

WP2: Categorising Public Comment Replies

Aims

The goals of this categorisation exercise were:

- i) To identify common topics that those who submitted replies wished to discuss, so that WP2/CCWG can organise itself to discuss these topics;
- ii) To show the relative popularity of each topic as an item for discussion, so that WP2/CCWG can prioritise its focus accordingly;
- iii) To collect those comments are all on a given topic together, and separate them out from unrelated comments, so that when WP2/CCWG discusses an issue it has readily before it all the feedback received on that issue
- iv) To ensure that items that were new to CCWG and which did not receive much attention were captured, so that these additional ideas were not excluded from consideration

Methodology

The reviewers read the Public Comment Replies¹ and sought to identify broad topics or issues to which particular comments were addressed. These topics were drawn broadly, and value neutral as to the position taken on the topic.

Section 1: Mission and Core Values

Outcome

The process produced seven major substantive topic areas for WP2/CCWG to discuss, plus “General comments about the proposal as a whole”, “New ideas proposed for inclusion” and “Other ideas, e.g. suggestions for CCWG’s working practices”. We also identify three sub-topic in each of three of this topic areas, should the discussion need to be broken down further.

Seven main topics or sixteens detailed topics seems a manageable number.

Every topic and subtopic had at least three commenters speaking to it, except “other ideas”.

The reviewers did not identify any comments raised that could not be categorised and indexed using this methodology: it therefore aims to constitute (errors and oversights aside) an exhaustive reference.

¹ The starting point for this exercise was the summary of public comment replies supplied by staff support, not the original replies themselves.

Breakdown of comments received

Main topic area	Sub-topic area	No. of commenters who submitted comments relating to this topic
Defined Powers		17
	General Regulatory Power	19
	Human Rights and Freedom of Expression	
	Contract compliance	
Balancing Core Values		13
Relationship to government and law		
	“Private sector led”	7
	Deference to GAC or governments	8
	Compliance with local law or international law	5
Correctness of Core Values		4
	Consumer choice / Paragraph 337 / Paragraph 60	5
	Multistakeholderism	4
	“Public good” and “Public interest”	7
Enforceability		9
Mutability and mechanisms to change core values		6
Specific areas that aren't DNS policy: e.g. specifically related to numbers, protocols, root servers or ccTLD		4
General or non-specific		13
New/missing items for inclusion text		9
Other ideas (not for inclusion in text)		2

Scope of topics

This section explains the meaning used by the reviewers when identifying a topic, and how comments were classified.

Defined Powers

There were a number of commenters who spoke specifically to the aspect of the proposal that ICANN's powers or role should be specifically enumerated, and that activities outside the scope of these defined powers or role should be prohibited. Comments relevant to this issue have been collected under defined powers.

However, there were also a considerable number of commenters who addressed their comments to a specific subset of this issue, namely, the CCWG's identification of a need to specifically exclude ICANN from undertaking activities “to attempt the regulation of services that use the Internet's unique identifiers, or the content that they carry or provide”. Comments that specifically referenced the need to protect human rights or freedom of expression and the adequacy of the proposed measures were grouped together here, as were comments criticising the wording for other reasons.

Balancing Core Values

Comments were grouped under this topic if they addressed the question of how core values and commitments would be balanced against each other. They include any comments relating to the new wording CCWG proposes to guide any balancing of Commitments.

Relationship to government and law

This topic area comprises three sub-topics:

- Comments received in relation to the phrase “Private sector led”, including any alternatives
- Comments received that discuss deference to the opinion of governments or of GAC, to government policy, or related matters, whether specifically in the context of the formal GAC advice to the Board or otherwise
- Comments received that discuss ICANN’s deference to, or compliance with, international law or local law (including any comments that discuss any perceived need to recognise, record, preserve or enhance such deference or compliance).

Correctness of core values

This topic covers any comments received that speak to the correctness of the core values as proposed by CCWG (for example, proposals for re-wording, suggestions of omissions, or statements of support for the CCWG's proposed wording).

The reviewers identified three sub-areas within this where comments were received:

- Multistakeholderism
- Any comments that discuss the use of the phrase “public good” or “public interest”
- A number of comments that discuss the mention of consumer choice and, in particular, compare paragraph 60 (a proposed new core value) with paragraph 337 (an explanatory paragraph not part of the proposed bylaws wording)

Enforceability

While there is a topic area that covers comments that merely state that ICANN's powers should be limited, those comments that specifically speak to the enforceability of that limitation are listed under this topic.

Specific areas that aren't DNS policy

Comments that addressed issues specifically about the relationship with the numbers community, the protocols community, the root name servers community, or about ICANN's activities and role (including limits on its role) in relation to number, protocols, or root name servers, or the consequences and implications of any of the above are listed under this topic, as are comments that discuss the limits of ICANN's role in relation to ccTLDs / ICANN's lack of authority to make policy for ccTLDs.

Mutability and mechanism to change core values

Any comments that address how core values might be changed, or the need to entrench them, or the need to ensure that they can be changed over time are collected under this topic.

General or non-specific

Any comments that speak non-specifically to the CCWG proposal as a whole.

New/missing items for inclusion in text

Any comments that identify new items that the comment proposes should be included in the bylaws text, not covered under other categories, are gathered under this topic.

Other

Other comments that do **not** propose or imply changes to the text are included under this topic, (for example, comments on how the CCWG should go about its work).

Mission and Core Values Appendix: Index of comments received

This appendix indexes the Public Comment Summary so that individual comments on a particular topic can be found quickly.

Topic	Commenter	Ref	Notes/extract	
Defined powers	DP-DK	95		
	IA	96		
	RySG	98		
	BC	100		
	LINX	104		
	JPNIC	105		
	Govt-BR	107		
	CDT	109		
	INTA	111		
	.NZ	112		
	HR2251	113		
	MM	115		
	CENTR	118		
	i2Coalition	119		
	Govt-IN	133		
	CIRA	149		
	NCSG	155		
	General Regulatory Power / Human Rights and Freedom of Expression / Contract compliance	NCSG	73	
		WC	91	
		DP-DK	95	
IA		96		
BC		100		
USCIB		103		
LINX		104		
JPNIC		105		
IPC		106		
MPAA		108		
HR2251		113		
NCSG		114		
MM		115		
i2Coalition		119		
JS		125		
CRG		128		
Govt-IN		133		
DP-DK		134		
USCC		151		
Balancing core values		IA	96	
		BC	100	
	.UK	101		
	USCIB	103		
	LINX	104		
	JPNIC	105		

	CDT	109	
	USCC	110	
	.NZ	112	
	CG	116	
	CENTR	118	
	i2Coalition	119	
	CENTR	157	
“Private sector led”	IA	96	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.
	RySG	98	
	BC	100	
	USCIB	103	
	HR2251	113	
	MM	115	
	ALAC	121	
Deference to GAC or governments	NCSG	73	
	JS	89	
	IA	96	
	Govt-ES	97	
	JPNIC	105	
	HR2251	113	
	MM	115	
	i2Coalition	119	
Compliance with local law or international law	IA	96	
	Govt-ES	97	
	CCG	99	
	i2Coalition	119	
	LAB	122	
Correctness of Core Values	NCSG	73	
	JH	138	
	USCIB	141	
	MPAA	147	
Consumer choice / Paragraph 337 / Paragraph 60	NCSG	73	
	BC	100	
	USCIB	103	
	MM	115	
	USCIB	141	
Multistakeholderism	DP-DK	95	
	RySG	98	
	LAB	122	
	JH	138	
“Public good” and	NCSG	73	

"Public interest"			
	NM	93	
	Govt-ES	97	
	LINX	104	
	MM	115	
	LAB	122	
	NM	130	
Enforceability	DP-DK	95	
	IA	96	
	BC	100	
	LINX	104	
	USCC	110	
	INTA	111	
	MM	115	
	INTA	152	
	.NZ	153	
Mutability and mechanisms to change core values	NM	93	
	RySG	98	
	.UK	101	
	.NZ	112	
	CENTR	118	
	ALAC	121	
Specific areas that aren't DNS policy	.UK	101	
	IAB	102	
	USCIB	103	
	RSSAC	123	
General or non-specific	DBA	90	
	Afnic	94	
	DP-DK	95	
	IA	96	
	RySG	98	
	BC	100	
	JPNIC	105	
	IPC	106	
	Govt-BR	107	
	USCC	110	
	Board	117	
	CENTR	118	
	NIRA	120	
New/missing items for inclusion text	DCA-T	92	
	BC	100	
	IAB	102	
	USCIB	103	
	MPAA	108	
	CDT	109	
	CENTR	118	

	ALAC	121	
	LAB	122	
Other ideas (not for inclusion in text)	Board	117	
	CENTR	118	

Section 2: Fundamental Bylaws

Outcome

The process produced three major substantive topic areas for WP2/CCWG to discuss, plus a single comment that the reviewers categorise as Miscellaneous. Within those major topic areas we find two sub-topic, two sub-topics and four sub-topics, respectively.

Three main topics or eight detailed topics seems a manageable number.

Every subtopic had at least four commenters speaking to it; the most popular had twenty-six.

The reviewers found a single comment raised that could not be categorised and indexed using this methodology: it therefore aims to constitute (errors and oversights aside) an exhaustive reference.

Breakdown of comments received

Main topic area	Sub-topic area	No. of commenters who submitted comments relating to this topic
Concept and choice of Fundamental Bylaws		
	The concept of having Fundamental Bylaws	26
	Which Bylaws should be fundamental?	13
Change mechanisms		
	Who can change the Fundamental Bylaws?	7
	Change thresholds and mechanisms	11
Proposals for additions and alterations to the Fundamental Bylaws		
	Proposals for additional Bylaws	5
	Does wording need to be more flexible?	4
	Location of Headquarters	7
	IANA Reviews	6
Miscellaneous comments		1

Scope of topics

Concept and choice of Fundamental Bylaws

There were a number of commenters who spoke specifically and explicitly in answer to the question posed about whether there was support for the bare concept of having Fundamental Bylaws that were harder to change than other Bylaws. These are collected into one sub-topic.

A set of commenters gave comments as to whether there was support for the specific bylaws that CCWG proposed for “Fundamental” status. These are collected into another sub-topic (NB: a separate major topic exists for new proposals).

Proposals for additions and alterations

The reviewers identified four groups of comments relating to this major topic:

- Those that commented on whether the location of the ICANN Headquarters should become a fundamental bylaw
- Those that commented on whether the IANA Functions Review and/or other provisions recommended by CWG-Stewardship should be incorporated into the bylaws and granted “Fundamental Bylaw” status
- Those that proposed the creation of new bylaws that would have fundamental status, or that would promote additional bylaws to fundamental status on top of those proposed by CCWG (apart from comments related to the location of ICANN headquarters or the IANA Functions Review / CWG-Stewardship proposals)
- Finally, a number of commenters suggested that, while they supported in principle granting “Fundamental Bylaw status” to the bylaws identified by CCWG, amendments to the wording of those bylaws should be considered before this occurs.

Change mechanisms

The reviewers identified two groups of comments relating to this major topic:

- Comments related to whose approval is required for changes to the fundamental bylaws (including support for the CCWG proposal that community approval should be required, rather than just the Board)
- Comments related to the thresholds of support that would be required to approve a change to a fundamental bylaw

Other

Other comments.

Fundamental Bylaws Appendix: Index of comments received

This appendix indexes the Public Comment Summary so that individual comments on a particular topic can be found quickly.

Topic	Commenter	Ref	Notes/extract
The concept of having Fundamental Bylaws	auDA	126	
	DBA	127	
	DCA-T	129	
	NM	130	
	AFRALO	131	
	Afnic	132	
	Govt-IN	133	
	DP-DK	134	
	IA	135	
	eco	136	
	JH	138	
	BC	139	
	.UK	140	
	USCIB	141	
	LINX	142	
	JPNIC	143	
	MPAA	147	
	CDT	148	
	CIRA	149	
	USCC	151	
	INTA	152	
	.NZ	153	
	NCSG	155	
	Which Bylaws should be fundamental?	GG	156
CENTR		157	
NIRA		158	
auDA		126	
AFRALO		131	
Afnic		132	
eco		136	
RySG		137	
LINX		142	
IPC		145	
MPAA	147		
CDT	148		
INTA	152		
.NZ	153		
NCSG	155		

	NIRA	158	
Who can change the Fundamental Bylaws?	RH	124	
	Govt-IN	133	
	BC	139	
	CDT	148	
	NCSG	155	
	GG	156	
	NIRA	158	
Change thresholds and mechanisms	DCA-T	129	
	NM	130	
	IA	135	
	RySG	137	
	BC	139	
	.UK	140	
	LINX	142	
	IPC	145	
	SR	150	
	USCC	151	
	GG	156	
Proposals for additional Bylaws	CRG	128	
	IPC	145	
	USCC	151	
	INTA	152	
	.NZ	153	
Does wording need to be more flexible?	IA	135	
	BC	139	
	USCC	151	
	GG	156	
Location of Headquarters	Afnic	132	
	IA	135	
	RySG	137	
	BC	139	
	IPC	145	
	Govt-BR	146	
	MPAA	147	
IANA Reviews	RySG	137	
	JPNIC	143	
	CWG-St	144	
	CDT	148	
	HR2251	154	
	NCSG	155	
Miscellaneous comments	JS	125	

Section 3: Independent Review

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

- Ratified: ALAC Statement on the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) - Proposed Accountability Enhancements (Work Stream 1) ICANN At-Large Staff
- SAC071: SSAC Comments on Cross Community Working Group Proposal on ICANN Accountability Enhancements Julie Hedlund
- FW: Comments on CCWG proposal Adam Peake
- REVISED ALAC Comment on CCWG-Accountability Initial Draft Proposal Alan Greenberg
- Comments from RSSAC. Lars-Johan Liman
- FW: [Acct-Staff] CCOMMENTS FROM NIGERIA INTERNET REGISTRATION ASSOCIATION Alice Jansen
- Fwd: Comments about CCWG reports from Jia He, CAICT Jia He
- CCAOI's comments to Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) on Proposed Accountability Enhancements (Work Stream 1) Amrita
- CCAOI i2Coalition ICANN Comments on accountability proposal Christian Dawson
- ENTR BoD Statement Peter Van Roste
- NCSG comments Rafik Dammak
- ICANN Board Comments on CCWG-Accountability Initial Draft Proposal Michelle Bright
- ALAC Comment on CCWG-Accountability Initial Draft Proposal Alan Greenberg
- Google Comments on CCWG-Accountability Initial Draft Proposal for Public Comment Will Hudson
- Comments on the CCWG report Milton L Mueller
- NCSG Comment: Input Needed on its Proposed Accountability Enhancements (Work Stream 1) Joy Liddicoat (via Google Docs)
- U.S. Rep. Mike Kelly Comments on CCWG-Accountability Initial Draft Proposal Fong, Isaac
- ITI comment re CCWG-Accountability proposal Salaets, Ken
- InternetNZ comments for CCWG Jordan Carter INTA Comments - CCWG Accountability Lori Schulman
- USCC Comments on CCWG Accountability Proposal Schlosser, Adam
- French Government
- Roberto Bissio
- eco
- Internet Association
- David Post-Danielle Kehl
- German Ministry of Economic Affairs and Energy
- NORID
- Government of Argentina
- Afnic
- DotConnectAfrica Trust
- Government of India
- AFRALO
- Carlos Raúl Gutiérrez

- Nell Minow
- Jan Aart Scholte
- William Currie
- Danish Business Authority
- auDA
- Richard Hill
- RIR Community [late addition]
- Comments Sue Randel
- Comments on the Cross Community Working Group on Enhancing ICANN Accountability Byron Holland
- CDT comments on the CCWG Accountability's proposal Matthew Shears
- MPAA comments on the CCWG-Accountability Initial Draft Report Deacon, Alex
- Comments of the Government of Brazil on the document "Cross Community Working Group (CCWG) Accountability Initial Draft Proposal for Public Comment" Jandyr Ferreira dos Santos Junior
- IPC Comments on the CCWG-Accountability Initial Draft Proposal Greg Shatan
- From co-chairs of the cross community working group on IANA Stewardship (CWG-Stewardship) Jonathan Robinson
- IT comments on CCWG-Accountability Initial Draft Proposal Rita Forsi
- JPNIC's Input for CCWG-Accountability Draft Proposal MAEMURA Akinori
- ISPCP Comments on CCWG-Draft-Proposal olivier.muron
- LINX - the London Internet Exchange - submission to CCWG-Accountability First Public Comment Malcolm Hutton
- USCIB Comments: CCWG Proposed Accountability Enhancements (Work Stream 1) Barbara Wanner
- IAB comments on CCWG-Accountability Draft Report IAB Chair
- ICANN Cross Community Working Group Accountability Initial Draft Proposal - Comments from Nominet UK Simeon Foreman
- Business Constituency (BC) comment on CCWG proposal for enhancing ICANN accountability Steve DelBianco
- Comments about CCWG reports from Jia He, CAICT Jia He
- Comments from CCG Arun Sukumar
- gTLD Registries Stakeholder Group (RySG) Comments -- Enhancing ICANN Accountability CCWG Draft Proposal Drazek, Keith
- Spanish Government comments on CCWG Accountability draft proposal Campillos Gonzalez, Gema Maria
- Violations of the CCWG Accountability Charter Dr Eberhard W Lisse

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

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

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

General

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

- i-2 Coalition – “We strongly agree” with a binding appeal process that allows review of “actions or failures to act that violate either a) substantive limitations on the permissible scope of ICANN’s activity or b) decision making procedures.”
- NCSG – “The NCSG believes that a strong independent appeals mechanism is critical to enhancing ICANN’s accountability. We strongly support the binding nature of the proposed process and the accessibility of this mechanism, particularly in relation to the cost burden of the mechanism. ICANN has a limited Mission, and it must be accountable for actions that exceed the scope of its Mission. This suggest that IRP should provide a means of challenging actions that exceed ICANN’s scope simply because they exceed its scope, not just because they have a negative “material affect” on the challenger. Either that, or ICANN-created restrictions on fundamental rights such as freedom of expression or privacy, must be considered “material affects” and so specified in the proposal.
- auDA (urging CCWG to make “bolstering the process for Independent Review to hold ICANN to a ‘substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith’ a “primary focus as it finalizes its recommendations”)
- AFRALO (“AFRALO members appreciate the reinforcement of the Independent review Process, as well as the reconsideration mechanism proposed in the report”)
- Post-Kehl (“we enthusiastically support the CCWG Draft Proposal’s efforts to overhaul and reform ICANN’s existing Independent Review Process (IRP)” and “agree that the IRP should possess hold ICANN to a substantive standard of behavior and be binding”)
- Dot Connect Africa (“Independent review is a very important redress mechanism for the users of ICANN’s services [and] needs to be more empowered to be able to do its duties as an independent yet judicial mechanism that can propose or produce declarations without the fear of a veto by a disagreeing ICANN Board”)
- AFNIC (“[T]he IRP is an answer long awaited by the community, to have an independent, affordable and binding decision making body that allows affected parties to challenge ICANN’s decisions [and] has to be included in the fundamental bylaws, along with the obligation for ICANN to fund adequately this process.
- Internet Association (“improvements to the Independent Review Panel will be among the most important tools to enhance ICANN’s accountability [and we] generally agree with the proposed requirements”)
- French government (“The French government have been a long-time advocate of more effective and affordable means of appeal and redress at ICANN, with adequate guarantees of independence. We consider that the proposed overhauling of the IRP in part 4 of the CCWG initial draft proposal definitively addresses such concerns”)
- eco (proposed IRP enhancements “would definitely enhance ICANN’s accountability,” though “it might be advisable to reach out to experts in the field and rely on their suggestions when it comes to details of the revised IRP”)
- Susan Randell, CDT, MPAA, Brazil, IPC, ISPCP, LINX, USCIB, NOMINET, BC, CCG, RySG and the Government of Spain were all supportive overall of the proposed improvements to IRP.

One commenter (the ICANN Board) suggested that it could not respond to the IRP proposal without more detail: “The proposed enhancements to the Independent Review Process (IRP) still appear to require further detail, including issues such as standing and remedies, as well as

definitional work. What steps are in place to avoid overloading the seven-person IRP panel with frivolous or vexatious complaints? We anticipate further questions after more details are provided.”

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

French Government:

“We would particularly insist on avoiding the creation of a legal arbitration court on the basis of the CCWG-Accountability initial draft proposals for the new IRP. On that basis, stakeholders would hardly be supplied with: either the guarantees of independence that, on the one hand, international arbitration usually does provide; or the guarantees of affordability that, on the other hand, international arbitration usually does not provide; [and] stakeholders would also risk being prevented from going to other courts to have their complaints examined once they submitted them to the new IRP.

“Recognizing the IRP as an international court of arbitration would be a major issue because arbitration is strictly regulated by law. In France as in many other countries, two parties can agree on arbitration only after one party feels that the other party fails to respect the terms of an existing contract. Furthermore, the two parties have to waive their right to go before courts of other jurisdictions. For those stakeholders who do not currently have a contract with ICANN, such as governments, there might be room for an agreement with ICANN on arbitration by the new IRP on the basis of other existing documents, such as ICANN’s Bylaws and Articles of Incorporation. In other words, it might be possible for us to consent to arbitration by the new IRP on the decision-making procedures followed by the Board, simply because such procedures already exist and are well-documented. However, as a party that might be aggrieved by future ICANN policies, we would have a legal problem consenting to arbitration by the new IRP on the merits of a complaint.”

Post-Kehl:

“The IRP’s mission is far removed from ordinary commercial arbitration, and will require a different structure, modeled more closely on the constitutional courts common in civil law countries . . . One cause of the failure of ICANN’s current IRP process is that it “has been modeled far too closely on ordinary international commercial arbitration [which] functions quite effectively for ordinary commercial disputes but is ill-designed for the fundamental purpose the IRP is meant to serve.” It is not reasonable to give a single arbitrator, chosen by a third-party provider, who may have little or no prior contact with or understanding of the complex world of DNS policy-making, who may never again be called upon to examine any aspect of ICANN’s operations or to consider its role in the management of DNS resources, who has no body of prior precedential decisions to use as a guide to decision-making and little or no incentive to add to the stock of well-reasoned and persuasive decisions, the power to decide (with no appeal of the decision permitted) that Board action contravened fundamental principles embodied in the corporation’s foundational documents and was therefore invalid.

IRP Powers

Scope of powers. Five commenters expressed support for empowering the IRP to determine whether the corporation has acted or failed to act in violation of procedural and substantive

limitations set forth in ICANN’s Articles of Incorporation and/or Bylaws (including commitments spelled out in the proposed Statement of Mission, Commitments & Core Values).

- The Internet Association “The Internet Association agrees that parties should be able to seek review of both substance and procedure. Redress should be available when a particular action or failure to act ‘violates either (a) substantive limitations on the permissible scope of ICANN’s actions, or (b) decision-making procedures, in each case as set forth in ICANN’s Bylaws, Articles of Incorporation, or Statement of Mission, Commitments, and Core Values or ICANN policies.’
- auDA Approving of “bolstering the process for Independent Review to hold ICANN to a ‘substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith’.”
- French Government “One of the innovations that we deem most important is that the new IRP will no longer be limited in its capacity to judge of the merits of a complaint by an aggrieved party. This will greatly expand the standard of review of the current IRP which [is] limited in its capacity to judge on anything but the decision-making procedures followed by the Board. We therefore support the expansion of the standard of review for the IRP to ‘ICANN’s Bylaws, Articles of Incorporation, or Statement of Mission, Commitments, and Core Values or ICANN policies’.”
- Post-Kehl Proposing “consolidating references to the IRP’s powers in one place in the Bylaws, and stating them more directly: The Independent Review Panel shall have the power to determine whether ICANN has acted (or has failed to act) in violation of these Bylaws.”
- eco Approving of “IRP decisions on the merits of the case (and not only on process)”

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

RIRs “The RIR community stresses that there are separate, well-established appeal mechanisms for disputes relating to Internet number resources. . . . Imposing different appeal procedures than the ones agreed upon and used by the numbers community would be contradictory to the bottom-up principle. Therefore, it is strongly suggested that disputes relating to Internet number resources be excluded from the scope of the proposed appeal mechanisms.”

- Peake (for Bygrave) – Questions “the interrelationship of the IRP and RPE. The relationship between the two review processes is not explained; nor is it self-evident. The CCWG-Accountability ought to clarify the extent to which each procedure necessarily deals with different types of complaints. At present, there seems to be a possibility for overlap – i.e., that a matter could be treated under the RPE and then the IRP. Yet, from the draft proposals, there is no firm indication that the CCWG-Accountability intends the RPE to be a preliminary “light-touch” form of review that is ordinarily initiated before embarking on an IRP. If it has not already done so, the Working Group ought to consider the pros and cons of integrating RPEs into the IRP scheme.”

- Jia He – “According to the existing design, IRP Panel is the judge to determine. The independence of IRP is very important. IRP Panel should not belong to ICANN Board, and should not only report to the ICANN Board (I think there is a translation problem in Chinese version. According to the current Chinese translation, IRP Panel only reports to ICANN Board. I see English is different) and should be binding upon the ICANN Board. To emphasize again, the mechanism should ensure that IRP must make independent and impartial decisions. Moreover, the Panel should make clear decision, including pointing out who is wrong, as well as the reasons. In addition, it is necessary to have re-appeal procedure.
- CENTR Board – “Last but not least we reiterate the requirement that any appeal mechanism must not cover ccTLD delegation and/or re-delegation issues.”

Binding decisions. Eleven commenters (Internet Association, Dot Connect Africa, auDA, Post-Kehl, Suzanne Randell, CDT, MPAA, Brazil, BC, IPC and eco) expressed support for the idea that IRP decisions must be binding on the Board none expressed a contrary view (although one commenter suggested that “ICANN’s decision-making should be accorded deference, and overturned only if a decision is arbitrary or not based on a reasonable interpretation of the relevant documents and factors”) (Internet Association).

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

One commenter sought additional clarification on the manner in which the principle identified by CCWG legal counsel (regarding the need for Board direction of the corporation’s affairs) might interfere with the binding nature of IRP decisions, and proposed solving that problem by giving the Board “an ‘override,’ or ‘veto,’ power over IRP decisions, exercisable *only* upon supermajority (or even unanimous) action by the Board (Post-Kehl p. xxx); one commenter took the opposite view, approving of IRP decision-making “without fear of veto by the Board” (Dot Connect Africa).

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

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

IRP Composition/Membership

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

One commenter proposed that the Board should send to the “community mechanism” not only the list of candidates it has selected, but the full list of eligible candidates, in which it should isolate the candidates proposed by the Board. Afnic.

Three commenters supported the principle of independence of IRP panelists from ICANN board, staff, SOs, and ACs (post-Kehl, Internet Association, French Government); several of them

expressed concern about the independence of IRP panelists given that IRP panelists would be both financially supported and selected by the ICANN Board. French Government, Jiah He, CCG and IPC. The government of Spain suggested the community should be more involved in panel selection.

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

- ALAC – Noted that IRP members must be independent from ICANN; suggested a requirement of independence from other parties (e.g. contracted parties)
- CENTR Board – "The panelists must be as independent as possible. Furthermore, we support the notion that panelists must have international arbitration expertise, additionally, but not exclusively, in the DNS environment. We would also like to highlight the importance of having multicultural, multinational and multilingual panelists."
- LINX suggested achieving greater independence through longer terms for standing panelists

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

IRP Procedures

On the fees for bringing a claim before the IRP, one commenter suggested that "the burden of the legal fees would be on ICANN." Dot connect Africa. That same commenter suggested that IRP proceedings should "focus on accountability and should not be dismissed on a flimsy technicality. An adjudicating IRP Panel should allow a plaintiff to re-file or amend an IRP filing if it is deemed to have been filed incorrectly," and the "time limits set for filing IRPs should be extended to at least 9 months from the date of the decision that is being challenged, having taken into account the additional (elapsed) time expended on Reconsideration and Cooperative Engagement Processes (CEP)." Dot Connect Africa p. xxx.

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

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

One commenter suggested that the IRP "should not be structured as a 'standing panel' comprising a number of arbitrators who are available for service on individual 1- or 3-person panels for the purpose of resolving individual disputes before being returned to the available 'pool,' but that *all* IRP members should hear and decide all cases, speaking with a single institutional voice. Post-Kehl.

- Jia He – "Moreover, the Panel should make clear decision, including pointing out who is wrong, as well as the reasons. In addition, it is necessary to have re-appeal procedure."
- i-2 Coalition – Suggests need for exhaustion requirement. Don't allow "parties to bring new arguments to the IRP without first vetting them through the community's policy development channels."
- i-2 Coalition – Suggests that IRP review be under abuse of discretion standard rather than "de novo." Failure to follow procedure is per se abuse but the AoD standard promotes "finality and predictability" of the consensus-based decision making process.

- CENTR Board – “Concerning the recommendation that IRP decisions should be based on precedents, we do not support this principle as any decision must always be duly substantiated and based on policies that might have evolved over the years.”
- Google – Urges exhaustion requirement (similar to i-2 Coalition)
- Google – Urges “abuse of discretion” standard (similar to i-2 Coalition).

Miscellaneous

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

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

QUESTIONS FOR CCWG

French Government:

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

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

“Must we then understand that all stakeholders, including governments, are expected to legally recognize the IRP as an international court of arbitration whenever they want to file a complaint against any action or inaction of the ICANN Board? · If so, does ICANN understand that it has to acknowledge the competency of alternative courts for merits of complaints by stakeholders aggrieved by its future policies? And since ICANN is based in the US, would the US authorities themselves give stakeholders guarantees on the exequatur for decisions taken by alternative courts regarding future ICANN policies? · Would it therefore not be sufficient that the power to enforce the new IRP’s decisions would lie only within ICANN community’s power to recall the entire Board, and not ‘in the court of the US and other countries that accept international arbitration results’? In other words, that the new IRP remains an internal mechanism within ICANN and does not become a legal arbitration court?”

Post-Kehl:

Urging the CCWG to obtain additional clarification from counsel on the question as to “whether, or the extent to which, California law permits the Board to agree, in advance and via a specific provision in the Bylaws, to comply with the decisions of an Independent Review Panel. The Proposal notes that that ‘the IRP could not address matters that are *so material to the Board that it would undermine its statutory obligations and fiduciary roles to allow the IRP to bind the Board,*’ without any indication of the matters that might fall into that category (and therefore outside of IRP review/control).”

Section 4: Reconsideration Process Enhancement

Outcome

The process produced a number of themes for WP2/CCWG to discuss, plus several random comments not widely mentioned.

Most commenters who addressed the reconsideration process supported proposed measures for improvement, with some expressing specific support for “improvement,” “strengthening,” and/or “expanding scope.” Others mentioned recommendations for improvement specifically targeted at one facet or other (or more) of the process. Once commenter (JPNIC (211)), however, suggested that improvements in the reconsideration process may be left for WS2.

Those indicating support in the manner indicated above were: auDA (198), DBA (199), AFRALO (201), AFNIC (203), IA (204), eco (205), RySG (206), JH (207), BC (208), USCIB (209), LINX (210), JPNIC (211), IPC (212), CDT (215), USCC (216), CENTR (219), NIRA (220), Sivasubramanian M (comment posted June 13), and DotMusic (comment posted June 13).

Breakdown of comments follows:

Main topic area	Sub-topic area	Number commenting on this topic
Enhance Overall Process		19
	Clarify RR/IRP distinctions; consider integration	1
	Consider addressing RR in WS2	1
Ombudsman Role		
	Ombudsman do preliminary review	10
	ICANN legal staff not involved in preliminary review	6
	Policy issues to go directly to BGC	1
Composition of Board Reviewers/Conflicts		
	Not review decisions in which member participated	2
	Rebuttal right	3
	Conflict-of-interest audit	1
	Full board votes	1
Review Standards		
	“Relevant” vs. “material” – keep “material”	4
	“Relevant” vs. “material” – use “relevant”	1
	Material information change	1
	Definition of “material” harm	1
	Review of external panel decisions	1
	Clarify distinctions between board and staff actions	1
Standing		
	Participation in policy process	5
	Is RR a requirement for IRP standing?	1
Deadlines/Timelines		

	Expanded filing deadline	2
	Narrowed decision timeline	1
	Deadline flexibility due to extraordinary circumstances	1
	Deadlines are sufficient	1
Transparency		
	Transcript/recording of Board discussions	2
	Full documentation of BGC dismissals	1
	Better DIDP	3
	Independent RR body may be needed	1
Other Comments		
	Other solutions needed for RR results than board member(s) removal	1
	Avoid frivolous/vexatious RRs	1
	Legal fees financial burden unfair to ICANN board	1
	Disputes involving Internet number resources should not be covered in RRs (or IRP for that matter)	1

Scope of topics

Enhance Reconsideration Request (RR) Process

There were no commenters who specifically declared themselves as being against changes/improvements to the RR process, most expressly support it.

- One commenter, however, indicated that clarification is needed between the RR and IRP processes, saying differences are neither explained nor self-evident. The commenter suggested consideration should be given to integrating RR into the IRP program.
- Another commenter requested more clarification on why RR must be addressed in WS1. The commenter noted other accountability measures in WS1 and said RR may well be considered as WS2 if it should become contentious.

Ombudsman Role

There were a number of commenters who recommended an expanded role for the ICANN Ombudsman. Under this topic two specific sub-themes emerged:

- First, that the Ombudsman undertake a preliminary-review role with respect to RR petitions; and,
- Second, that the Ombudsman displace ICANN legal staff in this role (i.e. that legal staff not have a role in this respect).
- One commenter agreed that the Ombudsman should do the initial review without ICANN legal staff doing an initial substantive review, but said that issues regarding policy should instead go directly to the BGC.

Composition of Board Reviewers/Conflict of Interest Checks

A number of commenters argued for changes in this area, including:

- Establish a requirement that board members not sit in review of decisions they made;
- Perform an annual audit of Board for relevant conflicts-of-interest;
- One commenter asked that the full board vote on final RR determinations.

Review Standards

A number of commenters suggested changes in areas where the RR standard of review is involved, including:

- The standards regarding the Board's reliance on false or inaccurate "relevant" information – some commenters wanted to retain the "material" standard instead of the CCWG's suggested change to "relevant."
- A commenter wanted to amend one of the above standards (insofar as reliance is concerned) to include actions/inactions taken on reliance on information that, subsequent to the action/inaction, materially changed.
- A commenter requested a definition of "materially affected" or "materially harmed," including whether this involves economic harm or is broader.
- A commenter's request for clarity as to how RRs handle disputes concerning decisions made by external panels (including discrepancies in results among multiple external panels).
- A commenter suggested trying to make the difference between board action/inactions vs. staff action/inaction easier.

Standing

- Some commenters said that RR petitioners should have in some manner participated in the policy development process in order to file an RR concerning such policy (not to “stand on side-lines” as policy is developed and then argue against that policy in an RR).
- Another commenter asked if RR is a requirement before one could bring an IRP (thus related to IRP standing).

Deadlines/Timelines

- Some commenters urged a filing deadline for RR petitions that is more generous than 30 days.
- Another thought the 120 deadline for a board decision was too long, proposing 90 days.
- Another commenter felt that these deadlines (including decision deadlines) should have a provision for extension in the event of extraordinary circumstances.
- One commenter specifically said timeframes and deadlines are sufficient.

Transparency

A number of commenters urged more transparency in RR proceedings, including:

- Give RR petitioner option to have transcript/recording of substantive Board discussions of case;
- Require full documentation of BGC’s dismissal of any RR.
- Allow RR petitioners to rebut BGC’s final recommendation (without raising new issues) prior to final Board decision;
- Greater responsiveness by ICANN’s DIDP (document disclosure policy).

Other Comments

- Financial arrangements: One commenter said that ICANN board bearing burden of legal fees seems unfair.
- One commenter said that in light of the CCWG proposal only empowering the community to remove board members the requirements for RR are not enough – other punitive measures/solutions should be considered.
- Another noted importance that RR process not be capable of use in a frivolous or vexatious way.

Appendix: Index of comments received

This appendix indexes the Public Comment Summary so that individual comments on a particular topic can be found quickly.

Topic	Commenter	Ref	Notes/extract
Clarify RR/IPR distinctions	LAB	222	
Consider addressing RR in WS2	JPNIC	211	
Ombudsman to do preliminary review	auDA	198	
	AFNIC	203	
	IA	204	
	BC	208	
	USCC	216	

	INTA	217	
	USCIB	209	
	IPC	212	
	CDT	215	
	DotMusic		http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/pdfzpy1fnCZN9.pdf
ICANN Legal not involved in preliminary review	auDA	198	
	IA	204	
	BC	208	
	USCC	216	
	USCIB	209	
	CDT	215	
Policy issues direct to BGC	BC	208	
Board mbrs not review actions they were involved in	DCA-T	202	
	DotMusic		See URL above
Rebuttal right	DCA-T	202	
	IPC	212	
	DotMusic		See URL above
Conflict of Interest Audit	AFNIC	203	
Full Board vote required	BC	208	
Reliance on "Relevant" vs. "Material" Info (keep "material")	IA	204	
	BC	208	
	GG	213	
	USCC	216	
... Use "relevant"	DotMusic		See URL above
Material info change following board/staff action	INTA	217	
Definition of material harm	USCIB	209	
Review of external panel decisions	ALAC	221	
Clarify distinctions board/staff actions	CRG	200	
Policy participation for standing	BC	208	
	IA	204	
	USCIB	209	
	GG	213	

	USCC	216	
Is RR a precondition for filing IRP?	CRG	200	
Expanded filing deadline	CENTR	219	
	IPC	212	
Narrowed decision timeline	CENTR	219	
Timelines flexibility for extraordinary circumstances	ALAC	221	
Timelines are sufficient	NIRA	220	
Transcript/recording board discussions	DCA-T	202	
	IPC	212	
Better DIDP	CDT	215	
	IPC	212	
	DotMusic		See URL above
Full documentation BGC dismissals	BC	208	
Other solutions needed for RR results than board member(s) removal	JH	207	
Avoid frivolous/vexatious RRs	.nz	218	
Legal fees burden unfair to ICANN board	NIRA	220	
Internet number resources have and should retain separate dispute mechanisms	RIR Community		http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/pdfWAmYiASmx0.pdf (posted June 12)