

## 4) Appeals Mechanisms

### 4.1 Independent Review Process Enhancement

#### INTRODUCTION

01 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, transparent, *efficient*, and that it be designed to produce *consistent and coherent results* that will serve as a guide for future actions.

02 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 ICANN's Articles of Incorporation and/or Bylaws, including commitments spelled out in the proposed *Statement of Mission, Commitments & Core Values*, or ICANN policies. (See, *Statement of Mission, Commitments, and Core Values*.)

03 The proposal calls for a fully *independent* judicial/arbitral function. The purpose of a standing panel is to ensure that panelists are not beholden to ICANN or any of its constituent bodies – but a core skill of this IRP's panelists is the need to build a thorough and detailed understanding of how ICANN's Mission is implemented, and its commitments and values applied – over time and across a variety of situations.

0304 The proposal does not establish a new international court or a new body of international law: it is not a Treaty function, and is internal to ICANN. It implements the body of rules for ICANN established by the ICANN multistakeholder community. Those rules remain under the control of the ICANN multistakeholder community, so this IRP remains a mechanism the community is using to ensure that its policies and processes are followed, and does not become a means to replace or subordinate the multistakeholder community to some other entity.

1. **Purpose of the IRP:** 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.
  - a. Empower the community and affected individuals/entities to prevent “mission creep,” enforce compliance with established multistakeholder policies, provide redress for

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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.
2. **A Standing Panel:** The IRP should have 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, Commitments & Core Values*, and ICANN policies established to hold ICANN accountable to legal requirements applicable to non-profit corporate and charitable organizations. This reflects proposed changes and enhancements to ICANN's existing Independent Review Process.
3. **Initiation of an IRP:** An aggrieved party would trigger the IRP by filing a complaint alleging that a specified action or inaction is 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. 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.
4. **Possible Outcomes of the IRP:** Decision that an action/failure to act 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. The intent is that IRP decisions should be binding on ICANN.
  - a. Decisions of the IRP Panel are not subject to appeal (except for review of very limited issues such whether the outcome exceeded the permissible scope of the arbitration or was procured by fraud or corruption. However, 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.
  - b. This balance between the absence of appeal and the limitation to the type of decision made is intended to

mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid that the panel's outcome overcomes the Board in its fiduciary duties.

5. **Standing:** 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 shall have the right to complain to the IRP and seek redress. They must do so within 30 days of becoming aware of the alleged violation and how it affects them.
  - a. Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff action where a complainant can demonstrate:
  - b. 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;
  - c. Either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits; and
  - d. A balance of hardships tipping decidedly toward the party seeking the relief.
6. The CCWG-Accountability recommends giving the community, as described in Section 5.1, the right to have standing with the IRP. In such a case, the burden of the legal fees would be on ICANN. The precise process for such a case is still under development.
7. In their letter dated 15 April 2015, the CWG-Stewardship-Stewardship indicated "As such any appeal mechanism developed by the CCWG-Accountability should not cover ccTLD delegation/re-delegation issues as these are expected to be developed by the ccTLD community through the appropriate processes". As requested by the CWG-Stewardship, decisions regarding ccTLD delegations or revocations would be excluded from standing, until relevant appeal mechanisms have been developed by the ccTLD community, in coordination with other parties.
8. In case of including the global number resources policy in its scope, further considerations should be made of its implications. The bottom up policy development process and its forum for the number resources is outside the ICANN, even though the ICANN Board approves its global policies, and the same mechanisms as the names related policies may not be applicable.
9. **Standard of Review:** A party challenging an action or inaction would have the burden to demonstrate that the complained-of action violates either (a) substantive limitations on the permissible scope of ICANN's

**Comment [MSAH1]:** Check this with Izumi: it doesn't read to me as consistent with her request, which we accepted.

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. The standard of review shall be a *de novo* and objective examination.

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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.
  - a. 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. The Standing Panel members should have diversity in geographic and cultural representation. Diversity of experience will be considered in completing the composition of the Panel. Reasonable efforts should be undertaken to achieve such diversity.
12. **Size of Panel**
  - a. Standing Panel – 7
  - b. 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. A five year term is proposed.
14. **Selection and Appointment:** The selection of panelists would follow a 53-step process:
  - a. ICANN will publish a draft tender for a third party international arbitral body for consultation with the community.

b. ICANN and the ICANN community will jointly select and appoint such a third party international arbitral body.

~~a-c.~~ Third party international arbitral bodies would nominate candidates

~~b-d.~~ The ICANN Board would select proposed panelists subject to community confirmation.

~~e-e.~~ The community mechanism (see Section 5.1) would be asked to confirm appointments.

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.).

16. **Settlement Efforts:**

- a. Reasonable efforts, as specified in a public policy, must be made to resolve disputes informally prior to/in connection with filing an IRP case.
- b. 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.
- c. The process must be governed by clearly understood and **pre-published rules applicable to both parties** and be subject to strict time limits.

17. **Decision Making:**

- a. 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. We anticipate that the Standing Panel would draft, issue for comment, and revise procedural rules. Focus on streamlined, simplified processes with rules that are easy to understand and follow.
- b. 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 made public and will reflect a well-reasoned application of the standard to be applied (i.e., Bylaws, the *Statement of Mission*,

*Commitments, and Core Values*, and ICANN policies.

18. **Decision:**

- a. Panel decisions (where there is more than one panelist) would be determined by a simple majority. Alternatively, this could be included in the category of procedures that the IRP Panel itself should be empowered to set.
- b. The CCWG-Accountability recommends that IRP decisions be “precedential” – meaning, that deference should a panel give to prior decisions? By conferring precedential weight on panel decisions, the IRP can provide guidance for future actions and inaction by ICANN decision-makers, which is valuable. It also reduces the chances of inconsistent treatment of one claimant or another, based on the specific individuals making up the decisional panel in particular cases. But this makes it more likely that a “bad” decision in one case affects other cases going forward.
- c. It is expected that judgments of the IRP Panel would be enforceable in the court of the US and other countries that accept international arbitration results.
- e-d. CCWG-Accountability confirms that the IRP Panel has the power to stay a Board decision or action. It further recommends that it also have the power to require ICANN to take a decision or action on an interim basis, until the Board has had a chance to consider and decide how to implement an IRP Panel decision.

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19. **Accessibility and Cost:**

- a. The CCWG-Accountability recommends that ICANN would bear all the ~~administrative~~ the costs of maintaining the system (including Panelist salaries). The Panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. Each party should bear the costs of their own legal representation, but ICANN should seek to establish access to pro bono representation for ~~community, non-profit-impecunious~~ complainants.
- b. The 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.

20. **Implementation:** The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Detailed rules for the

implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG and approved by the Board, such approval not to be unreasonably withheld. They may be updated in the light of further experience by the same process, if required.

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 Documentary Information Disclosure Policy (DIDP) as part of the accountability enhancements in Work Stream 2. We recommend that the confidentiality of the Cooperative Engagement Process shall only apply at the request of applicant. We recommend that the IRP should publish its own reasoned decisions, redacting only such confidential items (such as trade secrets) that it deems appropriate, having heard the representations of the parties.