follow procedure is per se abuse but the AoD standard promotes "finality and predictability" of the consensus-based decision making process.
- CENTR Board – "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."
- Google – Urges exhaustion requirement (similar to i-2 Coalition)
- Google – Urges "abuse of discretion" standard (similar to i-2 Coalition).

Miscellaneous

- CENTR Board – Suggests that ICANN funding of IRP compromises its independence, and that CCWG should "investigate possible alternatives, including the option of having the IRP managed by an internationally recognized body."

Finally, we note that 2 commenters (Nigeria and India) asserted that the CCWG should look again at ICANN's "jurisdiction" in the US. That is not, strictly, and IRP issue, but is worth mentioning.

QUESTIONS FOR CCWG

French Government:
"Since ICANN's new Statement of Mission, Commitments, and Core values, are to be incorporated in its Bylaws (Draft prop., section 3.1, §50), are we right in considering that the new IRP's ability to judge on the merits, rather than on procedures, only lies in the expansion of its standard of review to ICANN policies?"

"Are we correct in understanding that standard international courts of arbitration, such as the ICC, were not considered as adequate for the new IRP mechanism because of the expansion of its standard of review from ICANN's Bylaws and Articles of Incorporation to ICANN policies?"

"Must we then understand that all stakeholders, including governments, are expected to legally recognize the IRP as an international court of arbitration whenever they want to file a complaint against any action or inaction of the ICANN Board? · 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? And since ICANN is based in the US, would the US authorities themselves give stakeholders guarantees on the exequatur for decisions taken by alternative courts regarding future ICANN policies? · Would it therefore 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?"

Post-Kehl:
Urging the CCWG to obtain additional clarification from counsel on the 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 *so material to the Board that it would undermine its statutory obligations and fiduciary roles to allow the IRP to bind the Board*,' without any indication of the matters that might fall into that category (and therefore outside of IRP review/control)."