

## Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel

### Article IV, Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in [Section 2 of this Article](#), ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. [In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.](#)
3. [A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting \(and the accompanying Board Briefing Materials, if available\) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.](#)
- ~~3.4.~~ Requests for such independent review shall be referred to an Independent Review [Process](#) Panel ("IRP [Panel](#)"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. [The IRP Panel must apply a defined standard of review to the IRP request, focusing on:](#)
  - a. [The IRP did the Board act without conflict of interest in taking its decision?;](#)
  - b. [did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and](#)
  - c. [did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?](#)
5. [Requests for independent review shall be operated not exceed 25 pages \(double-spaced, 12-point font\) of argument. ICANN's response shall not exceed that same length. Parties may submit documentary evidence](#)

## Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel

supporting their positions without limitation. In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence.

6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel.

4.7. All IRP proceedings shall be administered by an international arbitration dispute resolution provider appointed from time to time by ICANN ("the IRP Provider") ~~using arbitrators under contract with or nominated~~, The membership of the standing panel shall be coordinated by that provider the IRP Provider subject to approval by ICANN.

5.8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this [Section 3](#).

6.9. Either party may ~~elect~~request that the ~~request for independent review~~IRP be considered by a one- or three-member panel; ~~in the absence~~Chair of ~~any such election~~, the ~~issue standing panel~~ shall ~~be considered by a one member panel~~make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.

7.10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels; ~~provided that if ICANN so directs, the IRP Provider shall establish a standing panel to hear such claims.~~

8.11. The IRP Panel shall have the authority to:

a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;

a.b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;

## Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel

~~b.c.~~ \_\_\_\_\_ declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

~~e.d.~~ \_\_\_\_\_ recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP<sub>;</sub>

~~9. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the IRP.~~

e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and

f. determine the timing for each proceeding.

~~10-12.~~ \_\_\_\_\_ In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by e-mail and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.

~~11-13.~~ \_\_\_\_\_ The IRP All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.

~~14. Declarations of the IRP shall be in writing. The IRP~~Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.

## Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.

~~12-18.~~ The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

~~13-19.~~ The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ~~the Website~~ICANN's website when they become available.

~~14-20.~~ The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.

~~15-21.~~ Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.