

This document contains a summary of the public comments¹ received in response to the draft Work Stream 1 recommendations issued by the Cross Community Working on Enhancing ICANN Accountability (CCWG-Accountability). The comments are summarized in order of submission for each category as applicable. Even though this summary was drawn-up to reflect as accurately and objectively as possible the views expressed by participants, it does not substitute in any way the original contributions which are publicly available for full reference at: <http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/>

Contributions provided by:

Comments on Specific Recommendations

- [African Regional At-Large Organization \(AFRALO\)](#)
- [Association française pour le nommage Internet en coopération \(Afnic\)](#)
- [At-Large Advisory Committee \(ALAC\)](#)
- [Australia's Domain Name Administrator \(auDA\)](#)
- [Business Constituency \(BC\)](#)
- [Canadian Internet Registration Authority \(CIRA\)](#)
- [Carlos Raúl Gutierrez \(CRG\)](#)
- [Center for Democracy & Technology \(CDT\)](#)
- [Centre for Communication Governance \(CCG\)](#)
- [China Academy of Information and Communication Technology \(CAICT\)](#)
- [Council for European National Top Level Domain Registries \(CENTR\)](#)
- [CWG to Develop an IANA Stewardship Transition Proposal on Naming Related Functions Stewardship \(CWG-St\)](#)
- [Danish Business Authority \(DBA\)](#)
- [David Post – Danielle Kehl \(DP-DK\)](#)
- [DotConnectAfrica Trust \(DCA-T\)](#)
- [DotMusic \(.MUSIC\)](#)
- [eco \(eco\)](#)
- [Federal Ministry for Economic Affairs and Energy \(Govt-DE\)](#)
- [Google \(GG\)](#)
- [Government of Brazil \(Govt-BR\)](#)
- [Government of India \(Govt-IN\)](#)
- [Government of Italy \(Govt-IT\)](#)
- [Government of Spain \(Govt-ES\)](#)
- [gTLD Registries Stakeholder Group \(RySG\)](#)
- [ICANN Board of Directors \(ICANN\)](#)
- [Information Technology Industry Council \(ITI\)](#)
- [Intellectual Property Constituency \(IPC\)](#)
- [International Trademark Association \(INTA\)](#)
- [Internet Architecture Board \(IAB\)](#)
- [Internet Association \(IA\)](#)
- [Internet Infrastructure Coalition \(I2Coalition\)](#)
- [InternetNZ \(.NZ\)](#)

- [Internet Services Provider and Connectivity Provider Constituency \(ISPCP\)](#)
- [Jan Scholte \(JS\) comment 1](#)
- [Jan Scholte \(JS\) comment 2](#)
- [Japan Network Information Center \(JPNIC\)](#)
- [Jiah He \(JH\)](#)
- [Lee Andrew Bygrave \(LAB\)](#)
- [London Internet Exchange \(LINX\)](#)
- [Milton Mueller \(MM\)](#)
- [Ministère des Affaires étrangères \(Govt-FR\)](#)
- [Ministry of Foreign Affairs of Argentina \(Govt-AR\)](#)
- [Motion Picture Association of America \(MPAA\)](#)
- [Namibian Network Information Centre \(.NA\)](#)
- [Nigeria Internet Registration Association \(NIRA\)](#)
- [Nell Minow \(NM\)](#)
- [Nominet \(.UK\)](#)
- [Non Commercial Stakeholder Group \(NCSG\)](#)
- [Regional Internet Registries \(RIR\)](#)
- [Representing the ecosystem of Internet Bahrat-Model \(CCAOI\)](#)
- [Richard Hill \(RH\)](#)
- [Roberto Bissio \(RB\)](#)
- [Root Server System Advisory Committee \(RSSAC\)](#)
- [Sébastien Bachollet \(SB\)](#)
- [Security and Stability Advisory Committee \(SSAC\)](#)
- [Sivasubramanian M \(Siva\)](#)
- [Sue Randel \(SR\)](#)
- [UNINETT Norid AS \(NORID\)](#)
- [US Chamber of Commerce \(USCC\)](#)
- [US Council for International Business \(USCIB\)](#)
- [US Rep. Mike Kelly HR2251 \(HR2251\)](#)
- [William Currie \(WC\) comment 1](#)
- [William Currie \(WC\) comment 2](#)
- [Zhong Rui \(ZR\)](#)

Contributor	Comment	CCWG Response/Action
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Revised Mission, Commitments & Core Values

Question 1: Do you agree that these recommended changes to ICANN's Mission, Commitments and Core Values would enhance ICANN's accountability?

Question 2: Do you agree with the list of requirements for this recommendation? If not, please detail how you would amend these requirements.

Contributor	Comment	CCWG Response/Action
Jan Scholte (JS) comment 1	<p>- Could tensions arise in practice between para 35 ('ICANN accountability requires compliance with applicable legislation in jurisdictions where it operates') and para 51/2/iii/2 ('any decision to defer to input from public authorities must be consistent with ICANN's Commitments and Core Values')</p>	<p>Concerns</p> <p>Summary / Impression:</p> <p>Action Suggestion:</p> <p>Consider need to reconcile limitation on compliance with deference to input from public authorities with both Commitments/Core Values and applicable law.</p> <p>CCWG Response:</p> <p>To the extent ICANN is directly subject to any applicable law it must comply with that law, and nothing in the proposed Bylaws is intended to change that (nor could it). This reality is recognized</p>

¹ The public comment period ran from 4 May 2015 to 3 June 2015. Due to the late availability of the translated versions of the proposal, those who were reliant on these translated versions to

		<p>in the proposed Core Values that calls on ICANN to comply with relevant principles of international law, applicable law, and international conventions.</p> <p>In the ICANN policy development context, however, “advice” from public authorities may go beyond what is required or prohibited by applicable law. In addition, the specifics of applicable law may vary from jurisdiction to jurisdiction. In discerning the global public interest through the bottom-up multistakeholder process, the Commitments and Core Values are designed to reflect widely established principles of fairness and due process, and to provide a stable and predictable foundation for ICANN policy development.</p> <p>The CCWG also notes that the ICANN Bylaws, including its Commitments and Core Values, do not and cannot displace the rights of sovereigns. All governments retain the right and authority to apply their laws and regulations to actors and actors subject to their jurisdiction. International law provides other formal intergovernmental mechanisms to prescribe behaviors where international powers agree on a common standard.</p>
<p>DBA</p>	<p>- Strengthened principles for ICANN, including a new Mission Statement, Commitments and Core Values, which i.e. aim at keeping ICANN within its technical mandate and focuses on its core mission.</p>	<p>Agreement</p> <p>Summary / Impression:</p>
<p>WC comment 2</p>	<p>Has the working group, when it comes to tightening up the Principles section discussed whether to include a commitment towards freedom of expression? And the reason I raise this is that one of the accountability issues is the question of who the community as accountability forum is accountable to. And one of the answers is to say that ICANN as a whole is accountable to democratic standards. An important aspect of the logical infrastructure as a system of unique identifiers, that ICANN is to be the steward for, is that it is an infrastructure which underpins humanity’s freedom of expression. And I was wondering if that has been discussed for inclusion in the revised Bylaws.</p>	<p>Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> This raises a variety of “who is watching the watchers” questions <p>Actions suggested:</p> <p>Consider an explicit reference to freedom of expression as a Commitment and/or Core Value to further safeguard fundamental right.</p> <p>CCWG Response:</p> <p>The revised ICANN Mission Statement explicitly provides that ICANN shall not engage in or use its powers to regulate services that use the Internet’s unique identifiers, or the content that they carry or provide. As the commenter points out, this is not the same as an affirmative undertaking to promote free expression on the Internet. The CCWG looked specifically at a number of similar suggestions and concluded: [AVRI AND GREG – WORKING ON HUMAN RIGHTS ISSUES]</p>
<p>DCA-T</p>	<p>Additional text for para 89 Employ open, transparent and bottom-up, [private sector led multistakeholder] policy development processes that (i) seeks input from the public, for whose benefit ICANN shall in all events act, (ii) promote well-informed decisions based on expert advice TO WHOM DUE DILIGENCE ON CONFLICT OF INTEREST HAS BEEN PERFORMED UPON, and (iii) ensure that those entities most affected can assist in the policy development process</p>	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Current Bylaws are too weak and permit excessive discretion. - Support limiting ability of ICANN Board to change Bylaws. <p>Action Suggested: Specifically call out that expert advice must be free from conflict of interest.</p>

		CCWG Response: The CCWG appreciates and will consider this input.
NM	<p>We provide for changes in the by-laws, but it may be that we would be better off making clear that core principles are not subject to change. The ultimate goal of the organization is to act in the interest of the public as a whole, without special treatment of any business, private entity, individual, or government. The inherent founding principle that this entity exists for the overall public good and not for the commercial benefits of any individual or group should be a core principle that cannot be changed, no matter how many people go for it.</p>	<p>Agreement – New Idea Summary / Impression:</p> <p>Actions suggested:</p> <ul style="list-style-type: none"> - Prohibit changes to Commitments and Core Values - Create Core Value stating that ICANN exists for the overall public good and not for the commercial benefits of any individual or group <p>CCWG response:</p> <p>ICANN exists, per its Mission Statement, to coordinate the global Internet’s unique identifiers and ensure the stable and secure operation of those systems. The primary Commitment contained in the proposed Bylaws is that ICANN must operate for the benefit of the Internet community as a whole. The CCWG discussed the idea of making the Mission Statement, Commitments, and Core Values unchangeable, but ultimately concluded that so long as sufficient safeguards are in place to prevent capture, flexibility should be maintained.</p>
Afnic	The revised Mission, Commitments and Core Values are more specific in the current draft that they were before. Clearer bylaws are an obvious enhancement for accountability.	Agreement
DP-DK	<ul style="list-style-type: none"> - We have alternative proposals that strengthen the statement of ICANN’s Mission so that it can serve effectively as an <i>enforceable</i> limitation on ICANN’s powers (and we propose several “Stress Tests” to test the adequacy of our formulation). - One central risk of the transition is that a largely unregulated and unconstrained ICANN will leverage its power over the DNS to exercise control over non-DNS-related Internet conduct and content. ICANN has (and has always been conceived of as having) a limited technical mission: in the words of its current Bylaws, that mission is to “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of [those] systems.” It should exercise those powers (but <i>only</i> those powers) necessary to carry out that mission effectively. Articulating precisely what that mission is and what those powers are, and doing so in a manner that will effectively circumscribe the exercise of the corporation’s powers and constrain its ability to exercise other powers, or to stray into policy areas outside of or unrelated to that mission, is a critical and indispensable task of the transition. The CCWG Draft Proposal recognizes this risk, and we strongly endorse its stated goals: (a) “that ICANN’s Mission is limited to <i>coordinating and implementing</i> policies that are designed to ensure the stable and secure operation of the DNS and are reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS.”; (b) that its Mission “does <i>not</i> include the regulation of services that use the DNS or the regulation of the content these services carry or provide,” and that (c) “ICANN’s powers are ‘enumerated’ – meaning that anything not articulated in the Bylaws are outside the scope of ICANN’s authority.” (emphases added). - The goals the CCWG is pursuing in this section of the CCWG Draft Proposal, and in the re-stated Mission, are critically important ones. We 	<p>Agreement – Concerns – New Idea Summary / Impression:</p> <p>CCWG has made significant progress in designing a durable accountability structure, but there are important omissions and/or clarifications that need to be addressed.</p> <p>Actions suggested:</p> <ul style="list-style-type: none"> - Clarify and strengthen the separation between DNS policy-making and policy-implementation by limiting the role of the Board to (1) organize and coordinate ICANN’s policy development process and (2) implementation (only) of consensus policies emerging from that process - Revise proposed Mission Statement to read: <ul style="list-style-type: none"> “(a) ICANN’s Mission is to coordinate the development and implementation of policies that are developed through a bottom-up, consensus-based multistakeholder process, designed to ensure the stable and secure operation of the DNS, and for which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS. “(b) ICANN shall have no power to act other than in accordance with, and as

strongly support the central thrust of the CCWG recommendations, and believe it can be articulated even more directly than in the draft. ICANN's Bylaws should explicitly recognize that the corporation's role in DNS policy-making is limited to: "coordinat[ing] the development [of] and implementation of policies" that are (a) "developed through a bottom-up, consensus-based multistakeholder process," (b) designed to "ensure the stable and secure operation of the DNS," and for which (c) "uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS." This helps to clarify that ICANN's role (and, therefore, the primary role of its Board of Directors) is to *coordinate a consensus-based policy-development process, and to implement the policies that emerge from that process.*

- A constitutional balance for the DNS must preserve and strengthen the separation between DNS policy-making and policy-implementation. ICANN's position in the DNS hierarchy gives it the *power* to impose its policies, via the web of contracts with and among registries, registrars, and registrants, on all users of the DNS. One critical constraint on the exercise of that power is that it is *not* free to impose on those third parties whatever policies it chooses – even those it believes in good faith to be in the "best interest" of those Internet users. It is the Internet stakeholder community, acting by consensus, that has the responsibility to formulate DNS policy. ICANN's job is a critical though narrow one: to *organize and coordinate* the activities of that stakeholder community – which it does through its various Supporting Organizations, Advisory Committees, and Constituencies – and to *implement* the consensus policies that emerge from that process.

- Power checks power. Although this separation has gotten muddier over the last 15 years, it has always been an essential component of ICANN's consensus-based, bottom-up policy development scheme – modeled, as it was, on the consensus-based, bottom-up processes that had proved so effective in managing the development and global deployment of the DNS and related Internet protocols in the period prior to ICANN's formation. It is a critical safeguard against ICANN's abuse of its power over the DNS. Effective implementation of this limitation will go a long way towards assuring the larger Internet community that ICANN will stick to its knitting – implementing policies which relate to the openness, interoperability, resilience, and/or stability of the DNS, arrived at by consensus of the affected communities.

- We believe that the implementation of this principle in the CCWG Draft Proposal can be substantially improved and strengthened. To begin with, it is not as clear and it could and should be that the statement of ICANN's Mission is meant to serve as *an enforceable limitation on ICANN's powers* – *i.e.*, that it is a means of enumerating those powers, and thereby of declaring what the corporation can, and cannot, do. The Proposal's demarcation between and among ICANN's Mission, its "Core Values," and its "Commitments" is overly complex and confusing. It is not clear which are meant to be enforceable enumerations of the corporation's power – to be included in a Fundamental Bylaw and enforceable by the Independent Review Board - and which are more generally advisory or aspirational, "statements of principle rather than practice" that are "deliberately expressed in very general terms." By covering so much ground between them, the structure detracts from, rather than enhances, the force of those provisions that are designed to serve as actual limits on the corporation's powers (as opposed to those that are merely aspirational). There are many good reasons to state aspiration and advisory guides to future corporate action, but we suggest that they be more clearly separated from the enumerated powers.

reasonably necessary to achieve, its Mission. Without in any way limiting the foregoing absolute prohibition, ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet's unique identifiers, or the content that they carry or provide."

- Adopt a new stress test to test the alternative formulation

CCWG Response:

The CCWG will consider this revised language

	<p>- We also suggest that the relevant CCWG-proposed Bylaw provision – that “ICANN shall not undertake any other Mission not specifically authorized in these Bylaws” – may not function effectively to limit ICANN to activities within the narrowly-stated limits of its Mission. Precisely because the Mission, Core Values, and Commitments cover so much overlapping ground, there is a vast range of action that ICANN might take that could be justified with reference to some element or elements appearing on those lists, and thereby deemed to have been “specifically authorized in these Bylaws.” We believe this could detract, importantly, from the effectiveness of the Mission statement as a meaningful limit on what ICANN can and cannot do.</p> <p>- We propose the following alternative as a Fundamental Bylaw, which we suggest would be a clearer and more direct statement of the principle to be implemented and therefore more likely to be adequately enforceable: “(a) ICANN’s Mission is to coordinate the development and implementation of policies that are developed through a bottom-up, consensus-based multistakeholder process, designed to ensure the stable and secure operation of the DNS, and for which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS; “(b) ICANN shall have no power to act other than in accordance with, and as reasonably necessary to achieve, its Mission. Without in any way limiting the foregoing absolute prohibition, ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet’s unique identifiers, or the content that they carry or provide.””</p>	
<p>IA</p>	<p>- IA agrees that ICANN’s Mission Statement, Commitments, and Core Values are instrumental to ensuring and enforcing ICANN accountability, and supports the concept that they should form ICANN’s “constitutional core.” ICANN’s conduct should be measured against these provisions and ICANN must be accountable for meeting these standards, as well as for not exceeding its scope of responsibilities.</p> <p>- IA supports changes to ICANN’s Bylaws to impose binding obligations on ICANN to operate for the benefit of the Internet community as a whole, and to carry out its activities in accordance with applicable law, and international law and conventions through an open and transparent process.</p> <p>- The scope of ICANN’s authority should be specifically enumerated.</p> <p>- IA supports the clarification to ICANN’s Mission Statement that the scope of its authority does not include the regulation of services that use the DNS or the regulation of content these services carry or provide.</p> <p>- IA supports the clarification to the Core Values that any decision to defer to input from public authorities must be consistent with ICANN’s Commitments and Core Values</p> <p>- IA suggests the continued use of the phrase “private sector led” in the Bylaws and other documentation. The term has been used since ICANN’s inception to mean “non-governmental,” and not commercial. If any alternative term is used, it must be clear that it is meant that ICANN will remain non-governmental led.</p> <p>- IA, however, seeks clarification on the inclusion of new criteria associated with balancing commitments and core values. The new language appears to import concepts from U.S. constitutional law jurisprudence. But under U.S. law, these tests are typically applied when one fundamental value (e.g., equal protection or freedom of speech) is infringed, not when the courts are seeking to balance competing fundamental interests. And the proposed tests, while useful for the context in which they were originally developed, do not provide any guidance as to how ICANN should actually balance competing interests.</p>	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - IA Supports the revised Mission Statement, Commitments and Core Values and supports the continues use of the phrase “private sector led” - IA seeks clarification on the new language for balancing Commitments and Core Values. According to IA (and other commenters) the proposed text is too US-centric and is typically applied when one fundamental value is being infringed, not when the courts “are seeking to balance competing fundamental interests.” IA concludes that the criteria do not provide guidance “as to how ICANN should actually balance competing interests.” <p>CCWG response:</p> <p>The CCWG is considering this comment.</p> <p>We note that in developing this test, the CCWG examined the standards applied by governments around the world for balancing legitimate legislative goals with fundamental rights and privileges. Based on our research, the standard articulated in the current proposed language is applied in a number of legal regimes, both civil and common law based.</p> <p>For example, Canada applies the following test, as set forth in <i>R. v. Oakes</i> (1986):</p> <ol style="list-style-type: none"> 1. <u>Prescribed by Law</u>: The limitation of any Charter right must be prescribed by law that is (i) within the

Unless CCWG can provide more information about how the new text would assist in decision-making, the Internet Association suggests retaining the existing language.

jurisdiction of the level of government that passed it; (ii) clear and accessible to ensure that citizens may know what kinds of activities are allowed and not allowed.

2. **Pressing and Substantial:** The government must prove that the objective of the law is pressing and substantial. In other words, the purpose of the law must be important to society.

3. **Proportionality:** This step in the Oakes Test contains three sub-steps. The concept of proportionality refers to whether the government, in the course of achieving its legislative objectives, has chosen proportional, or relative ways, to achieve those objectives. In other words, government has to find reasonable ways to achieve, or implement, its legislation. The analysis that occurs in these substeps is a fundamental aspect of the Oakes Test.

- **Rational Connection:** The limitation of the right must be rationally connected to the objective of the law in question. Any limitation to a Charter right cannot be arbitrary, or unconnected to the purpose of the law.
- **Minimal Impairment:** In order for a government action that infringes Charter rights to be justifiable, the Charter right must be impaired as little as possible.
- **Proportionate Effect:** This part of the Oakes Test is concerned with the overall benefits and effects of the law in question. Proportionate effect seeks to balance the negative effects of any limitation of a right with the positive effects that law may have on society as a whole. It asks if the limit on the right is proportional to the importance of that law's purpose. It also asks whether the benefits of that law are greater than any negative effects produced by a limitation on a right.

Likewise, the EU Charter of Fundamental Rights provides that: "*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are **necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.**"*

The proportionality principle or test usually contains the following three elements:

- There must be a causal connection between the national measure and the aim pursued; the measure is relevant or pertinent.
- There is no alternative measure available, which is less restrictive (of a competing right)
- And there must be a relationship of proportionality between the obstacle introduced, on the one hand, and, on the other, the objective thereby pursued and its actual attainment. This is referred to as proportionality *stricto sensu*; meaning that the measure will be disproportionate if the resulting

		restriction is out of proportion to the aim sought by or the result brought about by the national rule.
<p>Govt-ES</p>	<p>The proposed text “<i>While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities <u>in accordance with the Bylaws and to the extent consistent with these Fundamental Commitments and Core Values.</u></i>” Request the underlined text be deleted. Neither the current Bylaws nor the Articles of Incorporation limit the ability of governments to issue advice to the ICANN Board. This is because it would be ineffective as governments’ would still be obliged to protect general public interests (paragraphs 68 and 69 of the Tunis Agenda and page 6 of the Net Mundial Statement). Moreover, this is not in the best interest of the global Internet community ICANN pledges to serve as managing the Internet system of unique identifiers in the public interest is the first and foremost mission of ICANN (sections 2 and 3 of the AoC and sections 3 and 4 of the Aol)</p> <p>- In this respect, acting for the benefit of the global Internet users and ensuring its decisions are made in the public interest should feature higher in the Bylaws, either in the definition of its mission or as one of its first core values.</p> <p>- Core values para 69. There is no justification to strike out the explicit mention to local law when reflecting this provision of the Aol into the Bylaws. Local law plays an essential role in ICANN’s legal environment, as for instance data retention period or Whois accuracy issues easily prove. I CAN’T FIND THIS.</p>	<p>Concerns Divergence– Confusion</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - The government of Spain objects to the proposed language that clarifies that ICANN’s deference to public authorities must be tempered by adherence to ICANNs own Bylaws, including its Commitments and Core Values. - The government of Spain notes that any such limitation would be ineffective to the extent that ICANN’s actions would be inconsistent with applicable principles of sovereignty or law. - The government of Spain believes that the principle of decision-making in the public interest should appear higher in the text. - The government objects to the removal of a reference to local law. <p>CCWG response:</p> <p>The CCWG agrees that to the extent such compliance would be contrary to applicable law, we recognize that nothing in ICANN’s Bylaws could trump such law. In the ICANN policy development context, however, “advice” from public authorities may go beyond what is required or prohibited by applicable law. In addition, the specifics of applicable law may vary from jurisdiction to jurisdiction. In discerning the global public interest through the bottom-up multistakeholder process, the Commitments and Core Values are designed to reflect widely established principles of fairness and due process, and to provide a stable and predictable foundation for ICANN policy development.</p> <p>The CCWG also notes that the ICANN Bylaws, including its Commitments and Core Values, do not and cannot displace the rights of sovereigns. All governments retain the right and authority to apply their laws and regulations to actors and actors subject to their jurisdiction. International law provides other formal intergovernmental mechanisms to prescribe behaviors where international powers agree on a common standard.</p>
<p>RySG</p>	<p>- RySG notes a difference of opinion on language pertaining to ICANN “remaining rooted in the public sector.” We support the definition of Public Sector proposed in the draft proposal and do not believe that this clarifying language is inconsistent with the multi- stakeholder model. With respect to the obligation to avoid capture, it is not clear whether the CCWG-Accountability intends to address this through specific language or through community balancing mechanisms built into the proposed community empowerment structure. We advise that this be achieved through the latter; otherwise defining and identifying instances of capture may be difficult and introduce subjectivities. We believe that the checks and balances described in the draft proposal, which will be reflected in the revised bylaws, help to avoid capture.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - The Registry Stakeholder Group supports retention of ICANN’s obligation to remain “rooted in the public sector” and notes that this language is consistent with the multi-stakeholder model. - The RySG supports use of the proposed community empowerment structure (rather than Bylaws language) to prevent capture. <p>CCWG response:</p>

	<p>- If implemented, the RySG believes the recommended changes to ICANN's mission, commitments and core values would help to enhance ICANN's accountability to the global multi-stakeholder community. They are more clearly and strongly articulated than in the existing bylaws.</p> <p>- We are especially supportive of the recommended clarification that ICANN's powers are enumerated.</p> <p>- RySG supports the list of requirements included in the recommendation, provided that the community has the ability to approve or reject any future changes initiated or advanced by the ICANN Board</p>	<p>The CCWG will consider the suggestion regarding capture.</p>
<p>CCG</p>	<p>The proposed Mission provides that ICANN will be subject to international law. The only reference made to any particular convention in the proposal is with respect to WHOIS database adhering to privacy conventions. An exhaustive, or at the very least, an indicative list of applicable international treaties/conventions should be provided.</p>	<p>New Idea</p> <p>Summary / Impression: The CCG suggests that an indicative list of applicable international treaties and conventions should be used to define ICANN's obligation to comply with international law.</p> <p>CCWG response: The CCWG will consider this input.</p>
<p>BC</p>	<p>- BC, in general, supports the changes to ICANN's Bylaws in the areas of Mission, Commitments, and Core Values. When coupled with legally enforceable community power to block, or in some cases approve, Board-proposed amendments to the Bylaws, these changes would enhance ICANN's accountability.</p> <p>- BC looks forward to IETF language on ICANN's mission with respect to protocol, port, and parameter numbers, which is still a missing element.</p> <p>- BC supports the CCWG proposal to limit the scope of ICANN's mission via the Bylaws: "ICANN shall not undertake any other Mission not specifically authorized in these Bylaws." (paragraph 60 on p.20) However, the BC proposes a change to the next sentence in paragraph 60, which now reads: "...ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet's unique identifiers, or the content that they carry or provide".</p> <p>- BC strongly support the proposition that ICANN should not attempt to establish obligations on non-contracted parties. Paragraph 60 should be clarified and we propose that it should read as follows: "ICANN shall not engage in or use its powers to attempt to establish contractual obligations on companies with which it is not in privity of contract and shall not attempt to establish contractual obligations on contracted parties that are not agreed by such parties."</p> <p>- Regarding the balancing test among competing Commitments and Core Values, the BC seeks clarification as to why changes are needed to existing language. Any amendments to the existing language should promote prompt resolution of issues – not the lack of action. The BC strongly urges the CCWG to address this in the next iteration of the proposal.</p> <p>- BC supports the use of the phrase "private sector led" in the Bylaws.</p> <p>- BC supports ICANN's commitment stated in paragraph 336 (p.59), arising from the <i>Affirmation of Commitments</i> required review of gTLD expansions: "ICANN will ensure that as it expands the top-level domain space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection." While paragraph 337 indicates this language will be added to the Bylaws core values section, it is only partially reflected in paragraph 107 (p.26), which adds the phrase "enhances consumer trust and choice". The BC therefore urges the CCWG to implement the entire commitment from the <i>Affirmation of Commitments</i>, including "malicious abuse issues, sovereignty concerns, and rights protection"</p>	<p>Agreement New Idea</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - The BC supports the changes to ICANN's Mission Statement, Commitments, and Core Values. - The BC proposes to strengthen paragraph 60 to ensure that ICANN does not attempt to establish obligations on non-contracted parties. - The BC urges the CCWG to fully reflect the AoC obligations regarding new gTLD safeguards about malicious abuse, sovereignty concerns, and rights protection in the revised bylaws. <p>CCWG response: The CCWG will consider this input.</p>

<p>.UK</p>	<p>While we welcome the approach in this proposal, some of the wording needs more thought. (Wording like “to the extent feasible” and “where feasible,” for example, rather negates ideas considered to be fundamental.) Given the significant role of the mission, commitments and core values in underpinning the new accountability structure, we would question why they should not be considered at the level of fundamental bylaws for allowing changes. Changes here should be at a minimum subject to rigorous debate and command good community support. Paragraph 56: This appears to duplicate text from paragraph 55, but with a different emphasis. We would note that ICANN does not coordinate the development and implementation of policy for ccTLDs except in exceptional circumstances.</p>	<p>Agreement</p> <p>CCWG response:</p> <ul style="list-style-type: none"> - The CCWG agrees that certain language requires clarification. - The CCWG agrees that the Commitments and Core Values should be Fundamental Bylaws. - The CCWG agrees that ICANN plays a limited role with respect to the development of ccTLD policy.
<p>IAB</p>	<p>- We suggest a clarification to the following existing bylaws text in paragraph 56: "The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN: 1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are Domain names (forming a system referred to as "DNS"); Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and Protocol port and parameter numbers; 2. Coordinates the operation and evolution of the DNS root name server system; 3. Coordinates policy development reasonably and appropriately related to these technical functions." We believe the verb "coordinates" gives the wrong impression about ICANN's core function, particularly for those outside of the ICANN community who are not familiar with the ecosystem of entities involved in developing and managing policies and identifier assignments related to core Internet registries. Furthermore, since there are many sets of unique identifiers that ICANN is not involved in administering, it would be more accurate to use the term "core Internet registries" rather than referring to the Internet's unique identifier systems. We suggest the edited text below to make both of these points more clear: "The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to support, at the overall level, core Internet registries, and in particular to ensure the stable and secure operation of those registries. In particular, ICANN: 1. Supports the allocation and assignment of values in three categories of registries as directed by the consensus processes in the responsible operational communities. These categories are Domain names (forming a system referred to as "DNS"); Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and Protocol parameters; 2. Supports the operation and evolution of the DNS root name server system; 3. Supports policy development reasonably and appropriately related to the DNS." With these edits, we believe the paragraphs that further articulate ICANN's role (57-60) would not be necessary because item (1) circumscribes ICANN's mission to carrying out identifier allocation and assignment at the direction of the relevant communities. At the very least, it obviates the need for paragraph 59, which we view as unnecessarily constraining the relationship between the IETF and ICANN. That relationship has benefited from fluidity over the years and that characteristic should be preserved going forward.</p>	<p>Agreement New Idea</p> <p>Summary / Impression:</p> <p>The IAB suggests language clarifying ICANN's limited role with respect to coordination of unique identifiers for “core internet registries” rather than the whole of the Internet’s “unique identifier systems.”</p> <p>CCWG response:</p> <p>The CCWG will consider this input.</p>
<p>USCIB</p>	<p>- Para 50, 71-76: The need to balance competing interests exists in ICANN's current Bylaws. USCIB seeks clarification as to why changes are needed to existing language. Any amendments to the existing language should promote prompt resolution of issues and not inactions. USCIB strongly urges the CCWG to address this in the next iteration of the proposal.</p>	<p>Agreement – New Idea Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - The USCIB supports the retention of the term “private sector” - The USCIB proposes to strengthen paragraph

	<p>- Para 58: The current draft does not contain ICANN’s mission with respect to protocol, port, and parameter numbers (which is to be provided by IETF). We wait for this important element.</p> <p>- Para 60, para 337: We strongly support the proposition that ICANN should not attempt to establish obligations on non-contracted parties. Indeed, ICANN’s entire multi-stakeholder structure is built on a self-regulatory system implemented through contractual obligations and thus ICANN can only establish contractual obligations on parties with which it has privity through a negotiated and mutually agreeable contract/amendment with such parties. Therefore, para 60 should be clarified and we propose that it should read as follows: <i>“ICANN shall not engage in or use its powers to attempt to establish contractual obligations on companies with which it is not in privity of contract and shall not attempt to establish contractual obligations on contracted parties that are not agreed by such parties.”</i></p> <p>- We also note and support ICANN’s obligation at paragraph 337, <i>“ICANN will ensure that as it expands the top-level domain space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.”</i> Paragraph 337 says this language will be added to the bylaws core values section, which USCIB supports. However, the entirety of this section does not appear in the proposed bylaw core value changes proposed by the CCWG and we request that the entirety of this language be added.</p> <p>- para 89: We support the retention of the term “private sector.” It is both historically accurate and an important element to retain.</p> <p>- para 269: The proposed text for insertion in the bylaws is “where feasible, and appropriate, depending on market mechanisms.... ” We feel that there is a large range of opinions on the role of the market. The AoC, however, is stronger in its support of the marketplace, so we would suggest deleting the words “and appropriate”.</p>	<p>60 to ensure that ICANN does not attempt to establish obligations on non-contracted parties.</p> <ul style="list-style-type: none"> - USCIB also seeks clarification on the new language for balancing Commitments and Core Values. - The USCIB urges the CCWG to fully reflect the AoC obligations regarding new gTLD safeguards about malicious abuse, sovereignty concerns, and rights protection in the revised bylaws. <p>CCWG response:</p> <p>The CCWG will consider this input. Please also see responses above to comments submitted by the BC (#100) and by IA (#96) on these topics.</p>
<p>LINX</p>	<p>- We consider it essential that ICANN adopt a Mission in its Bylaws that is sufficiently clear to be justiciable – that is, for an independent body to objectively rule on whether a particular action is authorised by the Mission or is ultra vires.</p> <p>- LINX emphasises the importance of the following points: a. We support the clarification that ICANN’s Mission is limited to the enumerated powers, and we agree with the CCWG’s proposed statement of what the Mission is;</p> <p>b. We support the inclusion of an explicit statement that ICANN’s Mission does not include the regulation of services that use the DNS, or the regulation of the content these services carry or provide; c. We congratulate the CCWG on finding an imaginative way to identify certain Core Values as “Commitments” that should be adhered to absolutely, without need to balance against each other, while others may involve trade-offs. We support the chosen Commitments.</p> <p>- LINX is concerned by the reference to the “global public interest” in paragraph 105: a. We would strongly object to the inclusion of a general, unqualified commitment to the “global public interest” as this amounts to a general authorisation for the decision-maker to do whatever they feel is best in their almost unconstrained discretion. That would be inappropriate; b. Paragraph 105 qualifies the “global public interest” with “identified through the bottom-up, multistakeholder policy development process and are accountable, transparent, and respect the bottom-up multistakeholder process”; c. In our view this improves the term, but still risks asking the ICANN community, through the PDP, to seek to fix all the troubles in the world, and inviting them to take ICANN beyond its defined</p>	<p>Agreement</p> <p>Summary / Impression:</p> <p>Linx generally supports the proposed changes to the Mission Statement, Commitments and Core values but seeks a clarification to the term “global public interest” to ensure that ICANN (a) remains within its limited mission and (b) identifies public interest values consistent with that mission through the bottom up multi-stakeholder process.</p> <p>CCWG response:</p> <p>The CCWG appreciates and will consider this input.</p>

	<p>mission in pursuit of the global public interest as the ICANN community sees it. We would therefore remove the reference to "the global public interest" in Paragraph 105.</p>	
JPNIC	<p>Yes. We believe it enhances ICANN's accountability by clearly defining the scope of ICANN's missions, to ensure ICANN focuses to conduct its activities within this scope. We especially find it important, that "ICANN's Mission does not include the regulation of services that use the DNS or the regulation of the content these services carry or provide" We also agree to designate certain Core Values as Commitments listed below, which are all essential principles in ensuring ICANN remains accountable in maintaining the stability of the Internet and how the Internet and bottom up, transparent, open form should be facilitated.</p> <ol style="list-style-type: none"> 1. Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet 2. Limit its activities to those within ICANN's Mission that require or significantly benefit from global coordination; 3. Employ open, transparent, bottom-up, multistakeholder processes; and 4. Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment. <p>Yes, agree with the requirements listed help ensure that ICANN's mission is more clearly described, based on what has been commonly shared and agreed by the ICANN community, that ICANN conducts its activities under its scope, ensures stability and reliability of its services. We also agree that ICANN should defer to input from public authorities to be consistent with ICANN's Commitments and Core Values. This is an important point to cover.</p>	<p>Agreement Summary / Impression:</p> <p>JPNIC supports the proposed revisions to the Mission Statement, Commitments, and Core Values and believes that ICANN should defer to input from public authorities that is consistent with ICANN's Commitments and Core Values.</p> <p>CCWG response:</p> <p>The CCWG appreciates and will consider this input.</p>
IPC	<ul style="list-style-type: none"> - Generally agrees with the recommended changes to ICANN's Mission, Commitments, and Core Values. These changes help create a culture of accountability within the organization. - IPC is concerned that the proposal in paragraph 60 to add to the Bylaws a statement that "ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet's unique identifiers or the content that they carry or provide" could be read too broadly. We assume there is no intent here to constrain ICANN's ability to enter into or enforce contractual provisions that require those making these identifiers available to take into account how they are used in specified circumstances – for example, to require domain name registration services to adopt and enforce policies against prohibited or abusive uses of domain names. We urge that this very broad proposed language be reviewed and refined to reduce the risk of any interpretation that would constrain ICANN's ability to enforce its contractual obligations. -agrees with the requirements for this recommendation. Given recent events it is clear that maintaining a strict definition of ICANN's mission and scope is essential to organizational performance and operational accountability. 	<p>Agreement Concerns Summary / Impression:</p> <p>Summary / Impression:</p> <p>The IPC general supports the proposed revisions to the ICANN Mission Statement, Commitments, and Core Values, but is concerned that the prohibition on regulation of services or content could be read to constrain ICANN's authority to enter into and enforce contract prohibitions on abusive use of the domain name system.</p> <p>CCWG response:</p> <p>The CCWG appreciates and will consider this input.</p>
Govt-BR	<p>Brazil fully supports the suggestion of incorporating ICANN's specific mission into its bylaws (p.19 -20). Moreover, we support that the global multistakeholder community should be provided with accountability mechanisms to ensure that the corporation acts strictly in accordance with its mission.</p> <ul style="list-style-type: none"> - References to the leadership of the private sector ("private sector led", "rooted in the private sector") are inadequate and contradict the spirit of multistakeholderism that should govern the corporation. The fact that ICANN is currently incorporated as a "non-profit organization" reinforces this understanding. 	<p>Agreement Summary / Impression:</p> <p>The government of Brazil supports the proposed revisions to the ICANN Mission Statement.</p> <p>CCWG response:</p> <p>The CCWG appreciates and will consider this input.</p>

<p>MPAA</p>	<p>- Paragraph 337 notes that the language in paragraph 336 will be added to the Bylaw Core Values, however this language doesn't appear in the proposed Bylaw Core Values updates proposed by the CCWG. MPAA supports the obligation reference in 336 and we suggest the language, in its entirety, be added.</p> <p>- The proposed language in paragraph 60 is too broad. While we strongly support the notion that ICANN must not attempt to regulate non-contracted parties, we also assume it is not the intent to constrain ICANN's ability to enter into, interpret or enforce contractual obligations. The new accountability mechanisms must not minimize ICANN's ability to enforce contractual obligations and these obligations should be negotiated as they have been in the past, with ample input from the global multi-stakeholder community.</p>	<p>Agreement Concerns Summary / Impression:</p> <p>The MPAA general supports the proposed revisions to the ICANN Mission Statement, Commitments, and Core Values, but is concerned that the prohibition on regulation of services or content could be read to constrain ICANN's authority to enter into and enforce contract prohibitions on abusive use of the domain name system.</p> <p>CCWG response:</p> <p>The CCWG appreciates and will consider this input.</p>
<p>CDT</p>	<p>- CDT fully support the proposed changes to ICANN's Mission, Commitments and Core values. We believe that these changes – and particularly the notion of enumerated powers – should ensure that ICANN respects and acts in conformance with its mission and that any attempts to change that mission must be subject to greater thresholds and to community assent.</p> <p>- CDT supports the more detailed elaboration of the core values and commitments and agree with the strict limitations that the proposal suggests with regard to “balancing” one core value with another.</p> <p>- CDT support the incorporation of the Affirmation of Commitments (AoC). The AoC's reviews and other provisions that specifically lay out a series of expectations of behavior and similar commitments are key components of the overall enhancement of ICANN's accountability. Their inclusion is essential.</p>	<p>Agreement Summary / Impression:</p> <p>CDT supports the proposed revisions to ICANN's Mission Statement, Commitments, and Core Values, including the revised balancing test.</p> <p>CDT supports the incorporation of the AoC reviews and other provisions as essential components of ICANN's accountability.</p>
<p>USCC</p>	<p>- Yes, the recommended changes do represent a positive move towards enhancing ICANN's accountability. We want to encourage the CCWG to stay the course on creating assurances that accountability mechanisms are binding.</p> <p>- Yes we support the list of requirements included in the recommendation, but this support is contingent on the community having the ability to approve or reject any changes that the ICANN Board seeks to implement in the future.</p> <p>- however, wish to raise concerns with one bylaws change regarding modifying the “balancing” language describing how ICANN will evaluate situations when one commitment must be reconciled with another commitment or core value. This new language, closely tracks language on “strict scrutiny” and “intermediate scrutiny” tests that are a part of U.S. legal jurisprudence. These standards were not developed to be used to weigh multiple competing interests or values. Therefore, the original language covering balance and reconciliation of competing values ought to be retained.</p> <p>- However, in order to avoid confusion and ensure ICANN is able to best serve its core mission, we suggest the language in 337 be added to the bylaws. We further suggest paragraph 60 be amended to indicate that without prejudice to ICANN's ability to interpret or efforts to ensure compliance with its contracts, ICANN does not enjoy broad regulatory authority and will not engage in or use its power to regulate entities with which it does not have a contractual relationship, and shall not attempt to establish additional requirements on parties beyond those to which the parties agree.</p>	<p>Agreement Concerns Summary / Impression:</p> <ul style="list-style-type: none"> - USCC Supports the revised Mission Statement, Commitments and Core Values and supports the continues use of the phrase “private sector led” - USCC is concerned about the new language for balancing Commitments and Core Values. According to IA (and other commenters) the proposed text is too US-centric and is typically applied when one fundamental value is being infringed, not when the courts “are seeking to balance competing fundamental interests.” IA concludes that the criteria do not provide guidance “as to how ICANN should actually balance competing interests.” <p>CCWG response:</p> <p>The CCWG is considering this comment.</p> <p>We note that in developing this test, the CCWG examined the standards applied by governments around the world for balancing legitimate legislative goals with fundamental rights and privileges. Based on our research, the standard articulated in the current proposed language is applied in a number of legal regimes, both civil and common law based.</p> <p>For example, Canada applies the following test, as set forth in <i>R. v. Oakes</i> (1986):</p>

1. Prescribed by Law: The limitation of any Charter right must be prescribed by law that is (i) within the jurisdiction of the level of government that passed it; (ii) clear and accessible to ensure that citizens may know what kinds of activities are allowed and not allowed.

2. Pressing and Substantial: The government must prove that the objective of the law is pressing and substantial. In other words, the purpose of the law must be important to society.

3. Proportionality: This step in the Oakes Test contains three sub-steps. The concept of proportionality refers to whether the government, in the course of achieving its legislative objectives, has chosen proportional, or relative ways, to achieve those objectives. In other words, government has to find reasonable ways to achieve, or implement, its legislation. The analysis that occurs in these substeps is a fundamental aspect of the Oakes Test.

- *Rational Connection*: The limitation of the right must be rationally connected to the objective of the law in question. Any limitation to a Charter right cannot be arbitrary, or unconnected to the purpose of the law.
- *Minimal Impairment*: In order for a government action that infringes Charter rights to be justifiable, the Charter right must be impaired as little as possible.
- *Proportionate Effect*: This part of the Oakes Test is concerned with the overall benefits and effects of the law in question. Proportionate effect seeks to balance the negative effects of any limitation of a right with the positive effects that law may have on society as a whole. It asks if the limit on the right is proportional to the importance of that law's purpose. It also asks whether the benefits of that law are greater than any negative effects produced by a limitation on a right.

Likewise, the EU Charter of Fundamental Rights provides that: *"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are **necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.**"*

The proportionality principle or test usually contains the following three elements:

- There must be a causal connection between the national measure and the aim pursued; the measure is relevant or pertinent.
- There is no alternative measure available, which is less restrictive (of a competing right)
- And there must be a relationship of proportionality between the obstacle introduced, on the one hand, and, on the other, the objective thereby pursued and

		its actual attainment. This is referred to as proportionality stricto sensu; meaning that the measure will be disproportionate if the resulting restriction is out of proportion to the aim sought by or the result brought about by the national rule. , and Core Values but
INTA	<p>- agrees with these recommendations but would like to see the Community have the ability to challenge a decision made by ICANN on the basis that it contravenes one or more of the mission statements, Affirmation of Commitments (“AoC”), or core values. Such a challenge should be arbitrated by a third party and the procedure for any arbitration procedures should be outlined in advance.</p> <p>-agrees in principle with enumerated goals and recommendations. However, there must be accountability to the Internet community of governments, NGOs, and individual stakeholders, each of whom should have available a mechanism to challenge a decision by ICANN.</p> <p>-With regard to the proposed incorporation of AoC paragraph 7, we note that the introductory provision of a new Section 8 in Article II of the Bylaws presently reads, “ICANN shall adhere to transparent and accountable budgeting processes, providing [reasonable] [adequate] advance notice to facilitate stakeholder engagement in policy decision- making...” We believe that the use of the term “advance” is insufficient, as ICANN often provides inadequate time for comment periods, and the resulting limitation on adequate review is especially difficult for large membership organizations such as INTA, which represents trademark professionals from around the world. Therefore, we recommend that this phrase read, “providing reasonable and adequate advance notice.”</p>	<p>Agreement</p> <p>Summary / Impression:</p> <p>INTA generally agrees with the proposed revisions to the Mission Statement, Commitments, and Core values, but supports a community challenge mechanism.</p> <p>CCWG response:</p> <p>The proposed changes to the Independent Review contemplate a community challenge.</p>
.NZ	<p>The changes would improve the clarity of ICANN’s mission and make it easier for the community to ensure that the organisation doesn’t engage in scope creep.</p> <p>The reconciliation test set out on page 17 of the report is also an improvement on the current language in the Bylaws.</p> <p>Making these parts of the bylaws hard to change without broad community support would also help give assurance that ICANN won’t engage in scope creep.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <p>.NZ supports the proposed changes to ICANN’s Mission Statement, Commitments, and Core Values. .NZ also supports the revised balancing test, and inclusion of these provisions as Fundamental Bylaws.</p>
HR2251	<p>- Control over the management of the Internet domain name system will not be exercised by a governmental or intergovernmental body.</p> <p>- The bylaws of ICANN have been amended to provide for the following: No director or officer of ICANN may be selected by or represent a governmental or intergovernmental body.</p> <p>- The board of directors of ICANN is prohibited from voting on advice or a policy proposal offered by the Governmental Advisory Committee unless such Committee reaches consensus regarding such advice or proposal. For purposes of the preceding sentence, the term “consensus” means general agreement in the absence of any formal objection.</p> <p>- ICANN is committed to upholding freedom of speech, freedom of the press, freedom of assembly, and freedom of association and has adopted and implemented standards that are at least as protective of such freedoms as is the First Amendment to the Constitution.</p> <p>- ICANN is prohibited from engaging in activities unrelated to ICANN’s core mission or entering into an agreement or modifying an existing agreement to impose on a registrar or registry with which ICANN conducts business any condition (such as a condition relating to the regulation of content) that is unrelated to ICANN’s core mission.</p>	<p>Summary / Impression:</p> <p>The Comment consists of proposed United States legislation that has been superseded by subsequent events.</p>
NCSG	No ICANN action should violate fundamental human rights. We therefore welcome and note with approval that the call to forebear from content regulation in the mission statement section shows a positive concern for	<p>Agreement – Concerns – New Idea</p> <p>Summary / Impression:</p>

	<p>human rights.</p> <ul style="list-style-type: none"> - The NCSG supports a clear statement of ICANN's limited technical mandate. We agree that ICANN's mission should be limited to the coordination and implementation of policies and procedures required to facilitate the stable and secure operation of the DNS. - We applaud the recognition that ICANN's Mission does not include the regulation of services that use the DNS or regulation of the content that these services carry or provide. - We also applaud the CCWG's recognition that the existing bylaw language describing how ICANN should apply its Core Values is weak and permits ICANN to exercise excessive discretion. - In paragraphs 69-100 NCSG believes the CCWG should avoid overly broad references to furthering "the public interest;" such references should be more specific and refer to a "public interest goal within ICANN's mandate." ICANN does not have a mandate to pursue the general public interest; it is intended to serve the public interest only within its narrow DNS-related scope of activity. - Paragraph 105 There is horribly redundant wording here: "ensure that decisions are made in the global public interest identified through the bottom-up, multistakeholder policy development process and are accountable, transparent, and respect the bottom-up multistakeholder process." This should be simplified to: "Ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent." - Paragraph 107 We prefer the original wording, with the exception of adding "in the DNS market." The current revision muddles and undermines the clear intent of this passage, which was to encourage ICANN to rely on competition and market mechanisms. The addition of the words "healthy" and "enhances consumer trust" introduce vague criteria that in many ways contradict competitive market criteria. The addition of "consumer choice" is unnecessary as that value is already encompassed by a commitment to competition. - Paragraph 110 This paragraph is incorrect as it currently stands; it says "governments and public authorities are responsible for public policy." As ICANN deals with a global arena, it should say that "governments and public authorities are responsible for public policy in their jurisdictions." We also believe that the phrase "duly taking into account the public policy advice of governments" should be changed to "duly taking into account the advice of the GAC," as it is GAC - not "governments" - that formally provide advice to the board under the bylaws and not all of its advice deals with public policy. - We fully support the changes to the Core Values and the designation that certain Core Values are considered Commitments - values that should rarely (if at all) be balanced against each other - and the incorporation of various provisions from the Affirmation of Commitments. We support the addition of respect for Human rights to the core values and support the addition of an obligation for human rights impact analyses for ICANN decisions to the mission. <u>NCSG has consistently recommended that ICANN adopt the "Respect, Protect, and Remedy" framework which was developed for private corporations and that ICANN benchmark its human rights compliance by joining the Global Network Initiative. These would provide simple ways to further strengthen this core value.</u> 	<ul style="list-style-type: none"> - The NCSG agrees that ICANN should forebear from content regulation and supports the proposed revisions to ICANN's Mission, Commitments, and Core Values. - The NCSG supports the revised balancing test - The NCSG is concerned about overly broad references to the "public interest" – suggests clarification to ensure ICANN remains within the scope of its mission - The NCSG proposes revised wording for paragraphs 105, 107, and 110 - NCSG has consistently recommended that ICANN adopt the "Respect, Protect, and Remedy" framework <p>CCWG response:</p> <p>The CCWG appreciates and will consider this input.</p>
<p>MM</p>	<p>Clearly defining ICANN's mission and putting into place efficient and effective institutional mechanisms for enforcing those limitations is the most important element of the ICANN accountability reforms.</p>	<p>Agreement Concerns Summary / Impression:</p>

	<p>I applaud the recognition that ICANN's Mission does not include the regulation of services that use the DNS or the regulation of the content these services carry or provide. I hope this can serve as a strong constraint on existing and future ICANN contracts, some of which already violate that principle. I also agree with the CCWG's recognition that the existing bylaw language regarding the application of ICANN's Core Values is weak and permits ICANN to exercise excessive discretion. That being said, there are still elements in the draft that lend themselves to an expansive mission. In paragraphs 69-110, there are many references to furthering "the public interest." These references need to be modified to refer only to a "public interest in the openness, interoperability, resilience, security and/or stability of the DNS" or a "public interest goal within ICANN's mandate." Paragraph 107, which was intended to encourage ICANN to rely on competition and market mechanisms rather than top-down regulation, has also been altered in a way that suggests a more expansive vision of ICANN's remit. The addition of the concepts "healthy" and "enhances consumer trust" introduce vague criteria that differ from and may contradict competitive market criteria. The addition of "consumer choice" is unnecessary as that value is already encompassed by a commitment to competition. In general, I prefer the original wording, with the exception of adding "in the DNS market."</p> <p>Paragraph 110 fundamentally misrepresents the role of governments in ICANN. Currently it says that "governments and public authorities are responsible for public policy." As ICANN deals with a global arena, it should say that "governments and public authorities are responsible for public policy <i>in their jurisdictions</i>." We also believe that the phrase "duly taking into account the public policy advice of governments" should be changed to "duly taking into account the advice of the GAC," as it is GAC and not "governments" that formally provide advice to the board under the bylaws, and not all of its advice deals with public policy.</p>	<ul style="list-style-type: none"> - MM agrees that ICANN should forebear from content regulation and supports the proposed revisions to ICANN's Mission, Commitments, and Core Values. - MM is concerned about overly broad references to the "public interest" – suggests clarification to ensure ICANN remains within the scope of its mission - The NCSG proposes revised wording for paragraph 107 and 110 <p>CCWG response:</p> <p>The CCWG appreciates and will consider this input.</p>
<p>GG</p>	<p>Google does not support the CCWG-Accountability's proposed revisions to bylaws language addressing balancing and reconciliation of competing core values. In its Proposal, the CCWG-Accountability proposes modifying the "balancing" language in the bylaws to describe how ICANN will evaluate situations when one commitment must be reconciled with another commitment or core value. This new language, which among other 2 things requires some reconciliations to be "justified by an important, specific, and articulated public interest goal . . . [and] narrowly tailored using the least restrictive means reasonably available," appears to be taken from so-called "strict scrutiny" tests that U.S. courts use to 3 evaluate First and Fourteenth Amendment challenges. The proposal suggests that in reconciling core values, ICANN should use a version of the U.S. Supreme Court's intermediate scrutiny tests/. These standards are not appropriate for ICANN. In situations where U.S. courts employ strict or intermediate scrutiny tests, there is usually only one core value to be upheld (e.g., free speech, equal protection). These tests are not designed to provide guidance when balancing multiple compelling interests that lead to different conclusions. For that reason, the tests often favor governmental inaction. But in the face of competing core values, the Internet ecosystem depends on ICANN continuing to act, albeit in a way as faithful as possible to the many interests at stake. The strict scrutiny test does not provide ICANN with any guidance for how to address this conundrum, nor does it provide any predictability for the community that depends on ICANN's decision. We recognize, however, that the current test is vague: it, too, provides little guidance to the ICANN board and staff and little predictability to parties affected by ICANN's actions. At its core, the bylaws provision amounts to an exhortation that ICANN bodies</p>	<p>Agreement Concerns</p> <p>Summary / Impression:</p> <p>Google is concerned about the new language for balancing Commitments and Core Values. According to IA (and other commenters) the proposed text is too US-centric and is typically applied when one fundamental value is being infringed, not when the courts "are seeking to balance competing fundamental interests." IA concludes that the criteria do not provide guidance "as to how ICANN should actually balance competing interests."</p> <p>CCWG response:</p> <p>The CCWG is considering this comment. We have requested additional input from commenters on this point.</p> <p>We note that in developing this test, the CCWG examined the standards applied by governments around the world for balancing legitimate legislative goals with fundamental rights and privileges. Based on our research, the standard articulated in the current proposed language is applied in a number of legal regimes, both civil and common law based.</p> <p>For example, Canada applies the following test, as set forth in <i>R. v. Oakes</i> (1986):</p>

to “exercise [their] judgment.” We urge the CCWG-Accountability to develop a proposal that provides 5 meaningful guidance in balancing ICANN’s commitments and core values, while avoiding a bias in favor of preserving the status quo, even if the status quo itself does not represent the best effort to balance competing commitments and core values.

1. Prescribed by Law: The limitation of any Charter right must be prescribed by law that is (i) within the jurisdiction of the level of government that passed it; (ii) clear and accessible to ensure that citizens may know what kinds of activities are allowed and not allowed.

2. Pressing and Substantial: The government must prove that the objective of the law is pressing and substantial. In other words, the purpose of the law must be important to society.

3. Proportionality: This step in the Oakes Test contains three sub-steps. The concept of proportionality refers to whether the government, in the course of achieving its legislative objectives, has chosen proportional, or relative ways, to achieve those objectives. In other words, government has to find reasonable ways to achieve, or implement, its legislation. The analysis that occurs in these substeps is a fundamental aspect of the Oakes Test.

- *Rational Connection*: The limitation of the right must be rationally connected to the objective of the law in question. Any limitation to a Charter right cannot be arbitrary, or unconnected to the purpose of the law.
- *Minimal Impairment*: In order for a government action that infringes Charter rights to be justifiable, the Charter right must be impaired as little as possible.
- *Proportionate Effect*: This part of the Oakes Test is concerned with the overall benefits and effects of the law in question. Proportionate effect seeks to balance the negative effects of any limitation of a right with the positive effects that law may have on society as a whole. It asks if the limit on the right is proportional to the importance of that law’s purpose. It also asks whether the benefits of that law are greater than any negative effects produced by a limitation on a right.

Likewise, the EU Charter of Fundamental Rights provides that: *“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are **necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.**”*

The proportionality principle or test usually contains the following three elements:

- There must be a causal connection between the national measure and the aim pursued; the measure is relevant or pertinent.
- There is no alternative measure available, which is less restrictive (of a competing right)
- And there must be a relationship of proportionality between the obstacle introduced, on the one hand, and, on the other, the objective thereby pursued and its actual attainment. This is referred to as

		<p>proportionality stricto sensu; meaning that the measure will be disproportionate if the resulting restriction is out of proportion to the aim sought by or the result brought about by the national rule.</p>
<p>Board</p>	<p>How will the principles proposed to enhance and improve the Mission and Core Values of ICANN be tested against the bylaws in their entirety? Given that modifying the Mission and Core Values was not part of the community discussion at the Singapore meeting, what is the CCWG-Accountability doing to highlight this change as part of the suite of recommendations? In asking this question, we are supportive of the idea that the mission statement and core values should be refined.</p>	<p>Concerns – Confusion</p> <p>Summary / Impression:</p> <p>The Board questions how the revised language will be tested. The Board expresses concerns that this language was not part of the discussion in Singapore.</p> <p>CCWG response:</p> <p>The proposed revisions to the Mission, Commitments, and Core Values have existed in draft form since January of this year and were discussed several times in Singapore.</p>
<p>CENTR</p>	<p>- The recommendations in the draft include revising ICANN’s Bylaws to clarify the scope of ICANN’s policy authority, reflect key elements of the Affirmation of Commitments, and establish a set of “Fundamental Bylaws” which can eventually be amended based on prior approval by the Community. While we agree that ICANN’s Mission statement might require language refinement against the scope of ICANN’s policy authority, that the current Bylaws might also be reviewed to reflect the key elements of the Affirmation of Commitments and that the Board should have a limited ability to change the key accountability provisions, we support the list of requirements that represent the basis of the recommendation but we do not believe that these changes alone will improve accountability at ICANN Board and staff level. As a matter of fact and as stated earlier, we recommend that – once the accountability enhancements are enforced – both ICANN staff and Board go through regular training programmes to increase their accountability literacy and culture which are of paramount importance if the community likes to have the accountability spirit at the next level. Moreover, we think that introducing a distinction between “ICANN Commitments” and “ICANN Core Values” may just add unnecessary complexity within an already over-structured statutory framework. We would also like to point out that one of the first elements to be clarified is to make sure that any Bylaws do not contain “competing values”, but rather “complementary values”.</p> <p>- CENTR believes that introducing a distinction between “ICANN Commitments” and “ICANN Core Values” may just add unnecessary complexity within an already over-structured statutory framework;</p>	<p>Agreement Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - CENTR supports the proposed changes but is unconvinced that these changes are sufficient to ensure accountability of the Board and staff. - CENTR calls for regular training to increase accountability literacy and culture. - CENTR questions the distinction between Commitments and Core Values may add unnecessary complexity. <p>CCWG response:</p> <p>The CCWG appreciates and will consider this input.</p>
<p>I2Coalition</p>	<p>The i2Coalition strongly supports the inclusion of language limiting ICANN’s activities to those that further its mission, as well as changes to ICANN’s Bylaws requiring ICANN to carry out its activities in accordance with applicable law and international law and conventions through an open and transparent process. In particular, it supports clarifying ICANN’s Mission Statement to state explicitly that the scope of ICANN’s authority does not include the regulation of services that use the domain name system (DNS) or the regulation of content these services carry or provide. However, the i2Coalition has concerns regarding the inclusion of new criteria associated with balancing commitments and core values. The new language suggests that “strict scrutiny” and “intermediate scrutiny” concepts imported from U.S. constitutional law should guide ICANN in making decisions that implicate multiple commitments or core values. But under U.S. law, these tests are typically applied when one fundamental value (e.g., equal protection or freedom of speech) is infringed. They are</p>	<p>Agreement Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - The I2Coalition echoes comments made by Google regarding the balancing test for applying Commitments and Core Values - The I2Coalition supports the revised language intended to clarify that any decision to defer to input from public authorities must be consistent with ICANN’s Commitments and Core Values.

	<p>not designed to provide guidance when balancing multiple compelling interests that lead to different conclusions. For that reason, the tests often favor governmental inaction. But in the face of competing core values, the Internet ecosystem depends on ICANN continuing to make decisions, rather than refrain from acting. The strict scrutiny and intermediate scrutiny tests do not provide ICANN with any guidance for how to address this conundrum. For these reasons, we believe that the existing language regarding balancing and reconciliation of competing core values ought to be retained. The i2Coalition supports the clarification to the Core Values that any decision to defer to input from public authorities must be consistent with ICANN's Commitments and Core Values. This is important to the goal of accountability; public authorities would have the ability to provide input into ICANN decisions, while ensuring that all ICANN actions are compliant with its Bylaws.</p>	
NIRA	- NIRA agrees with recommended changes and requirements.	Agreement
ALAC	<p>Para 50, Section 3.1.1.a: The ALAC believes that in accordance with the Affirmation of Commitments, ICANN has a responsibility to develop policies that will foster user trust in the DNS. The ALAC understands that ccTLDs are outside of ICANN scope in regards to this.</p> <ul style="list-style-type: none"> - believes that fostering trust in the DNS must be incorporated into the ICANN Bylaws. This can be accomplished by adding the phrase "and to foster user trust in the DNS" to Paragraph 56 as well as including it in Commitments. The reference in paragraph 107 is not sufficient since that is in relation solely to competition. <p>Para 65: The ALAC believes that it is appropriate to define the reference to Private Sector leadership as explicitly meaning NOT led by the governments. Furthermore, although it is led by the private sector (as defined here), governments do have a role to play in the ICANN Multistakeholder model.</p> <ul style="list-style-type: none"> - recommends caution on classing any Bylaws related to reviews as fundamental without a provision for altering the timing, with widespread community agreement, but without requiring a formal Bylaw change. 	<p>Agreement – New Idea</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - ALAC proposes new language to "foster user trust in the DNS" in paragraph 56 and the Commitments - ALAC believes that paragraph 107 is inadequate to reflect the relevant provisions of the AOC - ALAC proposes that "private sector leadership" in paragraph 65 should be defined as meaning "not lead by governments" - ALAC urges caution on making reviews-related bylaws fundamental bylaws. <p>CCWG response: The CCWG appreciates and will consider this input.</p>
LAB	<ul style="list-style-type: none"> - para 56 the syntax is overly complex and ambiguous (does the "which" refer to "policy", "process" or "systems"?). I suggest the syntax be simplified. I suggest too that "open, transparent" be inserted directly before "bottom-up". - para 76, the words "in a way that is substantially related to that interest" seem superfluous and could thus be deleted. - 86, I suggest that the rather lengthy phrase "relevant principles of international law and applicable law and international conventions" be replaced by simply "international and domestic law" (assuming that "applicable law" is intended to encompass national/domestic law). - para 87, I suggest deleting "internet" from the phrase "internet DNS". - para 111, I suggest the following wording: "Striving to ensure that the interests of one or more interest groups are not advanced at the undue expense of others". 	<p>Agreement – New Idea</p> <p>Lee Bygrave generally supports the proposed revisions and makes several suggestions to clarify and enhance the wording.</p> <p>CCWG response: The CCWG appreciates and will consider this input.</p>
RSSAC	We note that the proposed bylaws revision (p. 20) includes a placeholder for language relating to the root server system in an updated description of ICANN's mission. We expect to contribute proposed language on this point as the process of revising the bylaws proceeds.	The RSSAC will provide language for the placeholder description of ICANN's mission with respect to the DNS root servers.
RIR	<ul style="list-style-type: none"> - A clear definition of the scope of ICANN's Mission, Commitments and Core Values could contribute positively to the enhancement of ICANN's accountability. - In particular the RIR community fully supports the description of 	<p>Agreement</p> <p>Summary / Impression: The RIR community supports the changes to</p>

	<p>ICANN's mission with regard to the coordination of policy development for Internet number resources page 20, paragraph 57):</p> <p>"In this role, with respect to IP addresses and AS numbers, ICANN's Mission is described in the ASO MoU between ICANN and RIRs."</p> <p>- With regards to ICANN's core values in the Bylaws and in particular page 25, paragraph 89, the RIR community notes that the term "private sector led multistakeholder" and similar terms) have been used by the NTIA in describing ICANN, but the RIRs describe their policy development processes using terms such as "inclusive, open, transparent and bottom-up". These different descriptions are compatible, provided it is understood that "private sector led" does not exclude government participation.</p>	<p>ICANN's Mission Statement, Commitments, and Core Values. It notes that the phrase "private sector led multistakeholder," which has been used by NTIA, is compatible with the RIR's approach so long as it does not exclude government participation.</p> <p>CCWG response:</p> <p>The CCWG appreciates and will consider this input.</p>
DotMusic	<p>DotMusic agrees with the recommended changes to ICANN's Mission, Commitments, and Core Values. These changes will help create a culture of accountability within ICANN. However, DotMusic is concerned that a Bylaws statement that "ICANN shall not engage in or use its powers to attempt the regulation of services that use the Internet's unique identifiers or the content that they carry or provide" can be interpreted too broadly. DotMusic recommends that this broad proposed language be reviewed and refined to reduce the risk of any interpretation that would constrain ICANN's ability to enforce any contractual obligation.</p>	<p>Agreement Concerns</p> <p>Summary / Impression:</p> <p>DotMusic generally supports the proposed revisions to the ICANN Mission Statement, Commitments, and Core Values, but is concerned that the prohibition on regulation of services or content could be read to constrain ICANN's authority to enter into and enforce contract prohibitions on abusive use of the domain name system.</p> <p>CCWG response:</p> <p>The CCWG appreciates and will consider this input.</p>
Siva	<p>The proposed changes would indeed enhance ICANN's Accountability. However, ICANN's adherence to the Accountability framework would depend on the commitment of the ICANN Board and its Members, Constituencies and its participants, Executive and Staff to the notions of Accountability, which ought to exceed the legal commitments of the organization and its constituents. Accountability standards would have to become inherent to the organization. This needs to be achieved by an ongoing process which could begin with an elaborate exercise in work stream 2</p>	<p>Agreement – New Idea</p> <p>Summary / Impression:</p> <p>Siva generally supports the proposed changes but believes that true accountability requires a cultural change that goes beyond legal commitments.</p> <p>CCWG response:</p> <p>The CCWG appreciates and will consider this input.</p>

Fundamental Bylaws

Additional Question: The CCWG-Accountability welcomes feedback on whether there is a need, as part of Work Stream 1 (pre-Transition), to provide for any other means for other parts of the ICANN system to be able to propose new Fundamental Bylaws or changes to existing ones. In particular, the CCWG-Accountability welcomes feedback on whether the Mission should be subject to even higher thresholds of Board or community assent.

Question 3: Do you agree that the introduction of Fundamental Bylaws would enhance ICANN's accountability?

Question 4: Do you agree with the list of requirements for this recommendation, including the list of which Bylaws should become Fundamental Bylaws? If not, please detail how you would recommend amending these requirements.

Contributor	Comment	CCWG Response/Action
RH	Only the membership should have the power to change the Bylaws.	<p>Agreement – New Idea</p> <p>Summary / Impression:</p> <p>Mr. Hill supports concept generally but believes only membership should have the power to amend the Bylaws.</p>
Jan Scholte (JS) comment 1	- Motivate more explicitly the creation of Fundamental Bylaws. Currently para 113 simply asserts that 'CCWG-Accountability believes', without specifying the grounds for this belief. Since the creation of Fundamental Bylaws adds considerable complication to the proposal, perhaps greater justification of the step is wanted? Indeed, why would Fundamental Bylaws inherently enhance accountability, as implied at para 122? Could situations not arise where a particular Fundamental Bylaw worked against	<p>Concerns</p> <p>Summary / Impression:</p> <p>- Mr. Scholte suggests that the need for "Fundamental Bylaws" and the assumption that they would contribute to accountability requires greater justification.</p>

	<p>accountability and, owing to its 'fundamental' character, would be harder to correct?</p> <ul style="list-style-type: none"> - The proposal repeatedly refers to ICANN's 'limited technical mission' and the need to avoid 'mission creep'. Where in practice would the line be drawn between 'technical mission' and wider activity? Could one person's legitimate mandate be another's mission creep? What lies behind this concern? Would it be helpful to be more specific in this regard: e.g. that ICANN should not embark on unduly restrictive regulation of the domain name industry; or that ICANN should not interfere in the operations of ccTLDs? 	<ul style="list-style-type: none"> - Ms. Scholte questions the community's expressed concerns about "mission creep" and suggests greater specificity with respect to this concern.
auDA	<ul style="list-style-type: none"> - auDA supports the concept of utilising "fundamental bylaws" as another mechanism for facilitating accountability. the concept of fundamental bylaws that restrict the ICANN Board's ability to change these tenets is similar to the "golden bylaws" concept auDA proposed as part of our initial response to the consultations of the CWG on IANA transition.¹⁴ Although the foci of the CWG and CCWG differ, auDA supports the concept of using such mechanisms as the primary tool for delivering accountability. - auDA supports the list of items that the CCWG proposes could be afforded coverage by fundamental bylaws - auDA notes the CCWG's observation that the language for underlying Bylaw provisions has not yet been reviewed by Legal Counsel and ". . . is only conceptual in nature at this stage. . ." and, accordingly, welcomes the opportunity to provide additional / revised commentary once such advice has been provided and analysed. 	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - auDA supports the concept of Fundamental Bylaws and the proposed list to be made fundamental. - auDA notes need for legal review of proposed language.
DBA	<p>In particular, we would like to emphasize the following: Creating a set of Fundamental Bylaws.</p>	<p>Agreement</p>
CRG	<ul style="list-style-type: none"> - To question 1a) ICANN values and fundamental Bylaw proposals call for more general values than the present narrow technical scope under the USG stewardship. For example: <i>ICANN is accountable to all its members, users and open and free Internet. ICANN is accountable for the IANA, functions as well as a stable, resilient, open and efficient DNS Market....</i> Then ICANN should be measured against those higher/more general standards. But the proposed amendments mix present technical objectives with more general (future) standards. It will be a hard discussion if we start with an amended text, but guess that's the reason we have so many lawyers involved. - Based on my personal experience in ATRT2, I consider the AoC to be the best basis for the actual constitutional core values, from which the new By Laws have to be drafted. For example, if the community commits to a "market" model in the fundamental ByLaws as per above, the discussion of "private sector led" or not led, becomes less relevant and maybe it can be preempted. The proposal has to respect some strict hierarchy of values first, technical conditions second, etc. so as not to get bogged down in details further down the road in the best UN fashion. - Q3. It should be part of WS to establish at the level of Management, the internal clarity of operative roles and the level of internal separation of powers between them. This cannot be left to the discretion of any new CEO anymore. The question is so important in terms of internal accountability, that it should be embedded in the Fundamental By Laws pre-transition (WS1) so has to have it protected under the highest threshold possible. - Q4. WS1 should develop a minimum requirement of internal checks and balances and transparent arms length relationships should be established at least for the major organisational areas of (a) policy development, (b) compliance and (c) operational functions, including but not limited to 	<p>New Idea</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Mr. Gutierrez proposes to add an additional fundamental bylaw that specifies the operative roles of ICANN staff and Board and the level of internal separation of powers among them. - Internal checks and balances should be place to separate policy development, compliance, and operational functions of organization.

	IANA.	
DCA-T	<p>- Q3. Indeed the ICANN's Bylaws should be harder to change than others. These would be deemed Fundamental Bylaws; these identified sections of the bylaws should be well designated and marked.</p> <p>- Q4. The proposed increase of the voting threshold to 3/4 of votes in favour of the change (higher than the usual threshold of 2/3) is acceptable, however the members of the board in question must also demonstrate their understanding of the proposals through proper study so that it is not just passed by vote without due considerations. The board members should be careful not to be just approvers of proposals; they must do so under justifiable and necessary means.</p>	<p>Agreement – New Idea</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Generally supports concept of Fundamental Bylaws, including specified list. - In addition to voting threshold, Board members must demonstrate their understanding of proposed changes before approving.
NM	<p>We provide for changes in the by-laws, but it may be that we would be better off making clear that core principles are not subject to change. The ultimate goal of the organization is to act in the interest of the public as a whole, without special treatment of any business, private entity, individual, or government. The inherent founding principle that this entity exists for the overall public good and not for the commercial benefits of any individual or group should be a core principle that cannot be changed, no matter how many people go for it.</p>	<p>Agreement – New Idea</p> <p>Summary / Impression:</p> <p>Perhaps better to prohibit change to core principles and Mission altogether.</p>
AFRALO	<p>Q3. The creation of fundamental bylaws that require the consent of the community to be changed is a good approach and would enhance the accountability of ICANN board to the community.</p> <p>Q4. AFRALO members believe that the fundamental bylaws should include the fundamental standing issues such as the mission and the core values of the organization, excluding any functional or operational issue.</p>	<p>Agreement – New Idea</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports basic concept of Fundamental Bylaws. - Should include Mission, Core Values, and other "fundamental standing issues"
Afnic	<p>Q3. Afnic supports the idea of fundamental bylaws, in the sense it's a way to balance the powers of the Board through the empowerment of the Community (see below). This set of fundamental bylaws is interesting only if the empowered community is put in place.</p> <p>Q4. Afnic agrees with the list of fundamental bylaws proposed and, in order to achieve the IANA stewardship transition, insist on the importance of including in the fundamental bylaws the provisions for reviews that are part of CWG-Stewardship work as well as the creation of the CSC.</p>	<p>Agreement – New Idea</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Good idea but only meaningful if empowered community is in place. - Include CWG Stewardship reviews and creation of CSC as Fundamental Bylaw
Govt-IN	<p>It is appreciated that the current proposal suggests that fundamental bylaws should stay intact unless change is called for by the community. It is important for ICANN to have a well defined mission, commitments and core values that should be reflected in its organisational DNA, objectives and prioritisation approach.</p>	<p>Agreement</p>
DP-DK	<p>We strongly endorse the use of Fundamental Bylaws as a means of assuring the broader Internet community that ICANN will continue to live up to the commitments it is making as part of the transition for the foreseeable future, and that these fundamental constraints on the abuse of its power will not themselves be subject to easy manipulation.</p>	<p>Agreement</p>
IA	<p>- IA agrees that classifying some Bylaws as "Fundamental Bylaws" will enhance ICANN's accountability by restricting its ability to change certain Bylaws with only a two-thirds majority.</p> <p>- The CCWG may want to examine whether there is a way to ensure that the need for binding Independent Review panels is enshrined in a Fundamental Bylaw without binding the community to the precise formulation recommended by the CCWG. Although the process set forth by the CCWG seems reasonable, it may be the case that it needs to be modified at the margins once parties have had some experience with it.</p> <p>- IC believes that it is a requirement for the ICANN principal office or headquarters to be located in Los Angeles should be included as a Fundamental Bylaw.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - May need flexibility to modify details of IRP with experience. - HQ in Los Angeles should be Fundamental Bylaw.
eco	<p>- Making some bylaws more robust than others, i.e. the idea of creating</p>	<p>Agreement</p>

	<p>Fundamental Bylaws, is a good one. The described process seems to strike an appropriate balance between making it harder to change these bylaws and at the same time allowing for changes whenever substantial parts of the community deem this to be required. Some flexibility needs to be retained for an organization working in a rapidly changing environment.</p> <ul style="list-style-type: none"> - Fundamental Bylaws, changes to which require approval, are an appropriate measure to enhance ICANN’s accountability. - The list of items qualifying for Fundamental Bylaws should be kept as short as possible and only encompass those clauses that are needed to protect the accountability architecture as such. Based on the suggestions made in the draft report, the list of items appears to be appropriate. 	<p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - Keep list short as possible - May need flexibility to modify details in light of experience and changing environment.
<p>Govt-ES</p>	<ul style="list-style-type: none"> - The organization needs a stable and predictable legal and jurisdictional environment and these requirements could certainly be included in the Bylaws as a way to ensure compliance with the accountability measures designed. But prescribing a particular jurisdiction now would preclude other jurisdictions that could perfectly fit and comply with these requirements (in and out the USA) from hosting the organization in the long run. - On the other hand, jurisdiction is already a task of Work Stream 2 (page 90) of the CCWG, and enshrining ICANN’s current jurisdiction as a fundamental bylaw would pre-empt the future work of WS2 in this regard. It is essential that when that process begins, the global public interest is taken into account and all relevant stakeholders have their say, including governments. 	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - Jurisdiction should not be prescribed in Bylaws at this time
<p>RySG</p>	<ul style="list-style-type: none"> - Executive Summary refers to “reviews required by the CWG-Stewardship.” We support the recommendation that these reviews be incorporated into the Fundamental Bylaws and recommend that the procedures for implementing the outcomes of such reviews that are determined by the CWG-IANA are also included within that fundamental bylaw 10 - Yes. Establishing an approval threshold of 75% would serve to ensure a substantial percentage of the affected community agrees with proposed changes. - RySG agrees with the list of proposed Fundamental Bylaws, with one recommended addition. We believe that ICANN’s current bylaw (Article XVIII, Section 1) establishing ICANN’s principle office location, which is consistent with the Affirmation of Commitments Section 8b establishing ICANN’s headquarters location, should be made a Fundamental Bylaw. Reason: All of the accountability mechanisms and reforms currently proposed by the CCWG assume ICANN’s continued operation under California not-for-profit corporate law. If that assumption were to change, all of the current accountability reform efforts would need to be re-assessed and started anew. - The RySG also strongly supports the recommendation that the CWG-Stewardship’s proposed IANA Function Review, including CWG-identified requirements for implementing the outcomes of the IFR, should be added to the ICANN Bylaws, as a Fundamental Bylaw. 	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach, voting threshold, proposed list. - Supports adding HQ requirement as Fundamental Bylaw. - CWG IANA Function Review and CWG-identified requirements should be Fundamental Bylaws.
<p>JH</p>	<p>According to the current proposal, I agree that the introduction of Fundamental Bylaws would enhance ICANN’s accountability. Because if we say something is wrong, we should have right criteria, which should be the Fundamental Bylaws. Although ICANN has Bylaws now, there are still many problems. This proposal should point out these problems and give specific amendments. For example, many problems have already been raised by the communities: the transparency of Nomcom, the representativeness of the ICANN Board of Directors (It is questionable whether board members selected from each community represent the</p>	<p>Agreement</p>

	<p>community or just themselves), the ICANN Board membership and voting rights issues, which law should ICANN follow. It is critical to have Bylaws under the ground of community consensus, because it is the criteria to judge whether ICANN does sth wrong or right decision. If the criteria is problematic, it is impossible to discuss about the latter issues.</p>	
BC	<p>- BC supports the concept of designating certain Bylaws as Fundamental Bylaws that would require majority approval by community Members. Also, the BC supports the CCWG's proposal that 75% of community Members must vote in favor of any proposed change to Fundamental Bylaws.</p> <p>- However, we suggest that the CCWG explore a way to ensure that the need for binding Independent Review is enshrined in a Fundamental Bylaw without fixing every aspect of Independent Review Panel procedure in the Fundamental Bylaw itself. The specific IRP procedures proposed are new, and the community and Board may wish to modify them based on gained experience without having to meet the very high bar established by enshrining these specific details in a Fundamental Bylaw. We need to ensure the process remains sufficiently flexible to address the needs of the community as the Internet continues to evolve.</p> <p>- Additional Fundamental Bylaws: Article XVIII Section 1, the location of ICANN's principal office</p> <p>- BC believes that Article 18 should be a Fundamental Bylaw, so that it would require 75% community voting approval for any change. BC Members presently rely upon contract enforcement and legal action based upon the US court system and do not want that to be changed without broad community approval. Moreover, the BC hopes to rely upon statutory powers to recall the Board and other actions, as necessary, to ensure that the ICANN Board and staff remain accountable to the community. The legal analysis indicating that these powers are available to Members of the organization was predicated on the understanding that ICANN would remain a non-profit organization organized under California Law.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - May need flexibility to modify details of IRP with experience. - HQ in Los Angeles should be Fundamental Bylaw. - Article 18 should be Fundamental Bylaw
.UK	<p>We support the general concept of fundamental bylaws.</p> <p>3.2.3.3: While we recognise the need to have a high bar to changing a fundamental bylaw, this can also be an impediment to necessary change. We wonder whether some thought should be given to exceptional mechanisms that can define and assess necessary changes (addition of new, abrogation or amendment of existing) in exceptional circumstances, something akin to a constitutional conference.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <p>Supports general approach but suggests consideration of exceptional mechanisms – e.g., “constitutional conference”</p>
USCIB	<p>Q3. Yes. Critical elements that require a high standard to change, are important both from a stability standpoint, and also to address legitimate concerns for the integrity of the transition.</p> <p>Q4. paragraph 337, “ICANN will ensure that as it expands the top-level domain space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.” Paragraph 337 says this language will be added to the bylaws core values section, which USCIB supports. However, the entirety of this section does not appear in the proposed bylaw core value changes proposed by the CCWG and we request that the entirety of this language be added.</p>	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <p>Supports general approach but requests inclusion of entire AoC provision regarding TLD expansion in Core Values</p>
LINX	<p>- LINX support the introduction of Fundamental Bylaws.</p> <p>- LINX agree with the CCWG's selection of bylaws for “Fundamental” status and do not identify any omissions.</p> <p>- LINX caution against excessive use of “Fundamental” status: ascribing bylaws ‘Fundamental’ status recklessly would force the community to use what is intended to be an exceptional mechanism more routinely. This would weaken the protection for those bylaws that do deserve</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Generally support, but avoid excessive use of “Fundamental” status. - Very high level should be established to amend or add to Fundamental Bylaws

	<p>entrenchment. We therefore advise approaching with caution any recommendations to give additional bylaws fundamental status.</p> <ul style="list-style-type: none"> - LINX believe the threshold suggested by CCWG for changing Fundamental Bylaws is appropriate. - LINK are willing to be persuaded that a mechanism should be created for the Community to add or amend Fundamental Bylaws, but this should be subject to a very high threshold within each community. Merely requiring the unanimous support of all SOACs should not be sufficient (or perhaps even necessary): if there is only a bare majority within GNSO this should not be sufficient. 	<ul style="list-style-type: none"> - Voting threshold ok
JPNIC	<p>Yes. By distinguishing Fundamental Bylaws from the other Bylaws, with explicit community approval required for its changes, it ensures changes to key components of the Bylaws will only take place with clear community support, and avoids the Board passing Fundamental Bylaw changes without getting noticed by the community. We also recognize the need for Fundamental Bylaws is identified by CWG-Stewardship. Yes, we agree all of them to be included in the Fundamental Bylaws. Including the IANA Function Review and any others they may require, as well as the creation of a Customer Standing Committee.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <p>General support – including need for CWG Stewardship requirements such as IANA Function Review and Customer Standing Committee</p>
CWG-St	<ul style="list-style-type: none"> - Work on the CWG Separation Process (previously Separation Review) has been further developed within the CWG and we expect that this will be more fully described in the forthcoming proposal from the CWG-Stewardship. We are not yet in a position to provide full details ahead of the closure of the this public comment period on June 3rd, but do expect to work with you in future to effectively communicate any additional requirement, including the possible use of a fundamental bylaw to deal with this. - The CCWG Accountability initial proposals describe the scope of the "fundamental bylaws" in section 3.2.4. It is proposed that the "Reviews that are part of the CWG-Stewardship's work – the IANA Function Review and any others they may require, as well as the creation of a Customer Standing Committee" would be considered Fundamental Bylaws. As such, any change of such Bylaws would require prior approval by the community. 	<p>Agreement</p> <p>Summary / Impression:</p> <p>General support – including need for CWG Stewardship requirements such as IANA Function Review and Customer Standing Committee</p>
IPC	<ul style="list-style-type: none"> - The IPC does not believe that there is a need for additional means to propose or amend Fundamental Bylaws, other than those proposed by the CCWG. The IPC is not necessarily opposed to increasing the supermajority thresholds proposed by the CCWG, but any change must be carefully analyzed to avoid a single stakeholder veto situation. Furthermore, there should be a degree of deference to existing supermajority thresholds of general applicability. - "Fundamental Bylaws" should be those bylaws that are <i>fundamental</i> to the mission and core values of ICANN. These bylaws should be harder to change because of their fundamental nature, not merely because they are designated as such. <p>Thus, the introduction of bylaws that are harder to change does not, by itself, enhance ICANN's accountability. Rather, it is the substance of these bylaws that must be reviewed to determine whether they will affect ICANN's accountability. That said, if these bylaws are fundamental in nature, they should be more protected from changes by the Board.</p> <ul style="list-style-type: none"> - The IPC is generally supportive of the bylaws which have been proposed to be "fundamental." However, as noted below, the IPC suggests that Affirmation of Commitments paragraph 8b should also become a Fundamental Bylaw: <i>ICANN affirms its commitments to: remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community.</i> 	<p>Agreement – Agreement – New Idea</p> <p>Summary / Impression:</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - IPC believes that this status should apply only to bylaws that are fundamental to the mission and core values of ICANN. - Supports proposed list but add AoC paragraph 8b re HQ in US
Govt-BR	<p>CCWG should consider reviewing Article XVIII, Section 1, of ICANN's</p>	<p>Agreement – Concerns – Divergence</p>

	<p>bylaws. Brazil supports the elimination of that specific requirement, which should by no means be granted the status of a "fundamental bylaw".</p>	<p>Summary / Impression:</p> <ul style="list-style-type: none"> - The Government of Brazil that Article 18 should not receive status of Fundamental Bylaw.
<p>MPAA</p>	<ul style="list-style-type: none"> - MPAA fully supports the concept of making certain bylaws Fundamental Bylaws that enjoy special protection and can only be changed based on prior approval by the Community. The five items proposed to have the status of Fundamental Bylaws (p. 5) will ensure a stable, autonomous and self-governing ICANN that is not easily altered or swayed by the Board or any external forces. - MPAA suggests that the existing ICANN bylaw requiring the principal office of ICANN be in the State of California, USA, also be designated as a Fundamental Bylaw. See additional comment on this topic in the Nexus section below. - Regarding transparency in the proposed IRP process, the MPAA believes it will be important for the community to be aware of the filing of IRPs in an open and timely manner. This will allow parties "materially affected" by the IRP process and eventually decisions to fully participate. - The US Courts provide a de facto check on ICANN's adherence to its bylaws and the rule of law. Litigation represents a last resort to be used only in the event of a catastrophic failure of the multi-stakeholder process, but the mere existence of that option has a stabilizing effect. As such, and as mentioned above, MPAA suggests that current ICANN bylaw Article 18, Section 1 be made a Fundamental Bylaw. requiring 75% community voting approval for any change, would go a long way to ensure a stable and accountable ICANN post transition. 	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - May need flexibility to modify details of IRP with experience. - HQ in Los Angeles should be Fundamental Bylaw. - Article 18 should be Fundamental Bylaw requiring 75% community approval for change.
<p>CDT</p>	<ul style="list-style-type: none"> - CDT agrees that the addition of fundamental bylaws enhances ICANN accountability and supports a role for the community with regard to approving new bylaws or changes to existing bylaws. The latter is a critical element in ensuring that ICANN does not stray from its mission, commitments and core values. - CDT supports the proposed list of current bylaws that would become fundamental bylaws. We also support the inclusion of the IANA Function Review (the periodicity of the review, as well as the Special Review) and the Customer Standing Committee (CSC) as a minimum set of IANA related mechanisms that should be brought into the fundamental bylaws. 	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach and list - Include IANA Function Review and CSC as Fundamental Bylaws
<p>CIRA</p>	<p>I believe the introduction of specific 'fundamental bylaws', while limiting the Board of Directors' ability to modify these bylaws may be effective as a check against mandate creep on the part of the organization.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <p>Supports general approach as effective check against mandate creep.</p>
<p>SR</p>	<p>I believe the thresholds proposed are sufficient at this time.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach and thresholds
<p>USCC</p>	<ul style="list-style-type: none"> - Yes, the threshold ensuring that 75% of the impacted community approves of the proposed changes will enhance accountability. - Yes it is useful to elevate certain bylaws, in particular those preventing mission creep would ensure accountability and allow ICANN to focus on its core duties. - However, given this higher voting threshold, the CCWG should consider how to strike a balance between providing an appropriate level of detail 	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach and thresholds - Consider need for flexibility to add improvements to new processes - Consider adding new Fundamental Bylaw aimed at safeguard against government

	<p>and creating the flexibility to add improvements to new processes created by the plan.</p> <p>- Suggests the inclusion of a new bylaw aimed at the prevention of government capture or undue ICANN influence on public policies unrelated to ICANN's core mission. This would be achieved through additional transparency, requiring that ICANN or any individual acting on ICANN's behalf make periodic public disclosure of their relationship with any government official, as well as activities, receipts and disbursement in support of those activities on behalf of ICANN. Disclosure of the required information facilitates evaluation by the multi-stakeholder community of the statements and activities of such persons in light of their function as representatives of ICANN.</p>	<p>capture, e.g., disclosure of relationship to governments, etc.</p>
INTA	<p>Q3. agrees that there should be certain bylaws considered "fundamental," in that they embody core principles and goals and, hence, are more difficult to amend or abrogate.</p> <p>However, establishing "fundamental" bylaws does not necessarily provide a remedy if the Community perceives that ICANN is not following a fundamental bylaw, or any other bylaw for that matter. We strongly support a mechanism in which an aggrieved party or group can seek redress if it has credible evidence that ICANN is not adhering to a fundamental bylaw.</p> <p>Q4. agrees, in general, with the bylaws which have been proposed to be "fundamental." However, after review, we suggest the addition of AoC ¶ 8b as a mechanism(s) for establishing the IRP (§4.1), and Community powers (§§5.3–5.6) should be included as a "fundamental" bylaw</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach and thresholds - Necessary but not sufficient – requires dispute resolution mechanism - Add Aoc paragraph 8b and Community Powers as Fundamental Bylaws.
.NZ	<p>- Yes. In the context of a membership model, making some parts of the bylaws harder to change – and the authorisation of such changes being more broadly done than simply by the Board – would be a meaningful enhancement to ICANN's accountability in the post-contract environment.</p> <p>- Yes – the requirements set out are reasonable, and the proposed list of Fundamental Bylaws is appropriate. The membership model on which this new accountability system rests should also be Fundamental, whether it is set out in the Bylaws or the Articles.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach and thresholds - Add membership model as Fundamental provision in Bylaws or Articles
HR2251	<p>ICANN has adopted, if necessary through amendment to its bylaws, all additional measures recommended by the multistakeholder community through the IANA Stewardship Transition Coordination Group, the Cross Community Working Group on Enhancing ICANN Accountability, and the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions.</p>	<p>Should include requirements of CWG Stewardship work</p>
NCSG	<p>- supports the empowerment of the ICANN community through the introduction of fundamental bylaws. - supports the importance of preserving the ICANN's narrow mandate and believes that a higher threshold for initiating a new or changing an existing fundamental bylaw and a role for the community to approve such bylaw changes are essential components in that regard.</p> <p>- support the list of suggested fundamental bylaws as well as the addition of reviews that are a part of the CWG Stewardship's work.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach, list and thresholds - Include IANA Function Review and CSC as Fundamental Bylaws
GG	<p>While we support designating some bylaws as fundamental, fundamental bylaws should not be overly detailed. Fundamental bylaws should be flexible enough to adapt to evolving experience. We agree with the CCWG-Accountability's proposal to designate certain bylaws as fundamental and the requirement to require support from the community, as well as a ¾ vote of the ICANN Board, in order to change any fundamental bylaws. However, given 6 this higher voting threshold, the CCWG-Accountability should consider whether some fundamental bylaws might be unnecessarily detailed. For example, we agree that the</p>	<p>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach. - Include IPR as Fundamental Bylaw, but retain flexibility to reflect experience (i.e., do not create operational rules as Fundamental Bylaws) - Consider whether others are too detailed, create too much inflexibility

	fundamental bylaws should include a requirement for a binding, accessible Independent Review Process (IRP) mechanism that reaches both substantive and procedural complaints. 7 However, because the ICANN community to date has no experience with this new IRP process, the procedures will likely evolve in light of experience. At this time, the detailed procedures governing how the IRP operates should not be fixed in the language of the fundamental bylaws.	
CENTR	We believe that the introduction of so-called "Fundamental Bylaws" that should be "harder" to change than other provisions, would moderately improve ICANN's accountability. The entire ICANN "rulebook" should apply to all ICANN Board members and/or staff without distinguishing among core values that would then become "frozen".	Agreement Summary / Impression: - Supports general approach and thresholds - Necessary but not sufficient – entire "rulebook" should apply to all
NIRA	- NIRA supports that the proposal be subjected to higher assent by the community. - NIRA agrees with the introduction of Fundamental Bylaws and requirements of the recommendation. It expect that Fundamental Bylaws would be scarcely used, and where they are use, the wishes and powers of the community would be allowed to prevail over that of the Board including recalling the Board.	Agreement Summary / Impression: - Supports general approach, list and thresholds
RIR	There is general support the introduction of Fundamental Bylaws. Regarding the list of Bylaws that should become Fundamental Bylaws, most of them indeed contain fundamental principles. However, the RIR community does not believe that the requirement for ICANN to remain in the United States of America is fundamental, but rather is an administrative issue.	Agreement Summary / Impression: - Supports general approach, list and thresholds - HQ/incorporation are administrative matters, not Fundamental Bylaws
Siva	Fundamental Bylaws would minimise the likelihood of misdirections in ICANN governance. On the need for such changes as part of Work Stream 1, it is not necessary to rush these changes as a part of the pre-transition proposals. The proposals for fundamental bylaw changes require deeper deliberations, more thoroughly done as part of Work Stream 2, which ICANN could irrevocably commit to facilitate and sufficiently empower.	Agreement Summary / Impression: - Supports general approach - Requires deeper calibration and should be part of Work Stream 2

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 or this recommendation? If not, please detail how you would recommend amending these requirements.

Contributor	Comment	CCWG Response/Action
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.	New Idea Summary / Impression: Do not seek nominations from international arbitral bodies; rather ICANN to call for nominations
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 sometimes rich and powerful states can pay the (for them relatively modest) fine and continue with the violating behavior. - 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?	Concerns Summary / Impression: - Consider how to make cost of non-compliance high enough to incentivize compliance - Define "independence" more precisely to avoid unnecessary challenges

auDA	<p>Bolstering the process for Independent Review to hold ICANN to a "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>Agreement</p> <p>Summary / Impression:</p> <p>Supports general approach</p>
DBA	<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:</p> <p>Supports general approach</p>
WC comment 1	<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:</p> <p>Supports general approach</p>
WC comment 2	<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:</p> <p>Unclear</p>
DCA-T	<ul style="list-style-type: none"> - 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 	<p>Agreement – New Idea</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - 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"

	<p>from seeking accountability through the IRP procedure.</p> <ul style="list-style-type: none"> - 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 damages and make such awards accordingly. - 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. <p>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.</p> <ul style="list-style-type: none"> - 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. 	
AFRALO	<p>AFRALO members appreciate the reinforcement of the Independent review Process.</p>	<p>Agreement</p> <p>Summary / Impression:</p> <p>Supports general approach</p>
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 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: Icann 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>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 - Provide for pro bono representation for all - Consolidate multiple complaints
DP-DK	<p>- We enthusiastically support the CCWG Draft Proposal’s efforts to</p>	<p>Agreement – New Idea</p>

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.e., both the Board and 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 and institutional power it will need to perform its critical task adequately.

- **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 *to determine whether ICANN is complying with the provisions of the Bylaws* – including, importantly, the provisions regarding ICANN's Mission and powers. The IRP should *not* 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.

- the power that the IRP *does* 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 *its* 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.

- 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 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

Summary / Impression:

- 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

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. 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.

- **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 *so material to the Board that it would undermine its statutory obligations and fiduciary roles to allow the IRP to bind the Board,*"² 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.

- Here as well there is no explanation of what powers are part of the 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 any 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.

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 *only* 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 an extraordinary Board action).

- **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 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.

- 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 *procedural* 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 *substantive* 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.

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 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 *this* process to exercise *that* power is, in a sense, entirely understandable.

- Unlike an ordinary “standing panel” of available arbitrators, the IRP “Standing Panel” needs to be an independent *institution*, 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.

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

	<p>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 as an <i>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.</p> <p>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 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>IA</p>	<p>- Improvements to the Independent Review Panel will be among the most important tools to enhance ICANN’s accountability</p> <p>- IA generally agrees with the proposed requirements.</p> <p>- 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.</p> <p>- IA supports the independence of IRP Panelists from the ICANN board, staff, SOs, and ACs.</p> <p>- 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.</p> <p>- 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.</p> <p>- 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.</p> <p>- IA believes that further consideration and clarification is needed 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</p>	<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>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>eco</p>	<ul style="list-style-type: none"> - The proposed improvements to the IRP and reconsideration process would definitely enhance ICANN's accountability. - 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 - 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>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - Consult with subject matter experts
<p>Govt-FR</p>	<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 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 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"). - 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 	<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? - International arbitration and "fork in the road" clause I NEED SOME HELP UNDERSTANDING WHAT THEY ARE ASKING FOR HERE

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.

This legal entanglement makes the solution to stress test #12 (forcing 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.

- 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. 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

	<p>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 arbitrators, who would not only be financially supported by the defending party (ICANN, Draft prop., section 4.1, §133, item 13), but who would also have been selected by the defending party (the Board, Draft prop., section 4.1, §133, item 14b), which seems to give fewer guarantees of independence of the panel.</p> <ul style="list-style-type: none"> - 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? - Could the CCWG-accountability therefore elaborate more on the independence of the new IRP standing panel? 	
<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 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. - 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 	<p>Agreement – Concerns</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - Supports general approach - Must protect "prospectively affected" party that demonstrates likelihood of harm done to interest it defends - 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>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.</p> <ul style="list-style-type: none"> - 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 could make the selection to be confirmed later on by the Board. - 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>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 appointments. We ask that the CCWG-Further clarify the restrictions on post-term appointments - 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 	<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>- 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>	
<p>CCG</p>	<p>- 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.</p> <p>- 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.</p> <p>- 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."</p> <p>The last two sentences need further clarification. Will Stress Tests be required to understand the consequences of the last two instances in this paragraph?</p> <p>- 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 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>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>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, communities propose specific solutions and then vote.</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>BC</p>	<p>- 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.</p> <p>- BC agrees that redress should be available when a particular action or</p>	<p>Agreement</p> <p>Summary / Impression:</p>

	<p>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.</p> <ul style="list-style-type: none"> - 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 would allow parties to introduce new arguments without first vetting them through the community’s policy development channels. - 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. 	<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>.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. 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. We welcome more effective appeals procedures. It is obviously important to ensure due process is respected to underpin ICANN 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.</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>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>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. -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. 	<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 - Stress tests should be considered for erroneous decisions by panel – community override? - Need to define "materially affected" and "materially harmed"
<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 	<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>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.</p> <ul style="list-style-type: none"> - 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. However, we do support a provision that geographic diversity should be taken into account when making panel selections. - 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>JPNIC</p>	<ul style="list-style-type: none"> - 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 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. - We further recommend that if this 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>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
<p>IPC</p>	<ul style="list-style-type: none"> - 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 	<p>Agreement</p>

the Proposal represents a significant first step in helping to achieve this.

- 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."

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.

2. Matters excluded from IRP: Assuming the "membership" organizational model is adopted according to the CCWG's Proposal (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. ICANN*:

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

Summary / Impression:

- 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

	<p>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>	
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.
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 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. - 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>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - MPAA generally supports this idea but believes clarification is needed with respect to standard of review; level of evidence required, etc. - Broader standing is appropriate to ensure community accessibility, but "material harm" standard requires clarification - Is a "right of review" available under the current plan? [NOT SURE I KNOW WHAT THIS MEANS]
CDT	<ul style="list-style-type: none"> - 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>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - CDT supports enhanced IRP; binding, accessible, and independent process is needed.
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</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support. - Should not include ccTLD delegation and/or re-delegation issues
USCC	<ul style="list-style-type: none"> -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 	<p>Agreement</p> <p>Summary / Impression:</p>

	<p>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 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. - 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. - 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. 	<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 requirements are needed.
<p>INTA</p>	<ul style="list-style-type: none"> - 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 appointment and removal of Board members. - 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. 	<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. - Ability to recuse panelist for bias. - Exhaustion of remedies should be required.
<p>.NZ</p>	<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 	<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>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>	
HR2251	<p>- 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>	
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.
MM	<p>I agree very strongly with the purposes of the IRP as enumerated in 133. 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>Agreement</p> <p>Summary / Impression:</p> <ul style="list-style-type: none"> - General support. - More clarity on selection – veto or <i>voir dire</i> 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?
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</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 - "Abuse 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>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 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>Board</p>	<ul style="list-style-type: none"> - 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. - 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>We agree the process needs to be refined. More detail is needed.</p>
<p>CENTR</p>	<ul style="list-style-type: none"> - 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. - 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. - 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. - Last but not least we reiterate the requirement that any appeal mechanism must not cover ccTLD delegation and/or re-delegation issues. - CENTR grees that the proposed improvements to the Independent 	<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

	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.	
NIRA	- NIRA agrees with recommended changes and requirements.	Agreement
ALAC	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.	Agreement – Concerns Summary / Impression: - Independence from other parties including contract parties, local, national, or international entities, etc. CCWG response: We agree with this comment.
LAB	- 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 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. - 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.	Confusion Summary / Impression: - Clarify inter-relationship between IRP and RPE - Face to face meeting or just e-doc exchange?
ZR	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.	Agreement – Concerns Summary / Impression: - Concerns re transparency and openness - Geographical and professional diversity should be considered in forming panels.
RIR	- 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 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. - Furthermore the RIR community stresses that there are separate, well-established appeal mechanisms for disputes relating to Internet number resources. In particular there is:	Agreement – Concerns Summary / Impression: - 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>1. An arbitration process described in the ASO MoU for disputes relevant to the global policy development process</p> <p>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.</p> <p>3. A bottom-up process for any concerns that a third party may have relating to Internet number resources issues.</p> <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>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 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 Booking.com v. ICANN:</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>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</p>	

	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.	
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Reconsideration Process Enhancement

Question 6: Do you agree that the proposed improvements to the reconsideration process 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. Are the timeframes and deadlines proposed herein sufficient to meet the community's needs? Is the scope of permissible requests broad / narrow enough to meet the community's needs?

Contributor	Comment	CCWG Response/Action
auDA	Make these areas primary focus as recommendations are finalized: 1) improvement and strengthening of ICANN's Request for Reconsideration process, including a significant expansion in scope; and 2) refinement in the role of the ICANN Ombudsman including direct preliminary involvement in the reconsideration process (replacing the current role of ICANN's legal team).	
DBA	New and improved appeal mechanisms: An IRP Panel that is binding, affordable, more accessible, broadened in scope as well as a reformed Reconsideration Process.	
CRG	<ul style="list-style-type: none"> - Does the Reconsideration process remain in place and is it required to be tried first before initiating the IRP? - I would suggest the proposal of the Reconsideration process should try to make the difference between Board action/inactions vs. Staff action/inaction easier. 	
AFRALO	AFRALO members appreciate the reinforcement of the reconsideration mechanism proposed in the report.	
DCA-T	<ul style="list-style-type: none"> - Composition of the Board Governance Committee and the NGPC must be different to provide fairness and rationale in the decision making. - Any outcome for reconsideration request should be reviewed by an independent group to ensure that the same group that made a decision that is being challenged, for which a reconsideration request is sought, are not the same group that will look into the reconsideration and adopt/ratify the earlier decision that they made. A group cannot keep or ratify/approve its own counsel. - Improvement of the transparency mechanisms will play a big role in determining the fairness of decisions made. Thus recordings / transcripts should be posted of the substantive Board discussions on the option of the requester. - It will be acceptable to also provide a rebuttal avenues and opportunity to the BGC's final recommendation (although requesters can't raise new issues in a rebuttal) before the full Board finally decides. 	
Afnic	Afnic agrees that there is a strong need to enhance the reconsideration process. Ombudsman implication is a good step. Furthermore, and as long as reconsideration requests are taken in charge by the Board Governance Committee, the implementation of a thorough and independent annual audit on Board members potential conflict of interest seems to be needed.	
IA	<ul style="list-style-type: none"> - strongly agrees that reform of the reconsideration process is needed ... and supports the majority of the proposed enhancements and the proposed timelines. - However, does not support allowing reconsideration where the ICANN board has failed to consider "relevant," rather than "material" information. In most jurisdictions, the standard for relevancy is extremely low. - CCWG [should] clarify rather than eliminate the requirement that 	

	<p>parties (or coalitions in which parties are a member) must participate in the applicable public comment process before seeking reconsideration.</p> <ul style="list-style-type: none"> - concerned that eliminating such a safeguard would not create the right incentives, as it would invite parties to use the reconsideration process as an end run around policy development by allowing parties to raise concerns only on reconsideration after policy development has concluded. CCWG should carefully consider whether additional safeguards in the reconsideration process could prevent these eventualities while still preserving an accessible IRP process. - agrees that the Board's reliance on its internal legal department is cause for concern. We support an initial review by an Ombudsman, but only if the review is conducted free from the involvement or influence or interference by ICANN's legal department or outside counsel. 	
eco	<ul style="list-style-type: none"> - The proposed improvements to the IRP and reconsideration process would definitely enhance ICANN's accountability. 	
RySG	<ul style="list-style-type: none"> - agrees that the proposed improvements to the reconsideration process would help to enhance ICANN's accountability - agree with the list of requirements and believe that the proposed timeframes and deadlines are reasonable and will likely meet the substantial majority of the community's needs. - the scope of permissible requests is appropriate 	
JH	<p>I agree that the proposed improvements to the reconsideration process would enhance ICANN's accountability. But the list of requirements for this recommendation is not enough. The proposal only empowered community the power to remove ICANN Board of Directors and recall of the Board. But apparently, not all the wrong decisions need to use the two measures, only for extreme situation. Actually, other punitive measures/solutions mechanism/regulation could be considered.</p>	
BC	<p>In general, supports the CCWG proposal to change the standard for Reconsideration Requests to include the amended Mission and Core Values for ICANN. (p.36)</p> <ul style="list-style-type: none"> - also supports the CCWG proposal to increase transparency by requiring full documentation of the ICANN Board Governance Committee's dismissal of any Reconsideration Request. (p.37) - supports the CCWG proposal to bypass ICANN legal department for the first substantive evaluation of Reconsideration Requests. - believes this review by the Ombudsman is appropriate only if the review is conducted free from the involvement or influence of or interference by ICANN's Legal Department or outside counsel. Matters of policy should go directly to the Board Governance Committee. (p.37) - supports requiring the full ICANN Board to vote on final determinations of Reconsideration Requests. (p.37) - However, has concerns with the proposal to allow reconsideration for failure to consider any "relevant" material. In most U.S. jurisdictions, the standard for relevancy is extremely low. Under the California Evidence Code, relevant evidence is "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" (emphasis added).¹¹ Any decision made by the Board or the staff is likely to overlook some relevant evidence. If failure to consider relevant evidence is grounds for reconsideration, nearly every decision is subject to reconsideration. Therefore, the BC recommends retaining the "material information" standard set forth in the current Bylaws. - also has some concern that the Reconsideration process proposed by 	

	<p>the CCWG would allow parties to introduce new arguments without first vetting them through the community’s policy development channels. This could eliminate the requirement to participate in applicable public comment processes. We are concerned that the proposed process might not create the right incentives: it invites parties to stand on the sidelines during the policy development process and bring their concerns to the Reconsideration Process after policy development has concluded. These could undermine the bottom-up, consensus-based process for developing policy.</p>	
<p>USCIB</p>	<p>We support the revisions to the Reconsideration Request with the following suggestions:</p> <ul style="list-style-type: none"> - Strongly suggest clarification that the Ombudsman must be fully independent of ICANN Legal staff in order to conduct the initial review as proposed. It should also be ensured that the office of the Ombudsman is properly staff so as to avoid bottlenecks in the review process. - Reiterate concerns expressed regarding the IRP process: be mindful of the fact that 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 Reconsideration Request is not abused by those seeking to override community-developed and approved policies. - With respect to enhancements for both the Independent Review Panel and the <i>Reconsideration Process</i>, 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. 	
<p>LINX</p>	<p>We support the CCWG’s proposals regarding the reconsideration process.</p>	
<p>JPNIC</p>	<p>Overall, we agree that improvements to the reconsideration process would enhance ICANN’s accountability. However, we would like to request for more clarifications on why this must be in WS1, given there are other accountability mechanisms to be in place. We generally support improvements and further consideration on reconsiderations but if there are any contentious issues, which does not get resolved before the IANA Stewardship transition, we recommend that some of the requirements to be added as further improvements of reconsideration as WS2.</p>	
<p>IPC</p>	<ul style="list-style-type: none"> - The IPC also strongly supports many of the CCWG’s recommendations for improving the Request for Reconsideration (“RfR”) process, with particular emphasis on the provisions concerning improvements to transparency mechanisms (e.g., recordings, transcripts, etc. see ¶ 154); document disclosure policies (see ¶ 164); and opportunities for rebuttal after the BGC’s final recommendation but prior to Board decision (see ¶ 155). - The IPC also — in principle — supports the efforts to extend RfR filing deadlines, though considers thirty (30) days to still be a bit on the lean side. See ¶ 161. While the IPC is mindful of the underlying goal of resolving disputes quickly, and does not feel that the timelines need to extend nearly as long as traditional statutes of limitations (or what might otherwise be considered “laches” under common law), further consideration is nonetheless encouraged to try and identify a slightly broader window to allow time for reasonable investigation of the merits of potential claims. See ¶¶ 139, 161; see also Bylaws Art. IV, § 2, Para. 5(a). - Initial review by the Ombudsman (or anyone with mediation training that can serve in a facilitative, rather than adversarial, role) is another 	

	<p>potentially useful approach that will likely reduce costs and, at minimum, help reduce the number of issues to be decided in the proceedings. See ¶ 149.</p> <p>- We also support the CCWG’s efforts to broaden the RfR standards and applicability (e.g., changing “material” to “relevant” as listed in ¶ 142; as well as removing highly subjective dismissal criteria such as “vexatious” or “querulous” as listed in ¶ 146). However, while we do consider the RfR process to be a useful accountability tool in certain situations (e.g., involving ICANN staff action/inaction), we feel that an expanded role for the IRP is more likely to ensure a greater degree of consensus and more adequately protect the interests of the community.</p>	
<p>GG</p>	<p>- GG supports creating a process to recall, in exceptional circumstances, individual ICANN Board members, though as noted below we are concerned about the proposed power to remove the Board as a whole given the potentially destabilizing effects of such a move.</p> <p>- The reconsideration request process should also encourage more efficient decision-making. As with other aspects of ICANN’s operations, Google believes that any changes to the Request for Reconsideration process should enhance accountability while at the same time promoting efficiency. For this reason, we believe that prior participation in the relevant public comment process should continue to be a requirement for parties to have standing to ask for a reconsideration request, for the reasons outlined in the above IRP discussion. Moreover, we urge the CCWG-Accountability to reconsider changes to the standard used when evaluating the scope of information that the ICANN Board should consider before acting or failing to act in a way that adversely affects a party. The Proposal suggests changing this standard from “material information” to “relevant information,” meaning 12 that in order to avoid challenge, the Board would be forced to consider information beyond that which is material to the decision at issue. This is a significant and novel change to the quantity and breadth of information that the Board would be forced to consider, leading the Board to an impossible decision between being overwhelmed with information – making decisions take longer, without necessarily being better – or not taking into account some information that meets the low threshold of “relevance” and risking a series of requests for 13 reconsideration that degrade the predictability and efficiency of ICANN’s operations. For these reasons, Google urges the drafters of the Proposal to retain the present “material information” standard in these provisions of the bylaws.</p>	
<p>i2Coalition</p>	<p>- The i2Coalition strongly agrees that ICANN’s actions should be subject to a binding appeal mechanism. Adoption of a binding appeals process is key to improving ICANN’s overall accountability to the Internet community. We also agree that review should be available for actions or failures to act that violate either (a) substantive limitations on the permissible scope of ICANN’s activity, or (b) decision-making procedures. And we agree that the substantive limitations and decision-making procedures that should form the basis for relief are those set forth in ICANN’s Bylaws; Articles of Incorporation; its Statement of Mission, Commitments, and Core Values; and ICANN policies.</p> <p>- However, we encourage the CWG-Accountability to consider two modifications to its proposal. First, the i2Coalition has some concern the IRP process, as currently proposed by the CCWG, would allow parties to bring new arguments to the IRP without first vetting them through the community’s policy development channels. We are 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</p>	

	<p>approach could create operational inefficiency and undermine the bottom-up, consensus-based process for developing policy within ICANN. The i2Coalition 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. Second, we believe that actual decisions should be reviewed under an abuse of discretion standard rather than the de novo standard currently contemplated by the Proposal. Under this model, failure to follow processes would qualify per se as an abuse of discretion. Pure de novo review would arguably allow individuals to circumvent the policy process and undermine the finality of consensus-based 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.</p>	
<p>CDT</p>	<p>- we also support the proposed changes to the Reconsideration Process. Again, these enhancements are central to ICANN's overall accountability and to empowering the community. CDT supports the increased role of the Ombudsman in lieu of ICANN's lawyers and encourages greater responsiveness by ICANN's DIDP.</p>	
<p>USCC</p>	<p>- The proposed improvements would help enhance ICANN's Accountability</p> <p>- In general, we agree that reform of the reconsideration process is needed. However, we urge the CCWG to reconsider changes to the standard used when evaluating the scope of information that the ICANN Board should consider before acting or failing to act in a way that adversely affects a party. The Proposal suggests changing this standard from "material information" to "relevant information," meaning that in order to avoid challenge, the Board would be forced to consider all relevant information before making a decision. This is a significant change to the quantity and breadth of information that the Board would be forced to consider because the threshold for relevancy could be considered quite low. For these reasons, the Chamber urges the drafters of the Proposal to retain the present "material information" standard in the reconsideration provisions of the bylaws.</p> <p>- We recommend that the CCWG retain the requirement to participate in a public comment process before seeking reconsideration, but modify it as proposed above in the context of seeking independent panel review.</p> <p>- The Board's reliance on their internal legal department is cause for concern, particularly because their primary legal obligation is to protect ICANN. We support an initial review by an Ombudsman, but only if the review is conducted free from the involvement or influence of or interference by ICANN's Legal Department or outside counsel. The Ombudsman must be truly independent, including in both staff and monetary resources.</p>	
<p>INTA</p>	<p>- agrees and we also suggest that ¶ 142(e) should be amended to add, after "relevant information" or "one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on information, and subsequent to the action or inaction, there is a material change in that information."</p> <p>- We recommend changing ¶ 149 to state that Ombudsman "should" (not "could") make initial recommendation to the BGC.</p>	

.NZ	We broadly support the direction set out but have not scrutinised the proposal in depth. It is important to ensure that the reconsideration 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.	
CENTR	We support both the broadening of the types of decisions which can be re-examined to include ICANN Board/staff action/inaction against ICANN's Mission or core values as stated in the Bylaws, and the improvement in terms of transparency regarding dismissal cases. At the same time, and considering possible calendar constraints, we recommend the deadline for a reconsideration request be increased to 45 days. On the other hand, final decisions should have a much shorter deadline. The 120 days deadline is too long and might imply negative collaterals on those impacted by ICANN Board/staff action/inaction. Therefore, final decisions should be issued within 90 days as ultimate deadline.	
NIRA	- 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 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.	
ALAC	<p>- Section 4.2: Regarding the enhancements to the Reconsideration Process, many recent reconsideration requests involved decisions of external panels. The ALAC suggests that the proposal be explicit as to whether such decisions are eligible for reconsideration and if so, how they are to be carried out (purely Board reconsideration or re-chartering a new and/or expanded panel). The CCWG should also consider whether discrepancies between multiple panel results could be the subject of reconsideration.</p> <p>- Para 156: The ALAC supports adding specific target deadlines for resolution of reconsideration requests, but suggests that they be worded as to allow for extraordinary situations which might require elongation of the allowed period. Paragraph 159 makes such an allowance for the 60 day period but not for the 120 day period.</p>	
LAB	- 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 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.	
RIR	<p>(note, same as RIR comment on IRP)</p> <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 implementation is underway. A more detailed timeline of tasks within the implementation process, relative to the IANA transition timeline, would be helpful to</p>	

	<p>clarify which are expected to precede the IANA transition, and which to follow.</p> <ul style="list-style-type: none"> - Furthermore the RIR community stresses that there are separate, well-established appeal mechanisms for disputes relating to Internet number resources. In particular there is: <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. - 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>DotMusic</p>	<ul style="list-style-type: none"> - DotMusic has been harmed numerous times as a result of inconsistent and unpredictable determinations that have been a common theme throughout the New gTLD Program with respect to Legal Rights Objections, Community Objections and other New gTLD Program-related Determinations (e.g. A Request for Re-consideration filed by a competitor against DotMusic's Public Interest Commitments [1]). In all these cases, there was no appeal mechanism in place to hold the Panel or the ICANN BGC accountable for their Determinations. - Moreover, DotMusic reiterates its concern about the anonymous nature of the panels determining the results of the Community Priority Process (CPE). Such a lack of transparency harms community applicants, favors non-community applicants and harms ICANN's accountability. Keeping the CPE panelists identity a secret and not allowing community applicants to communicate with CPE panelists also undermines transparency and further harms ICANN's accountability. <p>[1] In this case, the competing applicant's obstructive filing (See .Music LLC Reconsideration Request 15- 6, https://www.icann.org/en/system/files/files/reconsideration-request-15-6-music-redacted-17apr15-en.pdf) has resulted in delays in DotMusic's Community Priority Evaluation invitation and the inclusion of a disclaimer pertaining to DotMusic's PIC clarification section (See https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392). While the disclaimer states that the clarifications will not be part of DotMusic's Registry Agreement, DotMusic commits that the copyright provisions contained in the clarification section will be incorporated in its Registry Agreement</p> <ul style="list-style-type: none"> - DotMusic supports many of the CCWG's recommendations to improve the Request for Reconsideration (RfR) process, especially in areas concerning improving transparency mechanisms, document disclosure policies, and an opportunity for rebuttal prior to the Board's final determination. It is recommended that ICANN also considers incorporating an Initial review with the Ombudsman, who can serve a facilitative role in the process and help increase efficiency. DotMusic also supports the CCWG's efforts to broaden the RfR standards and applicability to change "material" to "relevant" as well as removing highly subjective dismissal criteria such as "vexatious" or "querulous". It is noteworthy to indicate that only two RfR's have ever actually been accepted by the BGC (ICANN Board Governance Committee), which may 	

	<p>be a result of a conflict of interest. This is because the ICANN BGC has an inherent bias in favor of ICANN Staff since both the BGC and Staff serve ICANN's best interests. An independent body without any relation to ICANN might be better suited to take this role of deciding RfR's</p>	
<p>Siva</p>	<ul style="list-style-type: none"> - Reconsideration process must be above any possible tendency on the part of the organization at various levels to adhere to defensive postures on wrong decisions or indecisions, actions or inactions, by the Community, Staff and Board, however unfair and wrong. Reconsideration ought to move beyond being a review of whether a certain process was followed in a decision and become an elevated framework for reconsideration within which comprehensive reviews would be made for fair and binding directives. - Reconsideration process is a Board Governance Committee process that is a peer review process in matters relating to action / inaction by the Board and it becomes an Executive Review process in matters concerning Staff Action/Inaction. Due to the 'peer' review nature of the process, it is an internal process, or almost a self-evaluation process. When an issue reaches this process, the BGC ought to have an unrestrained scope and a total willingness to correct a wrong decision / inaction by all available means. This is how the Reconsideration process needs to be designed and understood by Staff, Board and the Community. - The Ombudsman process is defined as an independent process, hence the independence of the Ombudsman needs to be total and complete. The Ombudsman could be empowered to investigate complaints against ICANN at any level, and with this end, the office of the Ombudsman needs to be constituted as unrestrained and uncontained. - The Accountability design process could cross examine the role of an independent Judiciary in a balanced Democracy to find if certain features of a balanced governance structure could be drawn in the design of the reconsideration processes in ICANN Governance. 	