

# IRP

1. **Overall** -There were 34 responses of the 95 which offered comments on IRP.

## 2. Major points:

- Funding concerns (various)..8 - CCAOI, .NO, CENTR, Cyberinvasion, E. Morris, ICANN Board, Intel, USCIB
  - CCAOI (Cyber Cafe Association of India)
    - • Moreover further information what ICANN would fund for IRPs needs to be shared.
  - .Nom CENTR –
    - • Remain concerned about independence, appointment and funding.
  - Cyberinvasion
    - • Issue of accessibility vs ability to finance an IRP complaint needs to be addressed.
  - E. Morris
    - Accessibility and affordability: There is a commitment in the Draft to ensure the IRP is affordable and accessible to all. Regrettably, this work has been scheduled for work stream 2. I find that unfortunate, as affordability was one of five key goals when we first began discussing IRP reform in the subgroups. Merely stating the desire to obtain “pro bono representation” ,for example, for those who would “otherwise be excluded from using the” IRP process is not the same as committing ICANN to do so. I would encourage the CCWG to reprioritize the affordability discussion and place it once again for action where it belongs: in work stream 1. Accountability that is unaffordable is not accountability at all
  - ICANN Board
    - 25. Accessibility and Cost – (Section 5.1, paragraph 268, clause 19) – Disagrees (ICANN will fund the costs of Multistakeholder Enforcement Mechanism (MEM) binding arbitration, including legal fees. Because of the availability of a funded MEM through which the community empowerment tools can be enforced, the Board recommends that the more individualized IRP proceedings should be subject to the current cost-shifting process.)
  - Intel
    - Intel supports the proposed IRP. We believe a liberal approach to who may petition the panel, in combination with the ability of the Panel to provide for loser pays/fee shifting in the event it identifies a challenge as frivolous strikes the right balance between due process and mitigation of delaying tactics.
  - USCIB
    - We suggest a permissive approach to who may petition the panel, coupled with the ability of the Panel to provide for loser pays/fee shifting in the event that it identifies a challenge as frivolous. Furthermore, participation in related ICANN public comment processes that are directly related to the issue under review should be a prerequisite for parties seeking relief before an IRP. This allows for a

good balance between enabling open access to due process and mitigating delay tactics.

- Standing concerns (govts, individuals, gNSO subsets) - 5 - Govt. Brazil, Govt. Spain, IPC, Linx, USCIB .
  - Govt. Brazil
    - • We share the concern expressed by Spain, on the other hand, regarding the fact that the proposed provisions would prevent governments as well as other entities from participating in an IRP and therefore call for appropriate adjustments in that regard.
  - Govt. Spain
    - We regret though, that our request to expand the standard to be a party of an IRP has not been taken into account. The “materially affected” clause actually prevents governments as well as other entities from participating in an IRP as decisions that may affect them might have not been implemented yet and thus, have not caused any material harm at the time of filing the complaint.
  - IPC
    - Concern - First, it is important to maintain the ability for stakeholder groups, constituencies and other subsets of larger stakeholder organizations to challenge Board decisions even if the majority does not support such a challenge.
  - Linx
    - 14. We do not consider it acceptable to limit this right to complain to those “directly affected”,
    - 15. Nor do we consider it sufficient to empower a collective community entity the right to raise such a complaint
    - • We do not agree with those that say that extending this right to all materially affected parties creates an unprecedented and unacceptable exposure to ICANN.
    - • 18. We believe that materially affected parties should have the right to complain, especially when the basis of that complaint is that ICANN has acted outside the scope of its Mission. As most entities do not closely track ICANN activities (nor do they have any reason to do so) this right would be empty if a fixed deadline were chosen.
    - • For a complete list of issues please consult the response.
  - USCIB
    - We suggest a permissive approach to who may petition the panel, coupled with the ability of the Panel to provide for loser pays/fee shifting in the event that it identifies a challenge as frivolous. Furthermore, participation in related ICANN public comment processes that are directly related to the issue under review should be a prerequisite for parties seeking relief before an IRP. This allows for a good balance between enabling open access to due process and mitigating delay tactics.
- Require participation in community processes to have standing 4 - BC, Google, i2Coalition, IA
  - BC

- The BC continues to be concerned that the Reconsideration and Independent Review process proposed by the CCWG would allow parties to introduce new arguments without first vetting them through the community's policy development channels.
  - Google
    - individual parties seeking review should be required to participate in any ICANN public comment process directly related to the subject being brought for Independent Review.
  - i2Coalition
    - 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 approach could create operational inefficiency and undermine the bottom-up, consensus-based process for developing policy within ICANN.
  - IA
    - Recommends participation as a requirement for IRP (The requirement to comment publicly would not apply to instances where ICANN simply contravenes existing policy or pursues implementation without seeking public comment.)
- Concern over independence of panel (3 - .NO, CENTR, Govt. India.)
  - .NO, CENTR
    - Remain concerned about independence, appointment and funding.
  - Govt. India
    - There is a risk that if ICANN will be funding the review panel directly, then the IRP might be biased in its findings. Independence may be impacted even after limiting the term to the maximum of five years. As reflected in previous comments to the Government Advisory Committee (GAC), such financial dependence might affect the true independence of the panel.

### 3. Other Points of note

- Exclusion of protocols and numbers.
- DIDP review was mentioned a few times
- Applicability to SMM (A. Doria, J. Scholte)
- Use Abuse of Discretion vs DeNovo (Google)
- Increase and ensure diversity requirements.

### 4. Summary analysis

- General concerns about availability of details and timing of implementation.
- Funding concerns (various)..

- Standing concerns (govts, individuals, gNSO subsets)
- Require participation in community processes to have standing
- Concern over independence of panel
- Exclusion of protocol and numbers.
- DIDP review was mentioned a few times
- Applicability to SMM (A. Doria, J. Scholte)
- Use Abuse of Discretion vs DeNovo (Google)
- Increase and ensure diversity requirements.

Details of relevant responses by commenter:

- AFRALO (African Regional At-Large Organization)
  - • The “IRP sub-group” is mentioned repeatedly in this section, while no definition (composition, mission, term, etc.) of this subgroup is provided.
    - 268 Implementation of these enhancements will necessarily require additional, detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a Cross Community Working Group (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), 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. In addition, to ensure that the IRP functions as intended, we propose to subject the IRP to periodic community review.
  - • Timeline for IRP: The period of time for complainants to file their complaint and the total period of time for the IRP to issue its final report should be clearly fixed, and not left for further decision. This is to avoid any possible gaming, unpredictability, corruption or other unfair result of the IRP.
  - • The panel shouldn’t issue corrective decisions, but decisions to override the ICANN action (or no action) that the board is obliged to accept and revise its decision accordingly. The corrective decisions are the sole right of the ICANN Board.
    - 18 Decisions (Page 42 para 268): The CCWG-Accountability intends that if the Panel determines that an action or inaction by the Board or staff is in violation of the Articles or Bylaws, that decision is binding and the Board and staff shall be directed to take appropriate action to remedy the breach. However, the Panel shall not replace the Board’s fiduciary judgment with its own judgment.
    - 5 (page 39, para 268) Possible Outcomes of the IRP: An IRP will result in a declaration that an action/failure to act complied or did not comply with ICANN’s Articles of Incorporation and/or Bylaws. To the extent permitted by law, IRP decisions should be binding on ICANN.
      - E - 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.
- ALAC (At-Large Advisory Committee)
  - • Paragraph 268, Subsection 2b: The ALAC supports the ability of the IRP to reconcile conflicting “expert panel” decisions, but notes that such decisions will not simply be a judgement that the Bylaws were not followed. The proposal should allow for an IRP outcome that specifically addresses such issues.
    - Role of the IRP: The role of the Independent Review Process (IRP) will be to:
    - Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any Advisory Committee or Supporting Organization);
    - Reconcile conflicting decisions of process-specific “expert panels”; and
    - Hear and resolve claims involving rights of the Sole Member under the Articles or Bylaws (subject to voting thresholds).
  - • Paragraph 268, Subsection 18: The ALAC’s understanding of the IRP is that it is an evaluation of ICANN actions and a determination of whether the ICANN Bylaws and Articles of Incorporation were followed. The proposed text implies that the IRP will order that the breach be remedied, but will not dictate exactly what the remedy should be. The ALAC supports this, but believes that it must be explicit that the IRP cannot dictate specific courses of action. If this interpretation is not correct and the intent is that an IRP can dictate specific remedies, then the ALAC strongly objects.
    - Paragraph 268, Subsection 18 standard to be applied.
    - Decisions:
    - Panel decisions 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.
    - The CCWG-Accountability recommends that IRP decisions be “precedential” – meaning, that panelists should consider and may rely on 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.
    - The CCWG-Accountability intends that if the Panel determines that an action or inaction by the Board or staff is in violation of the Articles or Bylaws, that decision is binding and the Board and staff shall be directed to take appropriate action to remedy the breach. However, the Panel shall not replace the Board’s fiduciary judgment with its own judgment.
    - It is intended that judgments of a decisional panel or the Standing Panel would be enforceable in the court of the U.S. and other countries that accept international arbitration results.

- • **Paragraph 279**, Internet Numbering out of scope for IRP: The rationale for this must be included.
  - Paragraph 268, Subsection 9- Exclusions; Numbering Resources: The Address Supporting Organization has likewise indicated that disputes related to Internet number resources should be out of scope for the IRP. As requested by the ASO, decisions regarding numbering resources would be excluded from standing.
- Avri Doria (endorsed by Joy Liddicoat & Timothy McGinnis)
  - • One of the comments that has been made in discussions is that there is no redress mechanism that is applicable to the SMCM. The question boils down to: what if the SMCM makes a decision that is incompatible with ICANN’s mission or core values?
  - • I recommend that the role of the IRP, in paragraph 268, be expanded to include “hearing and resolving claims that concern SMCM decisions.”
- BC (Business Constituency)
  - • The BC continues to be concerned that the Reconsideration and Independent Review process proposed by the CCWG would allow parties to introduce new arguments without first vetting them through the community’s policy development channels.
- CCAOI (Cyber Cafe Association of India)
  - • The Independent Review Process (IPR) needs to be clearly defined in WS1 to allow the community to decide if they want to support it.(implies neutral on the proposal for IRP)
    - (Paragraph 268, Subsection 20) - **Implementation:** The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional, detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG-Accountability (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), 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. In addition, to ensure that the IRP
  - • Moreover further information what ICANN would fund for IRPs needs to be shared.
    - (Paragraph 268, Subsection 19) Accessibility and Cost :
    - The CCWG-Accountability recommends that ICANN would bear all the administrative the costs of maintaining the system (including Panelist salaries), while each party should bear the costs of their own legal advice. The 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, for example by access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded form utilizing the process.
    - 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 (six months). The Panel will issue an update and estimated completion schedule in the event it is unable to complete its work within that period.
    -

- CCG-NULD (Centre for Communication Governance National Law University Delhi)
  - The appeal to the IRP panel’s decision to a larger panel is based on inadequately defined standards, and these need to be clearly stated. This would ensure the development of predictable, clear and coherent body of law that can be relied upon. The efficient functioning of the IRP and appeals process is dependent on the development of adequate supporting transparency mechanisms such as the Documentary Information Disclosure Policy (DIDP). However, a review and enhancement of the DIDP is recommended only as part of Work Stream 2. We recommend that the reforms in the IRP be supported with appropriate amendments in the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process that provide clearly stated parameters for operation of the reformed IRP.
- **ccTLD Australia (auDA)**
  - • The CCWG's revised IRP provisions are one example of a change that will be underpinned by Fundamental Bylaws. Further, community members (including the ICANN Board) are being asked to express a position on a structure that will pass judgement on their actions and bind them to its findings.
  - • As such, the community must have a greater level of detail when determining whether to support this change.
- **ccTLD Canada (CIRA)**
  - • Supports the proposed creation of “a standing, independent – review – panel of skilled jurists/arbitrators who are retained by ICANN and can be called upon over time and for various unrelated issues to resolve disputes regarding whether ICANN is staying within its limited technical Mission and acting in accordance with ICANN’s Articles of Incorporation and/or Bylaws.”
  - • Endorses the proposal’s statement that “decisions regarding ccTLD delegations or revocations would be excluded from standing, until the ccTLD community, in coordination with other parties, has developed relevant appeals mechanisms.”
    - (Paragraph 268, Subsection 8) Exclusions; ccTLD Delegation/Redelegation: In their letter dated 15 April 2015, the CWG-Stewardship indicated that, “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 the ccTLD community, in coordination with other parties, has developed relevant appeals mechanisms.
- **ccTLD France (Afnic)**
  - • At this stage, we would like to emphasize that the “reasonable efforts” envisaged in the document, par. 12 of the IRP presentation, are far from satisfactory. Afnic would like to see, in the proposal sent to the Board, a binding proposal instead.
    - (Paragraph 268, Subsection 12) Diversity: English as primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal tradition diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).

- • We suggest that at least one independent expert shall be chosen in each of the ICANN region, and that at least the panel should include three women and three men. This proposal wouldn't change the size of the standing panel (7).
  - See previous
- ccTLD New Zealand (Internet NZ)
  - • InternetNZ supports the improvements to Independent Review set out in the Proposal, and notes these improvements are dependent on the existence of a membership system within ICANN. Without such, the ICANN Board as a matter of fiduciary responsibility cannot agree to the incorporation of a system which gives independent decision-making to another party. The loss of such improvements would seriously weaken ICANN's soon-to-improve accountability.
- **ccTLD Norway (Norid)**
  - Supports CENTR comments
- **ccTLD United Kingdom (Nominet)**
  - • General support for the proposal (IRP proposal)
  - • Welcomes the introduction of "settlement efforts" as part of the appeals mechanisms (section 5 paragraph 268 point 16, page 41).
    - Settlement Efforts:
    - Reasonable efforts, as specified in a published 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 (Cooperative Engagement Process 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. In particular, the CCWG-Accountability will review the Cooperative Engagement Process as part of Work Stream 2.
  - • Welcomes periodic review of the review processes
    - (para 268) - Implementation of these enhancements will necessarily require additional, detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a Cross Community Working Group (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), 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. In addition, to ensure that the IRP functions as intended, we propose to subject the IRP to periodic community review.
  - • The introduction of clear processes, rules and timescales
    - (Paragraph 268, Subsection 19b) - 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 (six



months). The Panel will issue an update and estimated completion schedule in the event it is unable to complete its work within that period.

- • The introduction of precedential weight to ensure coherence between decisions. Consistency in decisions is important for justice to be done and to be seen to be done: should either party be able to appeal on grounds of inconsistency? It would be appropriate for the Panel to explain decisions how precedence had been considered.
  - (Paragraph 268, Subsection 18b) - The CCWG-Accountability recommends that IRP decisions be “precedential” – meaning, that panelists should consider and may rely on 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.
- **CENTR (European Association of National Internet Domain Registries)**
  - • Fully supportive of “a standing, independent – review – panel
  - • Endorses that “decisions regarding ccTLD delegations or revocations would be excluded from standing
    - (Paragraph 268, Subsection 8) Exclusions; ccTLD Delegation/Redelegation: In their letter dated 15 April 2015, the CWG-Stewardship indicated that, “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 the ccTLD community, in coordination with other parties, has developed relevant appeals mechanisms.
  - • Remain concerned about independence, appointment and funding.
    - (Paragraph 268, Subsection 14) - 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 (5 years, no renewal), and post-term appointment to Board, NomCom, or other positions within ICANN would be prohibited for a specified time period. Panelists will have an ongoing obligation to disclose any material relationship with ICANN, SOs and ACs, or any other party in an IRP.
      - Selection and Appointment: The selection of panelists would follow a 4-step process: ICANN, in consultation with the community, will initiate a tender process for an organization to provide administrative support for IRP, beginning by consulting the community on a draft tender document.
      - ICANN will then issue a call for expressions of interest from potential panelists; work with the community and Board to identify and solicit applications from well-qualified candidates with the goal of securing

diversity; conduct an initial review and vetting of applications; and work with ICANN and community to develop operational rules for IRP.

- The community would nominate a slate of proposed panel members.
  - Final selection is subject to ICANN Board confirmation.
- (Paragraph 268, Subsection 12, 13)- Diversity: English as primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal tradition diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).
  - Size of Panel:
  - Standing Panel – a minimum of 7 panelists
  - Decisional Panel – 3 panelists
- (Paragraph 268, Subsection 19a) - Accessibility and Cost:
- The CCWG-Accountability recommends that ICANN would bear all the administrative the costs of maintaining the system (including Panelist salaries), while each party should bear the costs of their own legal advice. The 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, for example by access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process.
- • Regular reviews
  - (para 268) - Implementation of these enhancements will necessarily require additional, detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a Cross Community Working Group (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), 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. In addition, to ensure that the IRP functions as intended, we propose to subject the IRP to periodic community review.
- • Concern about meeting CWG requirements re IRP applicable to PTI decisions
- **CWG-Stewardship**
  - • The CWG believes that the CCWG-Accountability draft proposal adequately satisfies this CWG-Stewardship requirement.
- **CyberInvasion Ltd**
  - • Strongly support the core values and principals set out in the proposal for the IRP
  - • timeframe for initiation and realisation of standing for the IRP are still to be determined - suggest that a tiered timeline
  - • agree that a diverse representation of legal background and training is a requirement for the selection of potential panellists (diversity) – suggest extremely high standard be applied



while each party should bear the costs of their own legal advice. The 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, for example by access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process.

- 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 (six months). The Panel will issue an update and estimated completion schedule in the event it is unable to complete its work within that period.

- • support the examination of the DIDP process as part of the Work Stream 2 effort
  - (Paragraph 268, Subsection 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.

- **Dyn**

- • Dyn understands, however, that the perfect should not be the enemy of the good, and that consensus often means that nobody thinks the answer is just right, so we might otherwise be willing to live with these flaws.
- • It is really hard to see why the various appeal and reconsideration functions cannot be streamlined into a single mechanism that ordinary humans could understand

- **Edward Morris**

- • I generally support the enhancements proposed for the Independent Review Process (IRP) in the Draft proposal. The increased scope for an IRP (to include Board and staff action / inaction as well as violations of ICANN's mission, commitments and core values), the easing of the standing requirement so that community components are extended such rights as a matter of form, and the right of appeal of an IRP decision to a full panel sitting en blanc, are all positives.
- • Accessibility and affordability needs to be for WS1 (see original comment for details).
- • Concern regarding Alleged Frivolous / Vexatious Actions. Suggest CCWG to provide a system whereby a Complainant may have an initial determination made through an early warning system about whether their proposed Action is or is not deemed not to be frivolous before costs accrue for the Complainant.
  - (Paragraph 268, Subsection 19a) - The CCWG-Accountability recommends that ICANN would bear all the administrative the costs of maintaining the system (including Panelist salaries), while each party should bear the costs of their own legal advice. The 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, for example by access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process.

- • Cooperative Engagement Process (CEP): The CEP is the most obtuse, dark, fundamentally nontransparent and unsound component of all of ICANN’s accountability mechanisms. It should have no place in a truly transparent and accountable ICANN (see original comment for details)
  - (Paragraph 268, Subsection 16b) - 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 (Cooperative Engagement Process or mediation) if, after specified period, that party’s concludes in good faith that further efforts are unlikely to produce agreement.
- • Conflicts of interest proposals for are not sufficient. (see original comments for details)
  - (Paragraph 268, Subsection 14) - 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 (5 years, no renewal), and post-term appointment to Board, NomCom, or other positions within ICANN would be prohibited for a specified time period. Panelists will have an ongoing obligation to disclose any material relationship with ICANN, SOs and ACs, or any other party in an IRP.
- **Google**
  - • Support for creating a process for meaningful review of ICANN Board or staff actions through a standing, independent group of experts
  - • The CCWG’s proposal allows review of ICANN actions only to the extent that they “exceed the scope of ICANN’s Mission and/or violate ICANN’s Articles and Bylaws. This limited scope of review leaves parties without a remedy if ICANN acts within the scope of its Mission, Articles, and Bylaws, but makes a fundamentally irrational decision.
    - (Paragraph 268, Subsection 1) - Purpose of the IRP: The overall purpose is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.
    - (Paragraph 268, Subsection 2) - Role of the IRP: The role of the Independent Review Process (IRP) will be to:
      - Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any Advisory Committee or Supporting Organization);
      - Reconcile conflicting decisions of process-specific “expert panels”; and
      - Hear and resolve claims involving rights of the Sole Member under the Articles or Bylaws (subject to voting thresholds).
  - • individual parties seeking review should be required to participate in any ICANN public comment process directly related to the subject being brought for Independent Review.

- • panels should review ICANN action 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.
    - (Paragraph 268, Subsection 10) - Standard of Review: The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on their own independent interpretation of the ICANN Articles and Bylaws in the context of applicable governing law. The standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN’s Mission and/or violates ICANN’s Articles and Bylaws. 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.
  - **Government of Brazil**
    - • Brazil reiterates the importance that decisions made by the IRP should be binding on the ICANN organization and effectively independent from national courts so that they could not be overruled by national courts where ICANN is legally established (support for proposal)
      - (Paragraph 268, Subsection 18c) - The CCWG-Accountability intends that if the Panel determines that an action or inaction by the Board or staff is in violation of the Articles or Bylaws, that decision is binding and the Board and staff shall be directed to take appropriate action to remedy the breach. However, the Panel shall not replace the Board’s fiduciary judgment with its own judgment.
    - • Furthermore, we consider it will be essential to clearly define steps with firm deadlines in the context of the work of the future Cross Community Working Group to be established with the mandate to detail the structure and procedures of the IRP.
    - • We share the concern expressed by Spain, on the other hand, regarding the fact that the proposed provisions would prevent governments as well as other entities from participating in an IRP and therefore call for appropriate adjustments in that regard.
      - (Paragraph 268, Subsection 6) - Standing: Any person/group/entity “materially affected” by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. They must do so within [number of days to be determined by IRP Sub Group] days of becoming aware of the alleged violation and how it allegedly affects them. The Sole Member has standing to bring claims involving its rights under the Articles and Bylaws. Issues relating to joinder and intervention will be determined by the IRP Sub Group, assisted by experts and the initial Standing Panel, based on consultation with the community.
- e) Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff action where a complainant can demonstrate:
- i. 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;
  - ii. Either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits; and

iii. A balance of hardships tipping decidedly toward the party seeking the relief.

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- **Government of France**

- • We do understand that the CCWG 2nd draft proposal “does not establish a new international court or a new body of international law”, that “it is not a Treaty function” and that, contrary to the current IRP, the CCWG intended to make decisions of the new IRP unambiguously binding on ICANN itself, a first new feature that we totally support. (support for the proposal)
- • The French government also takes the opportunity to reassert its support to the second new feature of the IRP, that is the ability to judge on the substance of complaints (notably vis-à-vis ICANN policies) rather than just on the conformity of the procedures followed by the Board (vis-à-vis ICANN Bylaws).
- • The French Government calls for the strictest conflict of interest policy to be implemented at Board, IRP and “SO/AC Membership Model” levels.

- **Government of India**

- • There is a risk that if ICANN will be funding the review panel directly, then the IRP might be biased in its findings. Independence may be impacted even after limiting the term to the maximum of five years. As reflected in previous comments to the Government Advisory Committee (GAC), such financial dependence might affect the true independence of the panel.
  - (Paragraph 268, Subsection 19a) Accessibility and Cost:
    - The CCWG-Accountability recommends that ICANN would bear all the administrative the costs of maintaining the system (including Panelist salaries), while each party should bear the costs of their own legal advice. The 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, for example by access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded form utilizing the process.
  - (Paragraph 268, Subsection 14) 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 (5 years, no renewal), and post-term appointment to Board, NomCom, or other positions within ICANN would be prohibited for a specified time period. Panelists will have an ongoing obligation to disclose any material relationship with ICANN, SOs and ACs, or any other party in an IRP.
    - Selection and Appointment: The selection of panelists would follow a 4-step process: ICANN, in consultation with the community, will initiate a tender process for an organization to provide administrative support for

IRP, beginning by consulting the community on a draft tender document.

- ICANN will then issue a call for expressions of interest from potential panelists; work with the community and Board to identify and solicit applications from well-qualified candidates with the goal of securing diversity; conduct an initial review and vetting of applications; and work with ICANN and community to develop operational rules for IRP.
- The community would nominate a slate of proposed panel members.
- Final selection is subject to ICANN Board confirmation.

- **Government of New Zealand**

- • We are broadly supportive of the recommendations put forth in the 2nd Draft Proposal.
- • While we acknowledge the commitment of the ccNSO in developing a clearer process for ccTLD delegation/redelegation, we do not consider a potential PDP is sufficient rationale for excluding ccTLD delegation/redelegation from the IRP.
  - (Paragraph 268, Subsection 8) Exclusions; ccTLD Delegation/Redelegation: In their letter dated 15 April 2015, the CWG-Stewardship indicated that, “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 the ccTLD community, in coordination with other parties, has developed relevant appeals mechanisms.

- **Government of Spain**

- • We applaud the enhancements put forward for the refurbished IRP, which will contribute to improve the community’s power to appeal ICANN’s decisions, including the provisions on geographic, legal and cultural diversity, translation services, independency of panellists (term limits and post-term prohibitions), and initial nomination of panellists by the community.
- • We regret though, that our request to expand the standard to be a party of an IRP has not been taken into account. The “materially affected” clause actually prevents governments as well as other entities from participating in an IRP as decisions that may affect them might have not been implemented yet and thus, have not caused any material harm at the time of filing the complaint.
  - (Paragraph 268, Subsection 6) - Standing: Any person/group/entity “materially affected” by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. They must do so within [number of days to be determined by IRP Sub Group] days of becoming aware of the alleged violation and how it allegedly affects them. The Sole Member has standing to bring claims involving its rights under the Articles and Bylaws. Issues relating to joinder and intervention will be determined by the IRP Sub Group, assisted by experts and the initial Standing Panel, based on consultation with the community.

- **Government of the United Kingdom**



- • We believe the CCWG second draft proposal to be comprehensive and well-structured. The UK Government supports in particular: .... the proposals to enhance the Independent Review Process including making its decisions binding on the Board
- **i2Coalition (Internet Infrastructure Coalition)**
  - • The i2Coalition appreciates the work of the CCWG, and we broadly support the proposal's direction. In particular, we appreciate that the CCWG shares two of our key goals: (1) ensuring that ICANN remains focused on its core mission of coordinating the global Internet's systems of unique identifiers and ensuring the stable and secure operation of the Internet's unique identifier systems, and (2) creating a binding mechanism by which actions outside of or in contravention of ICANN's bylaws can be challenged.
  - • 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 approach could create operational inefficiency and undermine the bottom-up, consensus-based process for developing policy within ICANN.
- **ICANN Board**
  - • ICANN Board supports the ability for the community and individuals/entities to seek an independent review of Board actions to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.
  - • Agreement (Supports or Supports with some changes) on 18 points - please see below for a summary or the response by the Board for full details.
  - • 25. Accessibility and Cost – (Section 5.1, paragraph 268, clause 19) – Disagrees (ICANN will fund the costs of Multistakeholder Enforcement Mechanism (MEM) binding arbitration, including legal fees. Because of the availability of a funded MEM through which the community empowerment tools can be enforced, the Board recommends that the more individualized IRP proceedings should be subject to the current cost-shifting process.)
    - (Paragraph 268, Subsection 19a) - The CCWG-Accountability recommends that ICANN would bear all the administrative the costs of maintaining the system (including Panelist salaries), while each party should bear the costs of their own legal advice. The 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, for example by access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded form utilizing the process.
  - • ICANN Board supports the ability for the community and individuals/entities to seek an independent review of Board actions to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.

- • 10 Purpose of the IRP – (Section 5.1, paragraph 268) – Supports with some changes (MEM)
- • 11 Role of the IRP – (Section 5.1, paragraph 268) - Supports with some changes (expert panels, MEM)
- • 12. A Standing Panel – (Section 5.1, paragraph 268) – Supports
- • 13. Initiation of an IRP – (Section 5.1, paragraph 268) - Supports with some changes (MEM)
- • 14. Possible Outcomes of the IRP – (Section 5.1, paragraph 268) - Supports with some changes (MEM would be binding)
- • 15. Standing – (Section 5.1, paragraph 268) - Supports with some changes (MEM keep current 30 day period until agreed otherwise by the community)
- • 16. Community IRP – (Section 5.1) - Supports with some changes (MEM)
- • 17. Exclusions; ccTLD Delegation/Redelegation and Numbering Resources – (Section 5.1, paragraph 268, clause 8 and 9) - Agreed. (similar to IAB request)
- • 18. Standard of Review – (Section 5.1, paragraph 268, clause 10) - Supports with some changes (return to pre-April 2013 standard for now – continue consideration of the standard in the reviews.)
- • 19. Composition of Panel and Expertise, Diversity and Size – (Section 5.1, paragraph 268, clause 11, 12, 13) - Agreed. The Board recommends that no Standing Panel be empanelled until the scope of the IRP is clarified. The Board agrees with the CCWG-Accountability’s recommendation to require 3-member decisional panels.
- • 20. Independence – (Section 5.1, paragraph 268, clause 14) – Agreed.
- • 21. Recall or Other Accountability – (Section 5.1, paragraph 268, clause 15) – Agreed (The ICANN Board supports 5-year terms and agrees that a recall process should be developed to ensure accountability.)
- • 22. Settlement Efforts – (Section 5.1, paragraph 268, clause 16) – Agreed (Agreed. We note that the CCWG-Accountability Proposal does not contain a lot of detail on how the mediation piece would fit into the timelines, and other process points, but agree with the CCWG-Accountability that these details can be worked through.)
- • 23. Decision Making – (Section 5.1, paragraph 268, clause 17) – Agreed
- • 24. Decisions – (Section 5.1, paragraph 268, clause 18) - Agreed. Decisions should be binding unless there is a conflict with the Board’s fiduciary responsibilities.
- • 26. Time for Resolving IRPs – (Section 5.1, paragraph 268, clause 19) – Agreed
- • 27. Implementation – (Section 5.1, paragraph 268, clause 20) – Agreed (The Board agrees that IRP provisions should be adopted as Fundamental Bylaws, and also agrees that detailed rules will need to be developed. As an initial step, the Board recommends rolling back the modification of standard of review to the standard that was in place before 2013.)
- • 28. Transparency – (Section 5.1, paragraph 268, clause 21) – Agreed (revise DIDP)
- **Intel**
  - Intel supports the proposed IRP. We believe a liberal approach to who may petition the panel, in combination with the ability of the Panel to provide for loser pays/fee shifting in the event it identifies a challenge as frivolous strikes the right balance between due process and mitigation of delaying tactics.

- **Internet Association**
  - • The Internet Association is pleased to comment on the “CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations.” We support the CCWG’s plan for enhancing ICANN’s accountability and believe these changes are necessary given the U.S. Government’s intent to relinquish its historical stewardship role.
  - • Supports the proposal including Implementation, independence of panelists, it being binding, precedence and the possibility of appealing rulings.
  - • Recommends participation as a requirement for IRP (The requirement to comment publicly would not apply to instances where ICANN simply contravenes existing policy or pursues implementation without seeking public comment.)
- **IPC (Intellectual Property Constituency)**
  - • The IPC generally supports the changes to the IRP as well.
  - • Concern - First, it is important to maintain the ability for stakeholder groups, constituencies and other subsets of larger stakeholder organizations to challenge Board decisions even if the majority does not support such a challenge.
    - (Paragraph 268, Subsection 6) - Standing: Any person/group/entity “materially affected” by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. They must do so within [number of days to be determined by IRP Sub Group] days of becoming aware of the alleged violation and how it allegedly affects them. The Sole Member has standing to bring claims involving its rights under the Articles and Bylaws. Issues relating to joinder and intervention will be determined by the IRP Sub Group, assisted by experts and the initial Standing Panel, based on consultation with the community.
  - • Concern - Second, it is important to have checks and balances available to avoid or temper situations where the majority attempts to commence an action on behalf of the “community” where a minority does not support such actions.
  - • Recommend - (j) provide for interim remedies available to the Community pending a reconsideration or IRP which suspends implementation by the Board of a “captured” policy
    - (Paragraph 268, Subsection 7) Community IRP: The CCWG-Accountability recommends giving the community the right to have standing with the IRP. In such cases, ICANN will bear the costs associated with the Standing Panel, although the IRP Sub Group may recommend filing or other fees to the extent necessary to prevent abuse of the process.
- **Jacob Malthouse**
  - • Process timelines are either vague, non-binding or have been extended
  - • Perhaps as a result of their vagueness, the proposed mechanisms are not described 'end-to-end' anywhere.
  - • The report does not describe a process, with clear guidance and thresholds, for the Board, mediator or a panel to determine whether complaints are spurious, repetitive or anti-competitive. There is no avenue for expediting complaints or for dismissing them early in the process. While ICANN, the Board or a panel could in theory dismiss complaints, in practice they have not done so.

- • A 'surge' in complaints as a result of a program or policy implementation by ICANN - such as an expansion of the number of generic top-level domains - does not appear to be addressed in the stress tests. This means that the maximum number of complaints that could be addressed by the Board, mediation or by the standing panel at any given time is not explored. A "pile-up" of extended, repetitive processes that impacts the Board, third-parties and policy making appears a serious risk.
- **Jan Scholte (CCWG Advisor)**
  - • General support for the proposal
  - • Concerns - For example, could the Board use the IRP to challenge the Community Mechanism for overstepping its mandate or violating its rules and procedures? Or could a new SO or AC which is refused participation in the Community Mechanism (para 309) appeal this exclusion to the IRP? In general there is a concern that the proposal gives the Community Mechanism substantial powers without fully thinking through how the new body will be accountability in the exercise of those powers.
    - (Paragraph 309) The SOs and ACs that wish to participate by voting in the Sole Member would simply indicate they wish to do so at the time of its creation and would not be required to make any changes to their current SO/AC structure to enable this. SOs or ACs choosing not to participate through voting initially could opt in later as set out in Section 6.2. New SOs or ACs that are created at a later date could choose to participate in the Sole Member at any time, but this would require the current participants to approve this and the ICANN Bylaws to be amended to reflect their participation.
  - • Creating a separate appeals mechanism for ccTLDs adds further complexity to an already labyrinthine institutional apparatus for governance of the DNS. Is it absolutely necessary?
  - • Perhaps some reflection is wanted regarding the degree of privilege to be accorded to registries (country code and generic) relative to other stakeholders in the new ICANN accountability arrangements. For example, why does para 105 make specific mention of TLD manager access to the IRP, when non-commercial users, intellectual property stakeholders and others might also have complaints? Similarly, why does para 132 suggest that only ccNSO and GNSO would be empowered to address matters escalated by the CSC? Prima facie the registries and registrars are the stakeholders most likely to have CSC-related complaints, but why close the door in advance to others who might in certain contexts have well-grounded grievances?
  - (Paragraph 105) CCWG-Accountability proposals include significant enhancement of ICANN's existing appeals mechanisms, including the IRP. The IRP will be available to TLD managers to challenge ICANN decisions including with respect to issues relating to the IANA functions (with the exception of ccTLD delegations and redelegations, as requested by the CWG-Stewardship). Its standard of review will be based on ICANN's Mission and Core Values, which includes compliance with documented policies. The decisions of the IRP will be binding on the ICANN Board.
  - (Paragraph 132) Creation of a customer standing committee: The CWG-Stewardship will be relying on the creation of a customer standing committee (CSC) within the ICANN Bylaws. Additionally, under the current CWG-Stewardship proposal, if not currently

within their mandates, the ccNSO and/or GNSO would be empowered to address matters escalated by the CSC.

- **LINX (London Internet Exchange)**

- • LINX strongly supports the main pillars of the CCWG proposal, which are the very essence of accountability: .....That there be an independent body, the IRP, to hear complaints that ICANN has acted inconsistently with its own governing documents.
- • We welcome the CCWG's proposal that the community would keep the rules of procedure of the IRP under review, and make other recommendations for reform.
- • We support the CCWG proposal that all costs other than the complainants own costs should be met by ICANN.
- • 13. In our view it is essential that materially affected parties have the right to complain to the IRP that they have been harmed by an ICANN policy, and that that policy is improper by reason of being outside the scope of ICANN's Mission, and so must be set aside.
  - (Paragraph 268, Subsection 1) - Purpose of the IRP: The overall purpose is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.
  - (Paragraph 268, Subsection 2) - Role of the IRP: The role of the Independent Review Process (IRP) will be to:
    - Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any Advisory Committee or Supporting Organization);
    - Reconcile conflicting decisions of process-specific "expert panels"; and
    - Hear and resolve claims involving rights of the Sole Member under the Articles or Bylaws (subject to voting thresholds).
- • 14. We do not consider it acceptable to limit this right to complain to those "directly affected",
  - (Paragraph 268, Subsection 6) - Standing: Any person/group/entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. They must do so within [number of days to be determined by IRP Sub Group] days of becoming aware of the alleged violation and how it allegedly affects them. The Sole Member has standing to bring claims involving its rights under the Articles and Bylaws. Issues relating to joinder and intervention will be determined by the IRP Sub Group, assisted by experts and the initial Standing Panel, based on consultation with the community.
- • 15. Nor do we consider it sufficient to empower a collective community entity the right to raise such a complaint
  - (Paragraph 268, Subsection 7) - Community IRP: The CCWG-Accountability recommends giving the community the right to have standing with the IRP. In such cases, ICANN will bear the costs associated with the Standing Panel,

although the IRP Sub Group may recommend filing or other fees to the extent necessary to prevent abuse of the process.

- • We do not agree with those that say that extending this right to all materially affected parties creates an unprecedented and unacceptable exposure to ICANN.
- • 18. We believe that materially affected parties should have the right to complain, especially when the basis of that complaint is that ICANN has acted outside the scope of its Mission. As most entities do not closely track ICANN activities (nor do they have any reason to do so) this right would be empty if a fixed deadline were chosen.
- • For a complete list of issues please consult the response.
- **RySG (Registries Stakeholder Group)**
  - supports proposal,
  - • While the RySG supports this proposal in general, more time is warranted to a) consider the ICANN Board's recent interventions (and comments) regarding the draft proposal and b) stress test proposed IRP changes.
  - • The RySG considers an enhanced Documentary Information Disclosure Policy as an essential component of the rules relating to the conduct of the enhanced Independent Review Process. The enhancement articulated in paragraph 268, subparagraph 21 ("Transparency") under Section 5.1 should not simply be recommended but instead should be made mandatory for IRP and other appeals processes.
    - (Paragraph 268, Subsection 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.
  - • The enhanced IRP will not be up and running until well into, or following the completion of, WS2. How will there be an assurance that ICANN will follow through with its commitments pending the enhanced IRP (short of having to remove board members or recall the entire board)? The RySG suggests one possible idea would be to create a contract between ICANN and any SO or AC that elects to be a party that would allow for specific performance remedies to follow through with the transition plan arrangements.
- **USCIB (US Council on International Business)**
  - • In general, USCIB agrees with the proposed improvements
  - • We suggest a permissive approach to who may petition the panel, coupled with the ability of the Panel to provide for loser pays/fee shifting in the event that it identifies a challenge as frivolous. Furthermore, participation in related ICANN public comment processes that are directly related to the issue under review should be a prerequisite for parties seeking relief before an IRP. This allows for a good balance between enabling open access to due process and mitigating delay tactics.
    - (Paragraph 268, Subsection 6) - Standing: Any person/group/entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. They must do so within [number of days to be determined by IRP Sub Group] days of becoming aware of the alleged violation and how it

allegedly affects them. The Sole Member has standing to bring claims involving its rights under the Articles and Bylaws. Issues relating to joinder and intervention will be determined by the IRP Sub Group, assisted by experts and the initial Standing Panel, based on consultation with the community.

- (Paragraph 268, Subsection 19a) - Accessibility and Cost: The CCWG-Accountability recommends that ICANN would bear all the administrative the costs of maintaining the system (including Panelist salaries), while each party should bear the costs of their own legal advice. The 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, for example by access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process.
- • However, in view of the additional detailed work required to implement the IRP enhancements, USCIB encourages the CCWG to include a deadline and procedures to ensure prompt selection of the special Cross-Community Working Group that will be convened for this purpose. It is critically important this group begin work on the IRP rules of procedures as soon as possible so they are completed within the proposed nine-month window for Work Stream 1 implementation.
- • Finally, with respect to enhancements for both the Independent Review Panel and the Reconsideration Process, USCIB recommends providing 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. Such clarity is important to discourage entities for pursuing remedial action based on inchoate allegations of harm.
  - (Paragraph 268, Subsection 3) - 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 the Articles of Incorporation and/or Bylaws.
  - (Paragraph 268, Subsection 6) - Standing: Any person/group/entity “materially affected” by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. They must do so within [number of days to be determined by IRP Sub Group] days of becoming aware of the alleged violation and how it allegedly affects them. The Sole Member has standing to bring claims involving its rights under the Articles and Bylaws. Issues relating to joinder and intervention will be determined by the IRP Sub Group, assisted by experts and the initial Standing Panel, based on consultation with the community.