Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process

1. Summary

- The overall purpose of the Independent Review Process is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.
- 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.
- The CCWG-Accountability therefore proposes several enhancements to the process to ensure that the Independent Review Process is:
    - Accessible, both financially and from a standing perspective
    - Transparent
    - Efficient
    - Designed to produce consistent and coherent results that will serve as a guide for future actions

2. CCWG-Accountability Recommendations

Modify the Fundamental Bylaws to implement the following modification to the IRP process:

- Including a standing judicial/arbitral panel
- Putting together a Panel composed of experts in various fields
- Standard of Review
- Making the Independent Review Panel more accessible
- Making the Independent Review Panel more affordable
- Ensuring that the process Results in a binding decision
- Ensuring that the process does not circumvent the bottom-up, multistakeholder-driven nature of ICANN's processes

3. Detailed Explanation of Recommendations

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 Independent Review Process be:

- Accessible, both financially and from a standing perspective
- Transparent
- Efficient
- Designed to produce consistent and coherent results that will serve as a guide for future actions

The Purpose of the Independent Review Process

The overall purpose of the Independent Review Process is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws. The Independent Review Process should:

- Empower the community and affected individuals/entities to prevent "mission creep" enforce compliance with the Articles and Bylaws through meaningful, affordable, accessible expert review of ICANN actions.
- Ensure that ICANN is accountable to the community and individuals/entities for actions outside its Mission or that violate its Articles or Bylaws.
- Reduce disputes going forward by creating precedent to guide and inform ICANN Board, staff, SOs and ACs, and the community in connection with policy development and implementation.

The Role of the Independent Review Process

The role of the Independent Review Process (IRP) will be to:

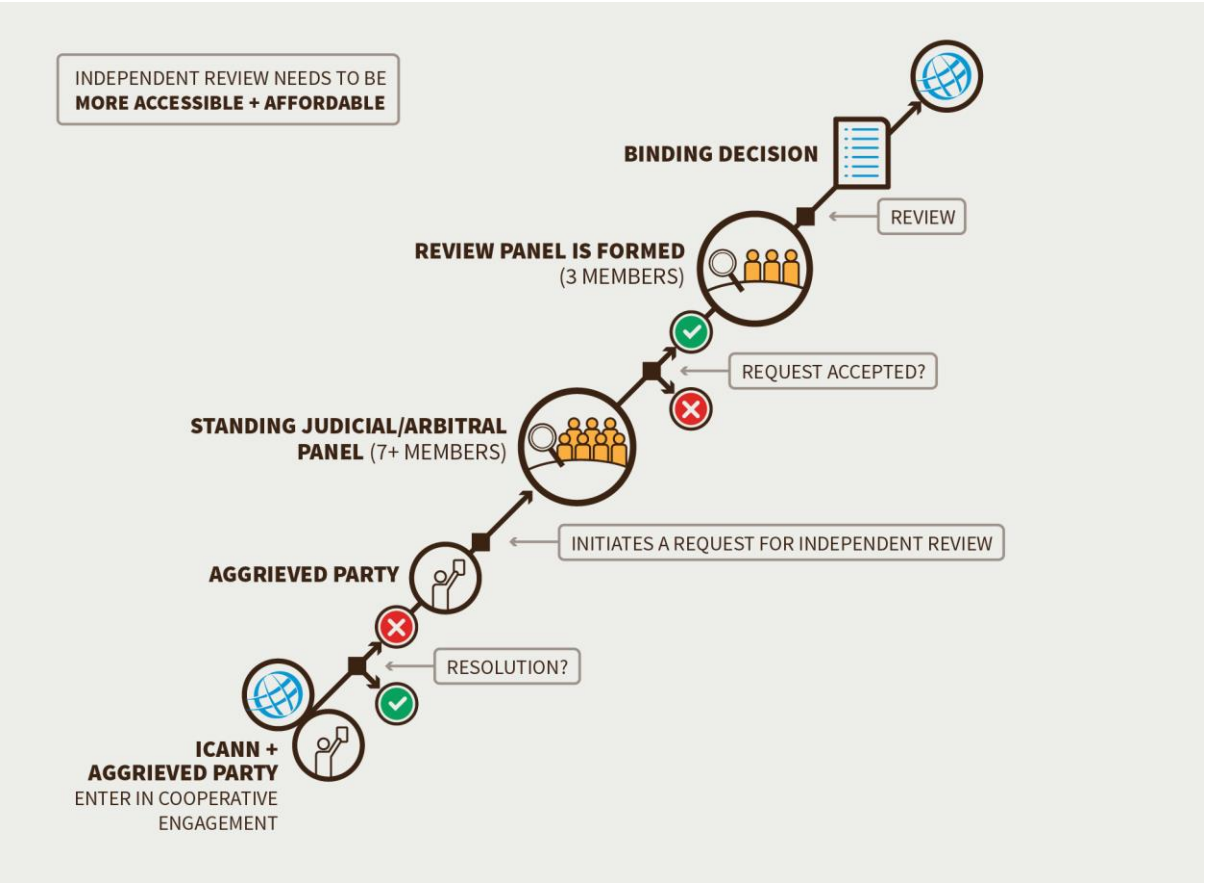
- Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any Advisory Committee or Supporting 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).

A Standing Panel

The Independent Review Panel 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.

Initiation of the Independent Review Process

An aggrieved party would trigger the Independent Review Process by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws. Matters specifically reserved to the Sole Member of ICANN in the Articles or Bylaws would also be subject to the Independent Review Process review.



Possible Outcomes of the Independent Review Process

An Independent Review Process 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, Independent Review Process decisions should be binding on ICANN.

- Decisions of a three-member decisional panel will be appealable to the full Independent Review Process Panel sitting en banc, based on a clear error of judgment or the application of an incorrect legal standard. The standard may be revised or supplemented via the Independent Review Process Sub Group process, which will be developed.
- This balance between the limited right 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 an outcome that would force the Board to violate its fiduciary duties.
- The limited right to appeal is further balanced by the Five Community Powers (outlined on page xx), relevant policy development processes, and advice from Advisory Councils, each as set forth in the Bylaws.
- Independent Review Process Panelists will consider and may rely on prior decisions of other Independent Review Processes that address similar issues.

- 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 likelihood of success on the merits or
        - sufficiently serious questions going to the merits
    - A balance of hardships tipping decidedly toward the party seeking the relief.

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 Independent Review Processes 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.

Community Independent Review Process

The CCWG-Accountability recommends giving the community the right to have standing with the Independent Review Process. 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.

Exclusions: ccTLD Delegation/Redelegation

In its 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.

Exclusions: Numbering Resources

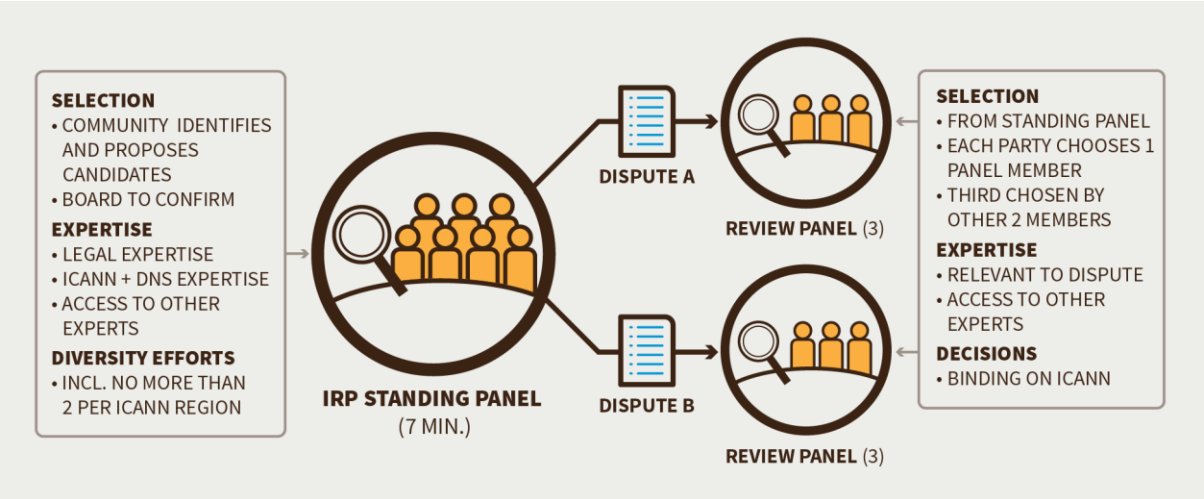
The Address Supporting Organization has likewise indicated that disputes related to Internet number resources should be out of scope for the Independent Review Process. As requested by the Address Supporting Organization (ASO), decisions regarding numbering resources would be excluded from standing.

Standard of Review

The Independent Review Process Panel, with respect to a particular Independent Review Process, 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 Independent Review Process 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.

Composition of Panel and Expertise

Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration is necessary. Panelists should also possess 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 (DNS). 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.



Diversity

English will be the 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: minimum of 7 panelists
- Decisional Panel: 3 panelists

Independence

Panel members must be independent of ICANN, including ICANN Supporting Organizations and Advisory Councils. 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, Supporting Organizations and Advisory Councils, or any other party in an Independent Review Process.

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 the Independent Review Process, 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.

Recall

Appointments made for a fixed term of five (5) years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed via the Independent Review Process Sub Group.

Settlement Efforts

- Reasonable efforts, as specified in a published policy, must be made to resolve disputes informally prior to/in connection with filing an Independent Review Process 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.

Decision Making

- In each case, a 3-member panel will be drawn from the Standing Panel. Each party will select one Panelist, and those panelists will select the 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.

- Panel decisions will be based on each Independent Review Process 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.

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.

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.
- 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.

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 functions as intended, we propose to subject the IRP to periodic community review.

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.

4. Changes from the 'Second Draft Proposal on Work Stream 1 Recommendations'

The CCWG-Accountability has not made any significant changes to the proposed enhancements to the Independent Review Process outlined in Draft 2 due to general community support received during the second public comment period. However, refinements to the language used in various descriptions have been made and operational procedures (as outlined in section xx) developed.

5. Stress Tests Related to this Recommendation

6. How does this meet the CWG-Stewardship Requirements?

The recommendations as outlined above meet the CWG-Stewardship requirements by:

- Creating the IRP directly meets the requirement of the CWG-Stewardship for an Independent Review Panel.
- Excluding ccTLD Delegation/Redelegation from the Independent Review Process
  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.
- Excluding Number Resources from the Independent Review Process
  The Address Supporting Organization has indicated that disputes related to Internet number resources should be out of scope for the Independent Review Process. As requested by the Address Supporting Organization (ASO), decisions regarding numbering resources would be excluded from standing.

7. How does this address NTIA Criteria?

Support and enhance the multistakeholder model ○ By enhancing ICANN's appeals mechanisms and binding arbitration processes and further fortifying

and expanding their remit, the community is further empowered
Maintain the security, stability, and resiliency of the Internet DNS ○ These accountability measures were designed to contribute to maintaining the operational functioning of organization
Meet the needs and expectation of the global customers and partners of the IANA services ○ These accountability measures were designed to contribute to maintaining the operational functioning of organization
Maintain the openness of the Internet ○ The accountability measures help to mitigate the likelihood of problematic scenarios by ensuring that robust accountability mechanisms are in place.
NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution