

### 3. Detailed Explanation of Recommendations

(5) A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN's existing 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 an IRP that was binding rather than merely advisory, and also strongly urged that the process be:

Section 4.3(a)(viii), (ix)

⟨ Transparent, efficient and accessible (both financially and from a standing perspective).

Section 4.3(a)(vii)

⟨ Designed to produce consistent and coherent results that will serve as a guide for future actions.

Section 4.3(a)(vii)

#### (6-7) Purpose of the Independent Review Process

The purpose of the IRP is to ensure that ICANN does not exceed the scope of its limited technical Mission, and otherwise complies with its Articles of Incorporation and Bylaws. The IRP should:

Section 4.3(a)(i)

⟨ Empower the community and affected individuals/entities to prevent "Mission creep," and enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable, accessible expert review of ICANN actions or inaction.

Section 4.3(a)(ii), (b)(iii)(A)(1)

⟨ Ensure that ICANN is accountable to the community and individuals/entities for actions or inaction outside its Mission or that otherwise violate its Articles of Incorporation or Bylaws.

Section 4.3(a)(iii)

⟨ Reduce disputes going forward by creating precedent to guide and inform the ICANN Board, staff, Supporting Organizations (SOs) and Advisory Committees (ACs), and the community in connection with policy development and implementation.

Section 4.3(a)(vi)

⟨ Hear and resolve claims that PTI, through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.

Sections 4.3(a)(iv) & (v)

#### (8-9) Role of the Independent Review Process

The role of the 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 AC or SO).

Section 4.3(a); Section 4.3(b)(ii),

(b)(iii)(A)(2)

⟨ Hear and resolve claims that PTI, through its Board of Directors or staff, has acted

(or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.

Section 4.3(b)(iii)(C)

o Per the CWG-Stewardship Final Proposal, ICANN will enter into a contract with PTI that grants PTI the rights and obligations to serve as the IANA Functions Operator for the IANA naming functions, sets forth the rights and obligations of ICANN and PTI, and includes service level agreements for the IANA naming functions.

See Section 16.3

o The ICANN Bylaws will require ICANN to enforce its rights under the ICANN-PTI Contract/Statement of Work, to ensure that PTI complies with its contractual obligations. ICANN's failure to enforce material obligations will constitute a Bylaws violation and be grounds for an IRP by the Empowered Community.

Section 4.3(a)(iv); see Section 16.3(b)

o The ICANN Bylaws will provide that PTI service complaints of direct customers of the IANA naming functions that are not resolved through mediation may be appealed by way of the IRP, in both cases as provided for in the CWG Stewardship Final Proposal Annex I, Phase 2.

Section 4.3(a)(v)

⟨ Note that CWG-Stewardship Final Proposal Annex I, Phase 2 also permits PTI Direct Customers to pursue "other applicable legal recourses that may be available." ICANN must modify Registry Agreements with gTLD Operators to expand the scope of arbitration available thereunder to cover PTI service complaints and potential inclusion of optional arbitration under agreements with ccTLD registries if developed through the appropriate processes or the development of another alternative dispute resolution mechanism.

⟨ The standard of review for PTI cases will be an independent assessment of whether there was a material breach of PTI obligations under the contract with ICANN, whether through action or inaction, where the alleged breach has resulted in material harm to the complainant.

Section 4.3(i)(iv)

⟨ Hear and resolve claims that expert panel decisions are inconsistent with the ICANN Bylaws.

Section 4.3(b)(ii), (b)(iii)(A)(3)

⟨ Hear and resolve claims that DIDP decisions by ICANN are inconsistent with the ICANN Bylaws.

Section 4.3(b)(ii), (b)(iii)(A)(4)

⟨ Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.

Section 4.3(b)(ii), (b)(iii)(A)(5); Annex D,  
Section 4.2

**(10-11) Standing Panel**

The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting

on complaints brought forward by individuals, entities, and/or the community who have been materially affected by ICANN's action or inaction in violation of the Articles of Incorporation and/or Bylaws.

Section 4.3(j)(i)

**(12-14) Initiation of the Independent Review Process**

An aggrieved party would trigger the IRP 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, or otherwise within the scope of IRP jurisdiction. The Empowered Community could initiate an IRP with respect to matters reserved to the Empowered Community in ICANN's Articles of Incorporation or Bylaws.

Section 4.3(d) & (g); Annex D, Section 4.2

When the Empowered Community has decided to pursue an IRP, the decision would be implemented by the chairs of the SOs and ACs who supported the proposal. The chairs of the SOs and ACs who supported the decision to file a community IRP would constitute a "Chairs Council" that would act subject to the direction of those SOs and ACs of the Empowered Community that supported the proposal. The Chairs Council would, by majority vote, act on behalf of the Empowered Community in taking any reasonably necessary ministerial steps to implement the decision to pursue the community IRP, and to delegate and oversee tasks related to the community IRP, including but not limited to, engagement of legal counsel to represent the Empowered Community in the community IRP, approval of court filings, or enforcement of a community IRP award in court if ultimately necessary.

Sections 4.3(d), 4.3(g) & 6.3; Annex D,

Section 4.2

**(15-16) Possible Outcomes of the Independent Review Process**

An IRP would 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 shall be binding on ICANN.

Section 4.3(o)(iii); Section 4.3(x)

⟨ Decisions of a three-member Decisional Panel will be appealable to the full IRP 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 by way of the IRP Subgroup process, which will be developed.

Section 4.3(w)

⟨ 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.

Section 4.3(w)

⟨ The limited right to appeal is further balanced by the seven Community Powers, relevant policy development processes, and advice from ACs, each as set forth in the Bylaws.

See Sections 6.2; 11.6 (and Annex A); 12.1

◁ IRP panelists shall consider and give precedential effect to prior decisions of other Independent Review Processes that address similar issues.

Sections 4.3(g) & (v)

◁ Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff actions where a complainant can demonstrate each of the following factors:

Section 4.3(p)

o 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.

Section 4.3(p)(i)

o Whichever:

◁ A likelihood of success on the merits. Section 4.3(p)(ii)(A)

◁ Sufficiently serious questions going to the merits. Section 4.3(p)(ii)(B)

◁ A balance of hardships tipping decidedly toward the party seeking the relief. Section 4.3(p)(iii)

#### (17-20) **Standing**

Any person, group or 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.

Section 4.3(b)(i); Section 4.3(d)

They must do so within a certain number of days (to be determined by the IRP Subgroup) after becoming aware of the alleged violation and how it allegedly affects them. The Empowered Community has standing to bring claims involving its rights under the Articles of Incorporation and ICANN Bylaws.

Section 4.3(b)(i)(A)-(B)

The ICANN Board’s failure to fully implement an Empowered Community decision will be sufficient for the Empowered Community to be materially affected. Issues relating to joinder and intervention will be determined by the IRP Subgroup, assisted by experts and the initial Standing Panel, based on consultation with the community.

Section 4.3(o)(v)

#### (21-22) **Community Independent Review Process**

The CCWG-Accountability recommends giving the Empowered Community the right to present arguments on behalf of the Empowered Community to the IRP Panel (see Recommendation #4...). In such cases, ICANN will bear the costs associated with the Standing Panel as well as the Empowered Community’s legal expenses, although the IRP Subgroup may recommend filing or other fees to the extent necessary to prevent abuse of the process.

Section 4.3(r); Annex D, Section 4.2

#### (23-32) **Exclusions:**

##### **Challenges the result(s) of a Supporting Organization’s Policy Development Process (PDP)**

Notwithstanding the foregoing and notwithstanding any required threshold for launching a community IRP, no community IRP that challenges the result(s) of an SO’s

PDP may be launched without the support of the SO that approved the policy recommendations from the PDP or, in the case of the result(s) of a Cross Community Working Group (CCWG) chartered by more than one SO, without the support of the SOs that approved the policy recommendations from that CCWG.

Section 4.3(c)(i); Annex D, Section 4.2

#### **Country Code Top-Level Domain Delegation/Redelegation**

In its letter dated 15 April 2015, the CWG-Stewardship indicated that “any appeals mechanism developed by the CCWG-Accountability should not cover country code toplevel domain delegation/redelegation issues as these are expected to be developed by the country code top-level domain community through the appropriate processes.”

Section 4.3(c)(ii)

As requested by the CWG-Stewardship, decisions regarding country code top-level domain delegations or redelegations would be excluded from standing, until the country code top-level domain community, in coordination with other parties, has developed relevant appeals mechanisms.

#### **Numbering Resources**

The Address Supporting Organization (ASO) has likewise indicated that disputes related to Internet number resources should be out of scope for the IRP, since an existing dispute settlement mechanism already exists as part of the ICANN Address Supporting Organization Memorandum of Understanding. As requested by the ASO, decisions regarding numbering resources would be excluded from standing.

Section 4.3(c)(iii)

#### **Protocol Parameters**

The Internet Architecture Board (IAB) has likewise indicated that disputes related to protocol parameters should be out of scope for the IRP, since an existing dispute settlement mechanism already exists as part of the ICANN / IANA - IETF MoU. As requested, decisions regarding resources for protocol parameters would be excluded from standing.

Section 4.3(c)(iv)

#### **(33-35) Standard of Review**

The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of ICANN’s Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions. 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 of Incorporation and/or Bylaws and prior IRP decisions. 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.

Sections 4.3(g) & (i)

With respect to PTI cases, the standard of review will be an independent assessment of whether there was a material breach of PTI obligations under the contract with ICANN, whether through action or inaction, where the alleged breach has resulted in material harm to the complainant.

Section 4.3(i)(iv)-(v)

(36-37) **Composition of Panel and Expertise** Section 4.3(j)(i)

Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration, is necessary. Panelists should either already possess expertise about the DNS and ICANN's policies, practices, and procedures, or commit to develop an expertise through training, at a minimum, on the workings and management of the 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.

Section 4.3(k)(iii)-(iv)

(38-39) **Diversity** Section 4.3(l)

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 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).

Section 4.3(j)(iv)

(40) **Size of Panel**

↳ Standing Panel: Minimum of seven panelists. Section 4.3(j)(i)

↳ Decisional Panel: Three panelists. Section 4.3(k)(i)

(41-42) **Independence**

Panel 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. To ensure independence, term limits should apply (five years, no renewal), and postterm appointment to the ICANN Board, Nominating Committee, or other positions within ICANN will be prohibited for a specified time period. Panelists will have an ongoing obligation to disclose any material relationship with ICANN, SOs, ACs, or any other party in an IRP. Panelists will be supported by a clerk's office that is separate from ICANN.

Section 4.3(j)(iii); Sections 4.3(q)(i)(B) &

4.3(q)(ii)

(43-44) **Selection and Appointment**

The selection of panelists would follow a four-step process: Section 4.3(j)(ii); Section 4.3(m)

1. ICANN, in consultation with the community, will initiate a tender process for an organization to provide administrative support for the IRP, beginning by consulting the community on a draft tender document.

Section 4.3(j)(ii)(A)

2. 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 wellqualified 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.

Section 4.3(j)(ii)(B)

3. The community would nominate a slate of proposed panel members. Section 4.3(j)(ii)(C)

4. Final selection is subject to ICANN Board confirmation. Section 4.3(j)(ii)(D)

**(45-46) Recall**

Appointments shall be made for a fixed term of five years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed by the IRP subgroup.

Section 4.3(j)(iii)

**(47-50) Settlement Efforts** Section 4.3(e), (h)

Reasonable efforts, as specified in a published policy, must be made to resolve disputes informally prior to/in connection with filing an IRP case.

Section 4.3(e)(i)-(ii)

Parties may cooperatively engage informally, but either party may inject an independent dispute resolution facilitator (mediator) after an initial Cooperative Engagement Process (CEP) meeting. Either party can terminate informal dispute resolution efforts (CEP or mediation) if, after a specified period, that party concludes in good faith that further efforts are unlikely to produce agreement.

Section 4.3(e)(iii)-(iv)

The process must be governed by clearly understood and prepublished rules applicable to both parties and be subject to strict time limits. In particular, the CCWGAccountability will review the CEP as part of Work Stream 2.

Section 4.3(e)(i)

**(51-53) Decision-Making**

In each case, a three-member panel will be drawn from the Standing Panel. Each party will select one panelist, and those panelists will select the third. The CCWGAccountability anticipates that the Standing Panel would draft, issue for comment, and revise procedural rules. The Standing Panel should focus on streamlined, simplified processes with rules that conform with international arbitration norms and are easy to understand and follow.

Sections 4.3(k) & 4.3(n)(i)

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.

Sections 4.3(g) & 4.3(i); Sections 4.3(t),

4.3(u) & 4.3(v)

**(54-58) 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.

Section 4.3(k)(v)

The CCWG-Accountability recommends that IRP decisions be precedential, meaning that IRP Panelists shall consider and give precedential effect to prior IRP decisions. By conferring precedential weight on panel decisions, the IRP can provide valuable

guidance for future actions and inaction by ICANN decision-makers. It also reduces the chances of inconsistent treatment of one claimant over another, based on the specific individuals making up the Decisional Panel in particular cases.

Section 4.3(g); Section 4.3(i)(ii); Section 4.3(v)

The CCWG-Accountability intends that if the panel determines that an action or inaction by the Board or staff is in violation of ICANN's Articles of Incorporation or Bylaws, then that decision is binding and the ICANN 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.

Section 4.3(x); Section 4.3(i)(iii)

It is intended that judgments of a Decisional Panel or the Standing Panel would be enforceable in the court of the United States and other countries that accept international arbitration results.

Section 4.3(x)(i)-(ii)

#### (59-61) **Accessibility and Cost**

The CCWG-Accountability recommends that ICANN bear all the administrative costs of maintaining the system (including panelist salaries and the costs of technical experts), while each party should bear the costs of their own legal advice, except that the legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN. 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 access to pro bono representation for community, nonprofit complainants, and other complainants that would otherwise be excluded from utilizing the process.

Section 4.3(r); Section 4.3(o)(vii); Section 4.3(y)

The panel should complete work expeditiously, issuing a scheduling order early in the process and in the ordinary course, and 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.

Section 4.3(s)

#### (62-63) **Implementation** Section 4.3(a)

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 (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. The functional processes by which the Empowered Community will act, such as through a council of the chairs of the ACs and SOs, should also be developed. These processes 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, the CCWG-Accountability proposes to subject the IRP to periodic community review.

Section 4.3(n); Section 4.3(n)(i)-(ii)

**(64-66) 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 IRP, and as such, the CCWG-Accountability recommends reviewing and enhancing the ICANN Documentary Information Disclosure Policy as part of the accountability enhancements in Work Stream 2.

Section 4.3(u) & (v)

All IRP proceedings will be conducted on the record, in public, except for settlement negotiations or other proceedings which could materially and unduly harm participants if conducted in public, such as by exposing trade secrets or violating rights of personal privacy.

Section 4.3(