

1. Introduction

The consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN's existing Independent Review Process (IRP). Commenters called for ICANN to be held to a *substantive standard of behavior* rather than just an evaluation of whether or not its action was taken in good faith. Commenters called for a process that was *binding* rather than merely advisory. Commenters also strongly urged that the IRP be *accessible*, both financially and from a standing perspective, *efficient*, and that it be designed to produce *consistent and coherent results* that will serve as a guide for future actions.

The process described below calls for a standing, independent panel of skilled jurists/arbitrators who are retained by ICANN and can be called upon over time and across issues to resolve disputes regarding whether ICANN is staying within its limited technical Mission, whether it is abiding by policies adopted by the multistakeholder community, and whether in carrying out its mission and applying consensus policies it is acting in accordance with the Fundamental Commitments to the community and its Core Values, in all cases as required by the proposed Bylaws. (See, *Statement of Mission, Fundamental Commitments, and Core Values.*)

The proposal calls for a fully *independent* judicial/arbitral function – but *not an external body*. The purpose of a standing panel is to ensure that panelists are not beholden to ICANN or any of its constituent bodies – but they are to be ICANN “experts” in the sense that they must understand how ICANN's Mission is implemented, and its commitments and core values are applied –over time and across a variety of situations.

2. Purpose

- a. Empower the community and affected individuals/entities 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.
 - b. Ensure that ICANN is accountable to the community and individuals/entities for actions outside its mission or that violate community-approved standards of behavior, including violations of established ICANN policies.
 - c. Reduce disputes going forward by creating precedent to guide and inform ICANN Board, staff, SOs/ACs, and the community in connection with policy development and implementation.
3. *Description*: A standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially harmed by ICANN's action or inaction in violation of commitments made in ICANN's Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed *Statement of Mission, Fundamental Commitments & Core Values*. This reflects proposed changes and enhancements to ICANN's existing Independent Review Process.
 4. *Accountability Category*: Review, redress, and checks/balances. The overall purpose is to ensure that ICANN does not exceed the scope of its limited technical mission and, in carrying out that mission, acts in a manner that respects community-agreed fundamental rights, freedoms, and values.
 5. *Initiation of an IRP*: Triggered (by filing of a complaint by aggrieved party) alleging that a specified action or inaction is not within ICANN's Mission or that is undertaken in manner that violates ICANN's Fundamental Commitments to the community and/or Core Values.
 6. *Possible Outcomes*: Decision that an action/failure to act (a) is or is not within ICANN's Mission and/or (b) was undertaken in a manner that violates ICANN's Fundamental Commitments or Core Values. The intent is that IRP decisions should be binding on ICANN. The extent to which this is achievable, and the means by which this effect might be achieved, are topics of ongoing review and discussion with legal counsel to the CCWG.

Questions and Open Issues:

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- Some members of the working group feel that the Board or the community be permitted under certain circumstances to reject an IRP decision, for example, with the unanimous support of the Board and a designated community body? Others note that this is inconsistent with our intent to ensure that the IRP, and not the Board, is the final arbiter of whether or not the Board has acted properly.
 - To the extent that the Board cannot be bound by an IRP decision (as noted, this remains a question in the legal review process) is the ability to recall some or all members of the Board a sufficient mechanism to ensure compliance with Panel decisions?
7. *Finality*: At least in some situations, the decision of the panel will be final, in that no appeals process will be available. The IRP is designed in the first instance as a means of holding ICANN to its limited technical mission and to its Fundamental Commitments and Core Values. We note that this mechanism could be used to challenge other actions or inactions. For example, direct customers of IANA services may want to use the mechanism for challenging compliance with IANA SLAs, delegations, revocations, etc. In such cases, it would be up to the relevant stakeholders to determine whether this is appropriate and, if so, what standard(s) would be applied by the panel.

Questions and Open Issues:

- Should proceedings before the IRP be “last resort” (i.e., no appeals process) in all cases?
 - Should ICANN or complainants have the ability to appeal panel decisions to a court of competent jurisdiction? In some cases or only in specified cases?
8. *Standing*: Any person/group/entity “materially affected” by Board/management/staff action that (a) exceeds the scope of ICANN’s limited Mission and/or (b) has been undertaken in a manner that violates ICANN’s Fundamental Commitments and/or Core Values.

Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff action where a complainant can demonstrate:

- Harm that cannot be cured once a decision has been taken or for which there is no adequate remedy once a decision has been taken;
- Either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits; and
- A balance of hardships tipping decidedly toward the party seeking the relief.

Questions and Open Issues:

- How would “material affect” be measured in the event that the “community” generally, or specific community groups sought independent review?
 - Who should have the right to intervene in an IRP in order to support or oppose the merits of a complaint?
 - Should ICANN have the right or obligation to “join” necessary parties to an independent review? What constitutes a “necessary party”? How do we prevent abuse of intervention rights?
 - Application of standard to existing IRPs?
9. *Standard of Review*: A party challenging an action or inaction has the burden to demonstrate that the complained-of action 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 By-laws, Articles of Incorporation, or *Statement of Mission, Fundamental Commitments, and Core Values*.
10. *Composition of Panel; Expertise*: Significant legal expertise, particularly international arbitration expertise and expertise, developed over time, about the DNS and ICANN’s policies, practices, and procedures. At a minimum, Panelists should receive training on the workings and management of the domain name system. Panelists must have access to skilled technical experts upon request. In addition to legal expertise and a strong understanding of the DNS, panelists may confront issues where highly technical, civil society,

business, diplomatic, and regulatory skills are needed. To the extent that individual panelists have one or more of these areas of expertise, the process must ensure that this expertise is available upon request.

While most of the working group was comfortable with this formulation, some participants prefer to require that the panelists themselves possess the requisite skill sets – of course, individual panelists need not possess every kind of expertise, rather, they suggest that taken together the panel should possess the requisite skills.

11. *Diversity: Geographic diversity.* English as primary working language with provision of translation services for claimants as needed.

Questions and Open Issues:

- How will geographic diversity be defined? For example, no more than X members from any one Region? Alternatively, no less than 1 member from each region?

Other diversity, e.g., gender?

12. *Size of Panel*

Standing Panel - 5 or 7

Decisional Panel – 1 or 3 Panelists

13. *Independence:* Members must be independent of ICANN, including ICANN SOs and ACs. Members should be compensated at a rate that cannot decline during their fixed term; no removal except for specified cause (corruption, misuse of position for personal use, etc.) To ensure independence, term limits should apply, and post-term appointment to Board, Nomcom, or other positions within ICANN would be prohibited.

Questions and Open Issues:

- What is the term of the appointment? 3 or 4 years?
- Limit to a single term?

14. *Selection and Appointment:* Separation of powers for nomination and confirmation of panelists. For example: (i) members nominate and Board confirms; (ii) Board nominates and members confirm; or (iii) third party international arbitral bodies nominate and members, board, or both confirm.

15. *Recall or other Accountability:* Appointments made for a fixed term with no removal except for specified cause (corruption, misuse of position for personal use, etc.).

Questions and Open Issues:

- Process for removal of panelists for cause must be defined. Board or community initiated process? Ultimate decision maker – Board, community, other members of the IRP standing panel, or some combination?

16. *Settlement Efforts:* Reasonable efforts, as specified in a public policy, must be made to resolve disputes informally prior to/in connection with filing an IRP case.

Parties to cooperatively engage informally, but either party may inject independent dispute resolution facilitator (mediator) after initial CEP meeting. Either party can terminate informal dispute resolution efforts (CEP or mediation) if, after specified period, that party's concludes in good faith that further efforts are unlikely to produce agreement.

*The process must be governed by clearly understood **and pre-published rules applicable to both parties** and be subject to strict time limits*

Questions and Open Issues:

- The CCWG-ACCT is recommending changes to the Reconsideration process. Under what circumstances, if any, should the Reconsideration process be a necessary first step to filing an IRP request?

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- What timeline is appropriate for CEP? Fourteen (14) days?
- What is the source for independent dispute resolution facilitators? Professional mediation services? A member of the standing IRP panel (who could not then serve as a IRP panelist in that case)? Community members acceptable to ICANN and the complainant?
- What non-disclosure obligations are appropriate? Can complainant waive confidentiality with respect to some or all issues.
- For transparency purposes, should a complainant have the right to post its written submissions, if any, publicly? To have any meetings recorded and transcribed?

17. *Decision Making*: In each case, a single or 3 member panel will be drawn from standing panels. In single member panel, ICANN and complaining party agree on panelist. In 3-member panel cases, each party selects one panelist, and those panelists select a third.

Questions and Open Issues:

- When is a single member panel appropriate, when is a 3-member panel appropriate?
- Can a complainant elect a 3-member panel in any case? If so, is cost shifting appropriate?

Standing Panel to draft, issue for comment, and revise procedural rules. Focus on streamlined, simplified processes with rules that are easy to understand and follow.

Panel decisions will be based on each IRP panelist's assessment of the merits of the claimant's case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts. All decisions will be documented and will reflect a well-reasoned application of the standard to be applied (i.e., the *Statement of Mission, Fundamental Commitments, and Core Values*).

18. *Decision*: By simple majority. Alternatively, this could be included in the category of procedures that the IRP itself should be empowered to set.
19. *Accessibility and Cost*: ICANN to bear administrative the costs of maintaining the system (including Panelist salaries); Panel to determine filing fees for claimants. Panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access to pro bono representation for community, non-profit complainants.

Panel should complete work expeditiously; issuing a scheduling order early in the process, and in the ordinary course should issue decisions within a standard time frame.

Questions and Open Issues:

- 3-month/6 month decision requirement?
- Provision for complex cases, such as monthly reports?

20. *Implementation*. Adopted as "durable" Bylaws provision.

21. *Transparency*: The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust independent review process. We recommend reviewing and enhancing the DIDP as part of the accountability enhancements.