

Appendix H. Independent Review – Sample Bylaws Language

The language provided below is offered as an aide to understand the IRP enhancements recommended by the CCWG. This language is not offered as final language, and has not been reviewed by counsel.

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in [Section 2 of this Article](#), ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws, in procedure or in substance. Except as part of a settlement on a particular dispute, ICANN shall have no authority to require any party to waive its rights under this Section 3.
2. Any person materially affected by a decision or action by the Board or staff, including any decision or action taken in response to the recommendation of an advisory committee or supporting organization, that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws, including conflicting and/or inconsistent results of any “expert panel,” may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to ICANN's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the ICANN's action. The community may also submit a request for independent review of any decision or action by ICANN that it asserts is inconsistent with the Articles of Incorporation or Bylaws. The Sole Member may bring an action arising under any rights of members granted by these Bylaws.
3. A request for independent review must be filed within thirty days of the requesting party becoming aware of the action that it contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.
4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether ICANN has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The standard of review for alleged violations of the Articles or Bylaws shall be a de novo, objective and independent one examining whether the Board or staff acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws. The standard of review for other claims shall be as required by law and/or as established in accordance with Paragraph 9 below.
5. **This and other procedural rules to be determined by sub-group and panel members.**

6. There shall be an omnibus standing panel (the “Standing Panel”) of no fewer than seven (7) members with a variety of expertise, including jurisprudence, international law, judicial experience, alternative dispute resolution and knowledge of the DNS and ICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the Standing Panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the Standing Panel. In the event that the Standing Panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a three-member panel comprised in accordance with the rules of the IRP Provider
7. The Independent Review Panel and process shall be administered by an international dispute resolution provider to be selected through a tender process jointly managed by ICANN and the ICANN community acting through a cross community working group (the “IRP Provider”).¹ ICANN shall publish a draft tender document, and solicit and consider comments from the ICANN community, before finalizing the terms of the tender. The membership of the standing panel shall be nominated by the ICANN Board and confirmed by the community through a process coordinated by the IRP Provider, subject to approval by ICANN, not to be unreasonably withheld. The selection of the panelists should include reasonable efforts to assemble a diverse panel, including without limitation diversity of legal tradition, geography, culture, language and gender, including reasonable efforts to select at least one andpanelist from any ICAN region.
8. Subject to the approval of the Board, the ICANN community, through a process coordinated by the IRP Provider, shall establish operating rules and procedures, consistent with this [Section 3](#).
9. The ICANN community, acting through a Cross-Community Working Group, may from time to time create rules, procedures and programs for the purpose of ensuring that the IRP is a fair and accessible form of independent review capable of holding ICANN to compliance with its bylaws for the benefit of the community as a whole. Such rules, procedures and programs shall only take effect with the consent of the Board, such consent not to be unreasonably withheld. Once adopted, these rules, procedures and programs shall have the same status and effect as these bylaws, save only that in case of conflict between any of them and these Bylaws, these Bylaws shall take precedence.
10. Either party may request that the IRP be considered by three-member sitting panel (each, an “IRP Panel”)
11. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP Panels.
12. The IRP Panel shall have the authority to:
 - a. Summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
 - b. Request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;

¹ NOTE: MH suggests that community involvement may be impractical

- c. Request assistance from skilled technical, business, diplomatic, regulatory and/or other experts;
 - d. Declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
 - e. Require that the Board stay any action or decision,
 - f. Require that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
 - g. Consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
 - h. Determine the timing for each proceeding.
13. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone or in person. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance, unless the IRP Panel determines otherwise.
14. All panel members shall adhere to a conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, and to an ICANN IRP conflicts-of-interest policy (including without limitation references to pre- and post-term engagements with ICANN and financial conflicts of interest with ICANN or its Stakeholder Organizations and Advisory Committees) as developed by the community and approved by the Board. Panel members shall serve for a fixed term of five (5) years, which may not be renewed. Panel members may be removed or recalled only for cause, e.g., corruption or misuse of the position for personal gain. The compensation of panel members, which shall be born by ICANN, shall not be reduced.
15. Prior to initiating a request for independent review, the complainant is urged to enter into a period of mediation or cooperative engagement, at the complainant's choice, with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The mediation and cooperative engagement processes shall be published on ICANN.org and is incorporated into this Section 3 of Article IV of the Bylaws.
16. Upon the filing of a request for an independent review, the parties are urged, but are not required, to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.

17. All matters discussed during the cooperative engagement and conciliation phases will, at the request of the complaining party, remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
18. The IRP Panel should strive to issue its written declaration as expeditiously as possible and no later than six months after the filing of the request for independent review. In the event this is not possible, the IRP Panel shall issue a report regarding the delay, including an estimated schedule for completion. The IRP Panel shall specifically designate the prevailing party. Each party to the IRP proceedings shall bear its own expenses.
19. The [complainant /party not prevailing] may appeal the IRP Panel's decision to the Standing Panel sitting *en banc*. A notice of appeal must be filed within 30 days of the issuance of a decision. The decisions of the Standing Panel shall be final and binding on [ICANN/the parties].
20. The decisions of all three-member IRP Panels (unless appealed) shall be final and binding on [ICANN/the parties], to the extent permitted by law.
21. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN's website when they become available.
22. The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets. Subject only to this, the IRP Panel shall publish reasoned decisions for its findings.
23. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.
24. Except where otherwise indicated in these Bylaws or the IRP rules and procedures, ICANN shall be obligated to fund the Independent Review Process, excluding the cost of complainant's counsel.