

## **AFNIC comment on the updated Supplementary Procedures for IRP**

- *To:* comments-irp-supp-procedures-28nov16@xxxxxxxxxx
- *Subject:* AFNIC comment on the updated Supplementary Procedures for IRP
- *From:* Marianne Georgelin <marianne.georgelin@xxxxxxxxxx>
- *Date:* Mon, 23 Jan 2017 15:07:10 +0100 (CET)

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Afnic is a registry operator for top-level domains corresponding to the national territory of France (.fr, .re, .pm, .yt, .wf, .tf). and is also the backend registry operator for 15 new generic Top Level Domains. Afnic is a member of CCNSO, Centr, and APTLD.

We welcome this opportunity to share our views on the Supplementary Procedures for IRP through this public comment and to acknowledge the efforts being undertaken by the IRP IOT in updating those rules.

We support the comments made by Spain and Switzerland (through their GAC Representatives) on the necessity to enhance diversity and to warrant a level-playing field in the process (with reference to Section 4.3 (l) and Section 4.3 (j) (iv) of the Bylaws). We agree with their proposal to add to the Supplementary Procedures the appropriate measures to ensure translation and interpretation at no charge during the hearings when requested by the claimant.

The procedures should also ensure that parties with less structured legal resources have enough time to introduce their claims within the time limit set forth for the procedure. We believe that the proposed 45 days time limit is too short to achieve this goal and we therefore agree with the comments supporting its extension to a 6 month period.

Thank you.

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## AT-LARGE ADVISORY COMMITTEE

### ALAC Statement on the Updated Supplementary Procedures for Independent Review Process (IRP)

#### Introduction

Leon Sanchez, ALAC Member of the Latin American and Caribbean Islands Regional At-Large Organization (LACRALO) and ALAC Vice Chair, developed an initial draft of the ALAC Statement on behalf of the ALAC.

On 20 December 2016, the first draft of the Statement was posted on the [At-Large Updated Supplementary Procedures for Independent Review Process \(IRP\) Workspace](#).

On that same date, Alan Greenberg, Chair of the ALAC, asked ICANN Policy Staff in support of the At-Large Community to send a Call for Comments on the Statement to the At-Large Community via the [ALAC Announce Mailing List](#).

On 05 January 2017, a version incorporating the comments received was posted on the aforementioned workspace and the Chair requested that Staff open an ALAC ratification vote.

On 10 January 2017, Staff confirmed that the online vote resulted in the ALAC endorsing the Statement with 12 votes in favor, 0 vote against, and 0 abstention. You may view the result independently under: <https://www.bigpulse.com/pollresults?code=6481UiQPPIN59kGiqvkBFxAG>.

## **ALAC Statement on the Updated Supplementary Procedures for Independent Review Process (IRP)**

The ALAC welcomes the opportunity to comment on the “Draft IRP Updated Supplementary Procedures” and hereby submits the following as a formal statement to the Board of Directors:

1. The ALAC recognizes the continued effort to maintain an up-to-date set of rules and procedures applicable to the ICANN’s day to day operations in a bottom-up, multi-stakeholder, consensus driven process.
2. The ALAC appreciates that details have been carefully addressed to avoid any clashing situations between the IRP Supplementary Procedures being updated and those proposed as new IRP Supplementary Procedures.
3. The ALAC specifically recognizes the effort put in drafting an updated set of IRP Supplementary Procedures that address the delicate balance between due process and expedited resolution times that will help provide, both, certainty and celerity to applicants in IRP processes.
4. The ALAC recommends that as we gain experience with these new procedures, there is ongoing monitoring to ensure continued improvement.

The ALAC is confident that this updated IRP Supplementary Procedures, when enacted, will indirectly benefit end users and continue to provide certainty to the DNS.



# **CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI**

## **Comments on the draft Updated Supplementary Procedures for ICANN's Independent Review Process**

The Centre for Communication Governance at National Law University, Delhi (CCG) thanks ICANN for the opportunity to submit this comment.

In examining the Updated Supplementary Procedures (USP) in the context of CCWG-Accountability Final Report and the ICANN Bylaws, our comment identifies areas where the IRP falls short of the Bylaws and the CCWG-Accountability Recommendations. We also make recommendations on improving the USP to comply with the mandate of CCWG-Accountability.

We first provide a brief background to the IRP and then discuss the three areas where the USP needs to be amended. This relates to the provisions on 1) time limit for filing claims, 2) independence and impartiality of independent review panelists and 3) the accessibility of the IRP to claimants from developing countries.

### **Background**

The Independent Review Process (IRP) is very important since it holds ICANN to its mission, preventing overreach.<sup>1</sup> It also attempts to ensure compliance with the Bylaws

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<sup>1</sup> Section 1.1 (c) of the ICANN Bylaws clearly limit ICANN's mission by stating that it shall not regulate the content of "services that use the Internet's unique identifiers". Available at <<https://www.icann.org/resources/pages/governance/bylaws-en>> (last accessed 25/01/17). Also see CCWG-Accountability Final Report for WS1, available at <<https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>> at p 33, para 174 (last accessed 17/01/17).



and Articles of Incorporation.<sup>2</sup> With this in mind, the Cross Community Working Group on Accountability (CCWG-Accountability) focused on strengthening the IRP in Work Stream 1 (WS1).<sup>3</sup> These were incorporated into the ICANN bylaws as a fundamental bylaw.<sup>4</sup> The Supplementary Procedures have been updated to comply with the amended bylaws. The USP however, falls short of many of the recommendations in the CCWG-Accountability Report and the Bylaws as discussed below.

## 1. Time-limit to file claims

The current supplementary procedure does not stipulate a time limit for filing an IRP. However, Section 4.3 (n) (iv) (A) of the Bylaws<sup>5</sup> tasks the IRP Implementation Oversight Team (IOT) with developing rules of procedure that include the time within which a claim needs to be filed. Accordingly, the Section 4 of the USP proposes that a claim should be filed with the ICDR (International Centre for Dispute Resolution) “no more than 45 days after a CLAIMANT becomes aware of the material [e]ffect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.”<sup>6</sup>

We understand the need to prescribe time limits for the speedy completion of arbitration proceedings. However, barring all claims after one year of the action or inaction is extremely problematic. ICANN policy processes take place over a long time. It is highly likely that a policy would be implemented more than a year after the Board has approved it. It must be remembered that the IRP is a check on abuse of ICANN’s power, and its protection must be safeguarded.<sup>7</sup>

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<sup>2</sup> Id, CCWG-Accountability.

<sup>3</sup> For a full list of CCWG-Accountability recommendations on the IRP, see id, pp. 33-36.

<sup>4</sup> Section 4.3, ICANN Bylaws, available at <<https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>> (last accessed 24/01/17).

<sup>5</sup> Section 4.3 is a fundamental bylaw.

<sup>6</sup> Section 4, Updated Supplementary Procedures for ICANN’s Independent Review Procedure, available at <<https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf>> (last accessed 17/01/17).

<sup>7</sup> Milton Mueller, *Putting Your Rights On The Clock: The IRP Supplementary Rules* (7<sup>th</sup> January 2017), available at <<http://www.internetgovernance.org/2017/01/07/putting-your-rights-on-the-clock-the-irp-supplementary-rules/>> (last accessed 17/01/17).



CCWG-Accountability's external counsel noted that [emphasis added] "Applying a strict 12-month limit to any IRP claim that commences at the time of the ICANN action or inaction and **without regard to when the invalidity and material impact became known to the claimant, is inconsistent with the Bylaws** (and is inconsistent with the terms of Annex 7 of the CCWG Report)."<sup>8</sup> The counsel also noted that alignment with Section 4.3 (n) (iv) (A) of the Bylaws<sup>9</sup> would require the provision of a clause for 'reasonably should have known',<sup>10</sup> as well as omission of the strict 12-month limitation period.

It should also be noted that arbitral institutions do not usually impose time limits on the submission of a claim. A survey of leading arbitral institutions such as the International Chamber of Commerce,<sup>11</sup> the London Court of International Arbitration<sup>12</sup> and the Stockholm Chamber of Commerce<sup>13</sup> suggests that this is not a common practice. They do however, impose time limits during the arbitral proceedings. This includes time limits on the appointment of arbitrators<sup>14</sup> and making the final award.<sup>15</sup> The ICDR Rules which govern the IRP also does not impose a time limit on filing claims.<sup>16</sup> In keeping with international practice, we recommend that the USP not contain a time limit on filing claims.

Further, as Professor Mueller notes, since a claimant is time-barred from challenging the policy, a successful challenge to an implementing action does nothing to prevent similar

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<sup>8</sup> Legal Memorandum from Sidley Austin LLP (4<sup>th</sup> January 2017), available at <<https://mm.icann.org/pipermail/iot/attachments/20170106/9dcc4fb4/Sidley-ResponsetoCertifiedQuestionofCCWGIoT-January42017-0001.pdf>> at p 4 (last accessed 17/01/17).

<sup>9</sup> ICANN Bylaws, supra, n. 1.

<sup>10</sup> Section 4.3 (n)(iv)(A) of the bylaws states that the Rule of procedure should include "The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute". Supra, n. 8, at p 4.

<sup>11</sup> ICC Rules of Arbitration (2012), available at <<http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>> (last accessed 24/01/17).

<sup>12</sup> LCIA Arbitration Rules (2014), available at <[http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx#Article\\_1](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article_1)> (last accessed 24/01/17).

<sup>13</sup> SCC Arbitration Rules (2017), available at <[http://www.sccinstitute.com/media/169838/arbitration\\_rules\\_eng\\_17\\_web.pdf](http://www.sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf)> (last accessed 24/01/17).

<sup>14</sup> See for instance, Article 12 of the ICC Rules; Article 5 of the LCIA Rules; Article 17 of the SCC Rules.

<sup>15</sup> See for instance, Article 30 of the ICC Rules; Article 43 of the SCC Rules.

<sup>16</sup> Similar to other institutions, ICDR does not impose time limits on filing a claim, but imposes limits on filing counter claims and in the appointment of arbitrators. See, ICDR Rules of Arbitration, available at <<https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestrelease>> (last accessed 24/02/17)

future actions.<sup>17</sup> This is of concern, as the IRP enhancements envisioned by the CCWG-Accountability were meant to “produce consistent and coherent results that will serve as a guide for future actions”,<sup>18</sup> which Section 4 of the USP fails to do. CCG appreciates that the IOT has already taken note of this concern and will be discussing it once the public comment period has ended.<sup>19</sup>

## 2. Independence and Impartiality of Independent Review Panelists

The independence of IRP panelists is essential to the completion of an IRP in a just and transparent manner. Section 4.3 (q)(i) of the ICANN Bylaws requires that Independent Review Panelists be independent of ICANN, its Supporting Organizations and Advisory Committees. Section 4.3(q)(i)(A) requires panelists to disclose any material relationships to the parties and Section 4.3(q)(i)(B) calls on the IOT to develop further independence requirements. Similarly, the CCWG-Accountability proposal recommends that panelists be term limited.<sup>20</sup>

The USP in Section 3 addresses the issue of independence.<sup>21</sup> But it merely echoes Section 4.3(q)(i)(A) of the ICANN by laws in requiring the disclosure of material relationships. It does not address the issue of term limits raised in the CCWG-Accountability proposal. The USP also does not contain any new independence requirements as per the mandate of the ICANN Bylaws. In the absence of such recommendations, it is useful to look at internationally accepted standards on the independence of arbitrators.

The independence and impartiality of arbitrators is an important facet of international arbitration. The standards for independence vary based on the circumstance of the case.<sup>22</sup> The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration is a useful, internationally accepted standard that can be applied

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<sup>17</sup> Milton Mueller, *supra*, n. 7.

<sup>18</sup> Annex 07, CCWG-Accountability Final Report for WS1, *supra*, n. 1, at p 1.

<sup>19</sup> IOT Meeting #13 (13<sup>th</sup> January 2017), Notes, recordings and transcripts available at <<https://community.icann.org/pages/viewpage.action?pageId=63149880>> (last accessed 17/01/17).

<sup>20</sup> Annex 07, CCWG-Accountability Final Report for WS1, *supra*, n. 1, at p 9, para 41.

<sup>21</sup> Section 3, Updated Supplementary Procedures for ICANN’s Independent Review Procedure, *supra*, n. 6.

<sup>22</sup> For a discussion on independence of arbitrators, see Michael Tupman, “Challenge and Disqualification of Arbitrators in International Commercial Arbitration”, *The International and Comparative Law Quarterly*, Vol. 38, No. 1 (Jan., 1989), pp. 26-52.





to the IRP.<sup>23</sup> Rather than a list of criteria, the Guidelines list general and practical standards that can be applied to different situations of conflict.<sup>24</sup> The standards are classified across three lists (red, orange and green) based on the extent of the conflict involved.<sup>25</sup>

Instead of sending the USP back to the IOT on this issue, we recommend that the USP make a reference to the IBA Guidelines so it may be applied on a case to case basis.

### 3. Accessibility to Claimants from Developing Countries

Both the ICANN by laws<sup>26</sup> and the CCWG-Accountability report<sup>27</sup> call for the IRP to be an accessible process. The latter calls on ICANN to establish processes to facilitate access to pro bono representation for community, non-profit other complainants who would not normally be able to use the IRP process.<sup>28</sup> However, the USP does not contain any specific rules that enable access to such claimants.<sup>29</sup>

To make the IRP more accessible, it might be instructive to follow the practices of other international organizations. The World Trade Organization (WTO) for instance makes special provisions to enable Least Developed Countries (LDCs) to access the Dispute Settlement System.<sup>30</sup> According to Van den Bossche and Gathii there are three kinds of strategies that can make the WTO dispute settlement system more accessible.<sup>31</sup> These are

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<sup>23</sup> International Bar Association, Guidelines on Conflicts of Interest in International Arbitration, (2014), available at

<<http://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafec8918>> (last accessed 23/01/17).

<sup>24</sup> Khaled Moyeed et al, “A Guide to the IBA’s Revised Guidelines on Conflicts of Interest”, Kluwer Arbitration Blog, 29<sup>th</sup> January 2015, available at < <http://kluwerarbitrationblog.com/2015/01/29/a-guide-to-the-ibas-revised-guidelines-on-conflicts-of-interest/>> (last accessed 23/01/17).

<sup>25</sup> Id.

<sup>26</sup> Section 4.3 (a) (viii) states that the IRP should “secure the accessible, transparent, efficient, consistent, coherent and just resolution of disputes”.

<sup>27</sup> Annex 07, CCWG-Accountability Final Report for WS1, supra, n. 1, at p. 11, paras 60-61.

<sup>28</sup> Id, para 60.

<sup>29</sup> Article 5 (Conduct of Independent Review) and Article 8 (Discovery Methods) of the USP require the IRP Panel to be guided by considerations of accessibility. However, they do not contain any recommendations on enabling access to the IRP as mentioned in the CCWG-Accountability report.

<sup>30</sup> Peter Van den Bossche and James Gathii, “Use of WTO Dispute Settlement by LDCs and LICs”, Trapca 2013, available at < <http://new.trapca.org/wp-content/uploads/2016/04/TWP1304-Use-of-the-WTO-Dispute-Settlement-System-by-LDCs-and-LICs.pdf>> at pp. 51-52 (last accessed 23/01/17).

<sup>31</sup> Id, at pp. 45-53 (last accessed 23/01/17).



experience based, resource based and rules based strategies.<sup>32</sup> Since this comment looks at revising the IRP procedures, rules based strategies within WTO are relevant to this context.

The WTO Dispute Settlement Understanding (DSU) (analogous to the supplementary procedures in ICANN) contains rules that apply specifically to disputes involving developing countries. Article 24 requires that WTO members exercise restraint while bringing disputes against LDC members.<sup>33</sup> It also requires that the Chairman of the Dispute Settlement body help mediate disputes before they go to a WTO panel.<sup>34</sup> The Cooperative Engagement Process in Section 4.3 (e) suggests that ICANN like the WTO encourages community members to attempt to settle disputes through mediation before using the IRP. In this context, a special allowance for developing countries could be made in similar terms to Article 24 of the WTO DSU. The USP can be amended to include a similar provision.

Article 27 of the DSU requires that the WTO Secretariat provide support through legal and technical expertise when requested by a developing country member.<sup>35</sup> Similarly, the ICANN secretariat can provide for legal and technical support to developing country claimants. .<sup>36</sup> This can be achieved by a provision in the USP that requires the ICANN secretariat to provide or make provisions to provide legal and technical support where necessary.

In addition to the CCWG-Accountability recommendation on pro bono access, we recommend that ICANN enact rules in the USP to enable better access to the IRP to developing country claimants.

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<sup>32</sup> Id.

<sup>33</sup> Article 24, WTO Dispute Settlement Understanding, available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm#24](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#24)> (last accessed 23/01/17).

<sup>34</sup> Id.

<sup>35</sup> Article 27, WTO Dispute Settlement Understanding.

<sup>36</sup> Id.



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January 30, 2017

**Re: DotMusic Public Comments concerning the Updated Supplementary Procedures for Independent Review Process (IRP)**

Dear ICANN and IRP-IOT:

DotMusic appreciates the opportunity to submit public comments concerning the Updated Procedures for the Independent Review Process<sup>1</sup> under the new ICANN Bylaws. Relevantly, DotMusic submitted public comments to ICANN on May 21, 2016 that was also pertinent to the IRP component of the New ICANN Bylaws.<sup>2</sup>

DotMusic urges that both ICANN and the IRP-IOT strongly consider amending the USP because of significant issues that compromise the credibility, impartiality and independence of the new IRP procedures to hold ICANN truly accountable in light of the Dot Registry IRP Determination,<sup>3</sup> the Council of Europe (COE) report *Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective* by Eve Salomon and Kinanya Pijl,<sup>4</sup> and the ICANN Community gTLD Applications and Human Rights webinar findings and recommendations.<sup>5</sup> Namely:

**New Rule 3. Composition of the Independent Review Panel**

The current rule calls into question the Standing Panel's impartiality. According to ICANN's May 2016 Bylaws, Article IV, Section 4.3(j), the Standing Panel members are nominated by ICANN's Supporting Organizations and Advisory Committees, and confirmed by the ICANN Board. This is

<sup>1</sup> ICANN, Public Comments - Updated Procedures for the Independent Review Process, <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>; See <https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf>

<sup>2</sup> DotMusic public comments to ICANN, *DotMusic public comments on the Draft New ICANN Bylaws*, May 21, 2016, <https://forum.icann.org/lists/comments-draft-new-bylaws-21apr16/pdfrrv4M1ldlr.pdf>

<sup>3</sup> Dot Registry, LLC v. ICANN (.INC/.LLC/.LLP), Independent Review Proceeding Final Declaration, July 29, 2016, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>

<sup>4</sup> Eve Salomon and Kinanya Pijl, Council of Europe report DGI (2016) 17, *Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective*, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806be175>

<sup>5</sup> ICANN Webinar, *Community gTLD Applications and Human Rights*, January 18, 2017, <https://community.icann.org/display/gnsononcomstake/Meeting+Notes>; Presentation: <https://community.icann.org/download/attachments/53772757/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf?version=1&modificationDate=1484753564000&api=v2>; Transcript: [https://community.icann.org/download/attachments/53772757/transcript\\_cwphrwebinar\\_180117.doc?version=1&modificationDate=1484926687000&api=v2](https://community.icann.org/download/attachments/53772757/transcript_cwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2)



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problematic because ICANN —the organization that confirmed the IRP Panelists— will be a party before the same Panelists.

The appearance of impartiality implicates due process principles highlighted in the Council of Europe’s Report. ICANN’s May 2016 Bylaws commits ICANN to respect internationally recognized human rights. With such right, due process provides for “a competent, independent and impartial tribunal.” Furthermore, the Council of Europe Report stresses that “ICANN needs to guarantee there is no appearance of conflict of interest:”

It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN’s vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest.<sup>6</sup>

ICANN will not meet this standard through use of the Standing Panel. To ensure impartiality, eliminate any appearance of conflict of interest and mitigate ICANN’s legal and reputational risk, it is recommended that an independent 3<sup>rd</sup>-party provider with experience in dispute resolution, such as the International Centre for Dispute Resolution (ICDR), administrate the IRP with neutral, independent Panelists that have no ties with ICANN or the ICANN community.

#### **New Rule 4. Time for Filing**

It is recommended that the statute of limitations be extended. Given that ICANN has created a system where it demands that all necessary evidence be filed with the initial written submissions, more than 45 days is necessary to ensure that Claimants are given a full and fair opportunity to present their case. It is interesting to note that the timeframe for filing an appeal of an IRP decision under the proposed rules (60 days) is longer than the existing timeframe for filing an IRP (45 days).

Furthermore, there should be no statute of repose. The 12-month limitation on commencing an IRP, regardless of when Claimants become aware of the relevant action or inaction unnecessarily limits Claimants’ ability to seek redress for ICANN’s actions or inactions. Both the May 2016 ICANN Bylaws and the Council of Europe affirm ICANN’s commitment to transparency. The imposition of a statute of repose encourages non-transparent behavior. If ICANN can prevent Claimants from learning about its actions or inactions for 12 months then Claimants cannot commence an IRP against ICANN.

#### **New Rule 5. Conduct of the Independent Review Panel**

The phrase “[w]here necessary” should be removed from the sentence “[w]here necessary, the IRP Panel may conduct live telephonic or video conferences.” Some members of the IOT also suggested to remove the phrase “where necessary.”

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<sup>6</sup> COE Report, *Independent, transparent and accountable decision-making*, p.44



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The parties should be also permitted to engage in an in-person hearing for all IRPs, instead of only under “extraordinary circumstances.” Claimants should have the opportunity to present their arguments directly before the Panel and not have to meet such a high threshold.

Moreover, the parties should be able to present evidence, such as witness statements and expert opinions, at the hearing. The New Rules restrict hearings to legal arguments except under specific circumstances. As stated in the Council of Europe, due process requires a “fair and public hearing” as stipulated by the International Covenant on Civil and Political Rights (ICCPR),<sup>7</sup> a multilateral treaty adopted by the United Nations that commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial:

Due process rights are traditionally known among human right experts to centre on the right to a fair trial and the right to an effective remedy. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is encompassed within Article 14(1) of the ICCPR and is applicable to both criminal and non-criminal proceedings.<sup>8</sup>

This rule prevents the parties from engaging in a “fair” hearing, as required by due process rights, because the Panel will be unable to personally assess the witnesses and experts, and therefore determine their reliability.

**New Rule 6. Written Statements:** The requirement to file “all necessary and available evidence” should be removed from the Supplementary Procedures entirely in light of the short deadline to initiate IRP proceedings as well as the reality that both parties should be entitled to file at least one additional set of responsive pleading with such factual and legal support as they deem appropriate.

Furthermore, this requirement contradicts with the new requirement in New Rule 5, which requires that all evidence must be submitted in writing “[X] days” in advance of any hearing. Such a requirement indicates that additional “necessary and available evidence” can be submitted after the initial written submissions and before the hearing.

Further, the Rules must provide for a right of reply that is not limited only to expert evidence. As currently drafted, the Requestor is entitled to only a single, 25-page submission filed simultaneously with its Notice of IRP and one right of reply to expert evidence.

**New Rule 7. Consolidation, Intervention and Joinder:** The appointment of a Procedures Officer from within the Standing Panel to consider issues of joinder, intervention, and consolidation is

<sup>7</sup> United Nations, International Covenant on Civil and Political Rights, No. 14668, March 23, 1976, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

<sup>8</sup> COE Report, *Due Process*, p.26; See also Article 13 and 15 ICCPR.



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unfair and liable to generate unnecessary costs. These issues should be decided by the duly constituted IRP Panel already hearing a claim, which will be best placed to gauge whether there is sufficient common ground for joinder or intervention.

**New Rule 8. Discovery Methods:** The request for discovery is a basic facet of requiring equality of arms between the parties in international arbitration and should not be consigned to the discretion of the of the IRP Panel as a matter of principle but instead the IRP Panel should be required to rule on both parties individual requests for discovery and whether such requests are relevant and material to the claims advanced in the arbitration. In accordance with this, there should not be a complete bar on all depositions, interrogatories, and requests for admission.

Additionally, consider whether it would be appropriate to make reference to the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration given the reference in the May 2016 Bylaws to developing “clear published rules for IRP . . . that conform with international arbitration norms . . .” Alternatively, discovery rules could also be drawn from the IBA Rules on the Taking of Evidence.<sup>9</sup>

Respectfully Submitted,

Constantine Roussos  
DotMusic  
Founder

Website: <http://www.music.us>

Supporting Organizations: <http://www.music.us/supporters>

Governance Board: <http://www.music.us/board>

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<sup>9</sup> International Bar Association, *Practice Rules and Guidelines - Rules on the Taking of Evidence in International Arbitration (2010)*, [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) and <http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>



**SUBMITTED VIA PUBLIC COMMENT FORUM AT:**

January 31, 2017

Internet Corporation for Assigned Names and Numbers (“ICANN”)  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536  
Email: [didp@icann.org](mailto:didp@icann.org)

**Re: PUBLIC COMMENTS FOR UPDATED SUPPLEMENTARY PROCEDURES FOR  
INDEPENDENT REVIEW PROCESS (IRP) (<https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>)**

Dear ICANN:

As the CEO of Dot Registry, LLC (“Dot Registry”), I submit the following public comments.

Dot Registry previously provided written submission of its public comments relating to the 2016 Draft New ICANN Bylaws<sup>1</sup>. Dot Registry remains opposed to any process by which anyone, other than a neutral third party, can review an IRP Declaration. Constructing a “Standing Panel” of ICANN insiders or having an “Ombudsman” perform an IRP review when the Ombudsman is reviewed and compensated by the ICANN Board, will only lead to bias, impartiality, conflicts of interest, corruption, and/or discrimination. To date, there is no viable outside independent check on the ICANN Board, including IRP Declarations due to the litigation waiver contained in the Application and Applicant Guidebook.

Accountability Mechanisms, contained in ICANN’s Bylaws, are the only means for an aggrieved party to seek recourse for ICANN Board and ICANN staff actions and/or inactions. The ICANN Board has a 99% success rate at rejecting Reconsideration Requests and enjoys a greater than 75% success rate at prevailing in an IRP. Additionally, an IRP will cost over \$1 million USD. ICANN has managed to stack the odds against an aggrieved party before this issue(s) are even brought to light.

Therefore, there must be a viable mechanism in place for an independent review of IRP Declarations so that the review is applied neutrally and objectively and with fairness and integrity. Dot Registry’s position is that any challenge or review related to an IRP Declaration should only be made in a court of competent jurisdiction.

**DOT REGISTRY, LLC**

Sincerely,

Shaul Jolles,  
Chief Executive Officer

A handwritten signature in black ink, appearing to read "S. Jolles", written over a horizontal line.

<sup>1</sup> See Draft New ICANN Bylaws, Report of Public Comments, at: <https://www.icann.org/public-comments/draft-new-bylaws-2016-04-21-en>

## Comments on IRP supplementary procedures

- *To:* "comments-irp-supp-procedures-28nov16@xxxxxxxx" <comments-irp-supp-procedures-28nov16@xxxxxxxx>
- *Subject:* Comments on IRP supplementary procedures
- *From:* "Perez Galindo, Rafael" <RPEREZGA@xxxxxxxx>
- *Date:* Wed, 30 Nov 2016 11:03:48 +0000

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Thanks for the opportunity to comment on the draft IRP supplementary procedures as foreseen in <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>.

The selection of English as primary working language may hamper the implementation of the diversity principle that drives the IRP (Bylaws Section 4.3(j)(iv): Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region of the standing panel). Hence, appropriate measures should be put in place with regards to provision of translation services for Claimants, in order to warrant a level playing field in the process. The following aspects could be added to the supplementary procedures:

- a) Interpretation services should be granted and provided at no charge if requested by the Claimant.
  - b) Any documents submitted in English should be accompanied by a translation in whole or in part into the language requested by the Claimant.
  - c) For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice or other communication is received, only if the translated documents referred to in the above letter have been sent to the Claimant. Otherwise, the period shall only begin to run when the aforementioned documents have been received.
- I kindly ask that these comments be taken into account by the drafting team.

Best regards

Rafael Pérez Galindo  
Spanish GAC Rep.



## comments on IRP regarding diversity in language of proceedings

- *To:* <comments-irp-supp-procedures-28nov16@xxxxxxxx>
- *Subject:* comments on IRP regarding diversity in language of proceedings
- *From:* <Jorge.Cancio@xxxxxxxxxxxxxxxx>
- *Date:* Tue, 29 Nov 2016 13:26:24 +0000

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Dear ICANN Staff

Thanks for this opportunity to comment on the draft IRP supplementary procedures.

The Bylaws provide that "All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for Claimants if needed."

My suggestion to the drafting team would be that they develop this rule in a fashion that enhances diversity.

For instance, the supplementary procedures could provide, inter alia, the following concretizations of the above rule:

- That translation also means interpretation during hearings.
- That, when translation services are required, they are granted per default (and rejection is ruled out generally).
- Also that the translated documents are provided at the same time as the original English documents or, at least, that the corresponding deadlines only count whenever the translated document has also reached the interested party, etc.

Hope this may be taken on board by the drafting team.

Best regards

Jorge Cancio  
Swiss GAC Rep.



# Comment on Updated Supplementary Procedures for Independent Review Process (IRP)

Status: FINAL

Version: 3

31-Jan-2017

**Business Constituency Submission**

**GNSO//CSG//BC**

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter. The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. Promotes end-user confidence because it is a safe place to conduct business
2. Is competitive in the supply of registry and registrar and related services
3. Is technically stable, secure, and reliable.

The BC welcomes to opportunity to comment on the **Updated Supplementary Procedures for Independent Review Process (USP)**<sup>1</sup>. We applaud the work of the IRP Implementation Oversight Team (IRP-IOT) to develop these supplementary procedures.

We note that the community was unable to reach consensus on three issues – the retroactive application of updated supplementary procedures for existing IRPs, statute of limitations for filing an IRP, and the permissibility of witness testimony / cross examinations during IRP hearings. We will comment on each of these issues.

### **Retroactive Application of Supplementary Procedures**

We support the current draft of the USP, which does not permit the retroactive application of supplementary procedures. Retroactive application of the new USP to existing IRPs would be inherently unfair to both of the parties involved in the IRP, causing additional legal expenses and delaying proceedings already underway.

However, one issue that should be explicitly clarified in the scope section of the USP is what vintage of ICANN Bylaws will control for any IRP disputes pending at the time of adoption of the post-IANA transition bylaws. The BC strongly believes that the new Bylaws should control, as these provide a claimant with substantially improved rights. In particular, the decision of the IRP panel is now binding upon ICANN, whereas in the past the ICANN Board could choose to reject the findings of the IRP panel. ICANN must be willing to apply this same standard to pending IRP cases, or else the credibility of its claim to embrace the new accountability mechanisms developed by the community could be suspect.

### **Statute of Limitations for filing an IRP**

The BC has very serious concerns about the currently proposed limitations on the time to file an IRP, which consists of a two-part test. The first part of the test is that the IRP must be filed within 12 months of the date of action or inaction. Moreover, a claimant must file their IRP within 45 days of “becoming aware of the material effect of the action or inaction.” ICANN’s Bylaws indicate that the Rules of Procedure “are intended to ensure fundamental fairness and due process” and that the rules “shall be informed by international arbitration norms.” In our view the proposed time limits for filing an IRP are not fair, do not reflect the reality of the speed at which ICANN moves as an organization, and are not convincingly informed by international arbitration norms.

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<sup>1</sup> ICANN public comment page at <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>

With regard to the proposed time limits, it is important to note that the current Rules of Procedure for the IRP process do not have a time limit at all. Moving to a deadline of 45 days from the date of awareness of an action or inaction that gives rise to a dispute is inherently problematic and unfair – particularly at a time when ICANN should be increasing its accountability pursuant to binding commitments to the community.

Additionally, the proposed filing deadlines make little practical sense, particularly in the context of ICANN’s slow moving systems and processes, whereby it can take years for a policy to be developed, approved by the Board, and then actually implemented. And even then, it is possible for the actual implementation of the policy to change at a later date. This very situation is implicitly acknowledged in the Bylaws. Section 4.3(c) (i) states that EC challenges to the results of a PDP are *excluded* from the IRP process, unless the Supporting Organizations that approved the PDP supports the EC bringing a challenge. This exception to an exception is in the Bylaws because the SOs and ACs involved in the CCWG were concerned that ICANN’s implementation of a policy would be outside of the scope of ICANN’s mission or in violation of its Bylaws.

The development of these Updated Supplementary Procedures is a classic example of how slowly ICANN moves, and why ICANN must have more generous timeframes for a claimant to bring forth an IRP. It is now 9 months since the ICANN board adopted the revised Bylaws. The updated procedures are still being drafted, and consensus has yet to be reached on three important aspects of the procedures. The USP should reflect these realities and allow potentially harmed parties to file an IRP throughout the entire lifetime of a policy.

It is critical to note that ICANN’s use of arbitration within its Bylaws is novel. Generally speaking, arbitration is an alternative dispute resolution mechanism that is explicitly agreed upon by two parties, via contract. There are also some instances of binding arbitration clauses being incorporated into the bylaws of for-profit entities, which limited the forum and remedies available to shareholders of those organizations. ICANN’s usage of arbitration, via its Bylaws, to impose an arbitration regime onto individuals and organizations with no shareholder interest or direct contractual relationship with ICANN is unusual. Due to this unusual application of arbitration, it is highly improbable that ICANN can truly adopt rules of procedure that are consistent with international arbitration norms. Arbitration is not widely used in this manner, so we cannot know what is normative from a statute of limitations perspective. Therefore, the IRP-IOT should err on the side of protecting the rights and remedies of the aggrieved party, and not impose arbitrary and unjustifiable deadlines.

Even more troubling is that the courts have relied upon ICANN’s consensus based, multi-stakeholder model to reject attempts at overturning arguably onerous language in ICANN’s agreements with contracted parties. We actually applaud the courts for giving such weight to bottom up, community generated policy.<sup>2</sup> But at the same time, if courts give the same weight to these Updated Supplementary Procedures, the likelihood of a successful legal challenge to the USP seems dim.

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<sup>2</sup> <https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-motion-dismiss-first-amended-complaint-28nov16-en.pdf> (Page 7)

Apart from our other arguments related to the statute of limitations to file an IRP, the current proposed language creates a transitional situation that could result in the inability of a currently harmed party to file an IRP. Consider a scenario where a party is materially impacted by action or inaction by ICANN taken more than 45 days prior to the adoption of the Updated Supplementary Procedures. For whatever reason, the harmed party has not yet filed an IRP. After the new Rules of Procedure are adopted and become applicable to this dispute, ICANN could very easily challenge that the statute of limitations to file an IRP, under the updated rules, has expired. We suggest that the USP be updated to add language that specifically addresses this transition scenario. It is critical for the IRP-IOT to err on the side of preserving the rights of a potentially harmed party in the drafting and implementation of these Updated Supplementary Procedures.

**In light of these concerns, the BC recommends that the IRP-IOT impose a moratorium on imposing any time limits related to bringing forth an IRP until further studies can be conducted by the ICANN community to assess the potential impacts of such time limits.**

Such a moratorium would make it clear to the ICANN community that ICANN is taking its accountability enhancements seriously. ICANN should support the further study of these issues by ensuring sufficient budgetary resources are in place to engage with third party experts and consultants.

It is imperative that ICANN recognize and act upon our strenuous objection to the proposed statutes of limitations in the Updated Supplementary Procedures prior to their adoption. The proposed limits are unfair, inconsistent with international arbitration norms, and may create substantial concerns around the legitimacy of ICANN as a standalone, multi-stakeholder model organization.

However, if there is not sufficient support from the ICANN community for such a moratorium, then the BC suggests some revisions to the time lines proposed by the IRP-IOT, as described below.

A 4-Jan-2017 legal memorandum was provided to the ICANN CCWG-Accountability IRP Implementation Oversight Team by its Counsel, Sidley Austin LLP. That memorandum addressed whether the draft USP timing language is consistent with the “agreement in principle” on timing of claims asserting a facial challenge, with this conclusion:

As currently drafted, Section 4 of the Draft Supplemental Rules does not capture the Agreement in Principle described above. The current draft language is more limited than the Agreement in Principle in that it allows only for challenges that are brought within 45 days of the date the claimant becomes aware of material harm by an invalid action or inaction *and* in any event within 12 months of the action or inaction giving rise to the claim. Therefore, as currently drafted, a facially invalid action or inaction could not be challenged by a claimant if the material impact to the claimant (harm or injury) arose at a time such that the claim could not be filed within 12 months from the ICANN decision that created the facial invalidity.

ICANN’s Amended Bylaws<sup>2</sup> (“Bylaws”) control the drafting of the Supplemental Rules. The CCWG-Accountability Final Report<sup>3</sup> (“CCWG Report”) also provides helpful guidance. We note that while neither the Bylaws nor the CCWG Report distinguish between IRP challenges on

grounds of facial invalidity versus other grounds, the Agreement in Principle described above does not appear to be facially inconsistent in significant respects with the Bylaws. However, we also note that the Bylaws do not specifically contemplate a 12-month limit on any claims and appear to require that any time limit run from the time at which the claimant became aware of or reasonably should have become aware of the material impact, which the Agreement in Principle does not address. (The CCWG Report also contemplated that the time limit would run from the time at which the claimant became aware of the alleged violation and how it affected them.)

The CCWG's legal Counsel also proposed this substitute language to make the proposed Rules consistent with the Bylaws and final CCWG Report:

A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of or reasonably should have become aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

Challenges which allege that a COVERED ACTION is invalid for all applications ("facially invalid") may be brought at any time within 45 days after CLAIMANT becomes aware of or reasonably should have become aware of the material effect of the COVERED ACTION giving rise to the DISPUTE without regard to the 12-month limitation.

At a minimum, the BC believes that the proposed substitute language must be adopted, since without it challenges to facially invalid covered actions could no longer be brought more than one year after their adoption, even if their application was in violation of the Bylaws or otherwise gave rise to an IRP claim. *Facially invalid actions should never be time-limited.*

However, adoption of the proposed substitute language would still leave the possibility that an action that was invalid as-applied could be time-barred if the affected party did not become aware, or could not reasonably have become aware, of its material effect until more than twelve months after its adoption. Given the slow pace of actual implementation of ICANN decisions, twelve months is far too short for such a time limitation.

As neither the Bylaws nor the CCWG Report contemplate distinct timing rules for various types of Disputes our preference would be to remove the twelve month limitation for "as applied" disputes as well and simply require that challenges be brought within a set time period after the affected party became, or should reasonably have become, aware of its material effect. Given the time necessary to analyze material effect, consult with counsel, and file an action we believe that the minimum time for filing should be increased to at least one year; noting that such an extended filing limit will also create a space in which the aggrieved party and ICANN may reach a mutually satisfactory settlement without resort to legal challenge.

If an overall time limit for “as applied” disputes is retained it should be substantially longer than twelve months – we would suggest a minimum of three years to assure that where there is material harm and a resulting right to challenge, there is a practical remedy to provide redress.

### **Permissibility of Witness Testimony / Cross Examinations during IRP hearings**

The BC appreciates that the IRP Bylaws and Updated Supplementary Procedures are designed with expediency and cost effectiveness in mind. However, the proposed threshold for witness testimony and cross examination should be less stringent. In particular, we feel that the IRP panel should consider the following factors:

- Is a witness necessary for a fair resolution of the claim?
- Is a witness necessary to further the purposes of the IRP?

The panel should only consider the time and expense of witness testimony after first considering the fairness and furtherance of the IRP and the gravity of actual or potential harm to the claimant.

Further, the panel should only consider the time and expense related to witness testimony and cross examinations if one party to the claim can provide proof that such a delay or expense would create a legitimate and unjustifiable financial hardship. A claimant should not be precluded from offering witness testimony or conducting cross examinations simply because it might increase expenses or slightly delay the resolution of the dispute.

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This comment was drafted by Jay Sudowski, with edits by Phil Corwin, Chris Wilson, Marie Pattullo, and Steve DelBianco.

It was approved in accord with our charter.



## **Comments of the Intellectual Property Constituency Comments on the Draft Independent Review Process Updated Supplementary Procedures**

**February 1, 2017**

The Intellectual Property Constituency (IPC) of the GNSO appreciates this opportunity to comment on the draft Updated Supplementary Procedures for the ICANN Independent Review Process (IRP Supplementary Procedures) developed per the requirements contained in the final report of the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability, Work Stream 1) (see <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>).

We commend the IRP Implementation Oversight Team (IOT) for its efforts in drafting updated procedural rules for the IRP to reflect the enhancements provided for in the revised ICANN Bylaws of 1 October 2016. We also appreciate the helpful explanatory Report of the IRP IOT, and note that there were three issues in particular on which the IOT was unable to reach full consensus. We provide our comments on these three issues: application of the updated rules to existing but unresolved IRPs, time limits for filing, and in-person hearings and cross examination. We also provide our comments on the following additional points, which the IPC considers to be of importance: consolidation, intervention and joinder, appeals to the Standing Panel, and costs.

### **Summary**

For the reasons set out more fully in the sections below, the IPC makes the following recommendations for changes to the Draft IRP Updated Supplemental Procedures:

#### Existing but Unresolved IRPs:

1. Amendments governed by the Bylaws should apply to all IRPs arising from events which post-date the adoption of the revised Bylaws, save to the extent that an issue has already been dealt with under the existing rules.
2. Amendments on which the IOT has discretion should apply to any IRP arising from events post-dating the adoption of the IRP Supplementary Procedures, but not to IRPs which are already underway at adoption.

#### Timing of the Claim:

1. The adoption of a constructive knowledge element as required under the Bylaws.
2. The 45-day time limit be amended to allow an initial filing window of 90 days from actual or constructive knowledge.
3. Alternatively, whilst not our preferred option, the 45-day deadline could remain in place with the caveat that only a *de minimis* IRP complaint would need to be filed within that window in order to merely provide notice to ICANN and the broader



community, with the ability to file a substantive complaint in a longer period (such as an additional 45 days from the original filing).

4. The 12-month time limit be dispensed with for all Claims, since this is inconsistent with the constructive knowledge element. If not removed for all Claims, this should in any event be removed for Claims of “facial” invalidity, as advised by Sidley and addressed in their revised text.
5. The interplay between the IRP and various other community accountability mechanisms be identified and addressed, and specifically that timing ambiguity and inconsistency be rectified.
6. Payment of the IRP fees should be by reference to the receipt of the invoice from ICDR, rather than on filing the IRP.

Consolidation, Intervention and Joinder:

1. Any third party directly involved in the underlying action which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s).
2. Multiple Claimants should not be limited collectively to the 25-page limit for Written Statements but shall be entitled to their own individual page limits. Unnecessary and unreasonable costs generated as a result can be addressed by the Panel when making costs awards.
3. Requests should be determined by the IRP Panel and not by a Procedures Officer.

Appeals:

1. Appeals be made to an Appeals Panel, being a subset of the Standing Panel, between 5 and 7 members, who did not hear the original IRP and who have no other conflict of interest. The Standing Panel should number sufficient members to allow for this.
2. Costs of the appeal should be in the discretion of the Appeals Panel, but there should be a presumption that a losing appellant will bear the other party’s reasonable costs of the appeal.

Costs:

1. Include language within § 15 to the effect that “Nothing in these IRP Supplementary Procedures is intended to supersede ICDR Rules, Article 20(7) and Article 21(8), including the right to request an interim order allocating costs arising from a party's failure to avoid unnecessary delay and expense in the arbitration”.

**Application of the updated rules to existing but unresolved IRPs**

The Report of the IRP IOT explains that the IOT was unable to reach full consensus on the applicability of the updated rules to existing but unresolved IRPs. This issue was therefore referred to the full CCWG-Accountability, which decided not to provide for such retroactivity due to concerns as to unintended consequences, including increased complexity and potential Bylaws violations resulting from doing so.

In considering this issue in particular, and the draft IRP Supplementary Procedures in general, it is important to bear in mind the intended purpose behind developing an amended IRP, namely to enhance ICANN's accountability to those impacted by its actions and inactions and specifically "to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws" (see Para 174 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations) and that ICANN should be "held to a substantive standard of behaviour rather than just an evaluation of whether or not its action was taken in good faith"( Para 175 *ibid.*). Consequently, the CCWG-Accountability proposed several enhancements to the IRP "to ensure that the process is:

- Transparent, efficient and accessible (both financially and from a standing perspective).
- Designed to produce consistent and coherent results that will serve as a guide for future actions." (Para 176 *ibid.*).

It is the IPC's view, therefore, that in considering the question of whether the amended rules should have retroactive effect we ought to bear these aims in mind and deliver this increased accountability where possible, without re-opening matters which have already been dealt with. In doing so, the IPC considers that it is necessary to take account of the nature of the amendment, and specifically to consider whether the amendment is one which is governed by the Bylaws, or whether the Bylaws merely grant discretion to the IOT to determine the relevant standards and rules.

#### Amendments governed by the Bylaws

In the former case – for example the amendment to the standard of review – the relevant provisions were adopted in October 2016 with the amended Bylaws. The implementing rules contained within the IRP Supplementary Procedures should therefore apply to any IRP arising from events which post-date the adoption of the revised Bylaws since that is the point at which all parties became bound. We understand that this is the intention, since the IRP Supplementary Procedures state that "These procedures apply to all independent review process proceedings filed after [insert effective date] of the Bylaws." To the extent, however, that matters have already been dealt with under the old rules in an ongoing IRP we would suggest that they should not be reopened, unless it would be unjust and unreasonable to one of the parties not to do so.

#### Amendments for which the IOT had discretion

For matters covered by the IRP Supplementary Procedures which were left in the revised Bylaws to the discretion of the IOT, including matters relating to the timing to make a claim, conduct of hearings, and the availability of appeals, these new rules should apply to any IRP arising from events post-dating the adoption of the IRP Supplementary Procedures, but not to IRPs which are already underway at adoption. To provide otherwise could lead to unfairness, since the parties to an IRP could be expected to have taken the existing rules into account when reaching their decision whether or not to proceed, and would not have had the opportunity to consider rules which were not then in existence.

## Time limits for filing

### Time to bring Claims is too short and has no constructive knowledge element

Although the IPC appreciates the need for finality and closure with respect to the community's ability to bring IRP proceedings, the IPC is concerned by the brevity of the proposed deadlines for filing IRPs – within 45 days of when the complainant becomes aware of the harm and no more than 12 months from the ICANN action or inaction causing the harm. See Draft IRP Updated Supplementary Procedures at 6.

First, this standard limits the filing period based on a potential claimant's actual knowledge of the harm, and does not include a constructive knowledge element, as envisaged in the ICANN Bylaws. See ICANN, Bylaws Section 4.3(n)(iv)(A) ("The time within which a Claim must be filed after a Claimant becomes aware **or reasonably should have become aware** of the action or inaction giving rise to the Dispute.") (emphasis added). Although this formulation is likely an intentional omission by the IOT, imposing too short a time frame based on actual knowledge of a harm caused by ICANN action or inaction could be unduly prohibitive for potential claimants, and could invite "gaming" to extend the limitations period.

Indeed, while certain harms might be readily apparent within 45 days, others, and particularly those that might impact only discrete portions of the community, might reasonably take longer, even potentially longer than the 12-month final limitation on bringing claims following the ICANN action or inaction.

In this regard, we note and agree with the advice of Sidley Austin LLP in their Memorandum dated 4 January 2017. Sidley comments that the 12-month cut off for commencing a claim may have been selected by the IOT as designating the maximum time limit within which the claimant "reasonably should have become aware," and that if so "such a determination would be subject to criticism and it could result in claims being foreclosed before an injury, and hence any knowledge of any injury, had even arisen". Sidley advises that "Applying a strict 12-month limit to any IRP claim that commences at the time of the ICANN action or inaction and without regard to when the invalidity and material impact became known to the Claimant, is inconsistent with the Bylaws (and is inconsistent with the terms of Annex 7 of the CCWG Report)".

Further, even where a harm may become apparent with these windows, it may be very difficult for Claimants to prepare and file an IRP complaint within 45 days of actual notice of the actionable event, particularly in the cases where multiple stakeholders are involved. If a situation arose where the IPC was considering filing an IRP, for example, this is not a decision which could be made by the Constituency's leadership without obtaining the approval of its membership which could, potentially, even require a vote. Since the IPC's membership itself includes a number of organisational members this process of consultation and approval must, inevitably, take a little time. We imagine that other Constituencies and Stakeholder Groups may be in a similar position, as would the full GNSO. A 45-day time limit risks denying ICANN's constituent member groups access to the IRP.

Without prejudice to the further comments made below, therefore, the IPC recommends that:

- 1) The adoption of a constructive knowledge element as required under the Bylaws;

- 2) The 45-day time limit be amended to allow an initial filing window of 90 days from actual or constructive knowledge;
- 3) Alternatively, whilst not our preferred option, the 45-day deadline could remain in place with the caveat that only a *de minimis* IRP complaint would need to be filed within that window in order to merely provide notice to ICANN and the broader community, with the ability to file a substantive complaint in a longer period (such as an additional 45 days from the original filing);
- 4) The 12-month time limit be dispensed with for all Claims, since this is inconsistent with the constructive knowledge element. If not removed for all Claims, this should in any event be removed for Claims of “facial” invalidity, as advised by Sidley and addressed in their revised text.

#### Interplay with other accountability mechanisms is unclear

##### 1. Cooperative Engagement Process

Prior to the filing of a Claim, parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process (CEP). It is not clear how long a CEP would take, but would likely run up against the 45-day filing period (even if revised). Based on information contained in the schedule of pending CEPs and IRPs published by ICANN, some CEPs take months or even years to complete. Thus, both the 45 day and any 12-month time limit are potentially impossible to meet if there is a CEP. This is an unsatisfactory ambiguity which ought to be directly addressed, either by the CEP stopping the clock, or by the IRP being formally commenced and then stayed pending the CEP. The latter option is not entirely satisfactory, however, since the work in preparing the IRP Claim would need to be done, and the fees paid to ICDR which may prove to have been wasted if the CEP resolves matters. Therefore, the IPC recommends that any CEP that precedes the filing of an IRP Claim toll any filing limitations period associated with the matter.

##### 2. Request for Reconsideration

Similarly, in many cases community members would first file a Request for Reconsideration (RFR) before resorting to the IRP. For reasons similar to those referred to above in relation to the CEP, the filing of a RFR on the issue should also toll the deadline, and the IPC recommends that the IRP Supplementary Procedures should specifically identify and address this interplay between the RFR and the IRP. As with the CEP, the RFR could resolve the matter before the need to file an IRP, but in the event it does not, the deadline for filing the IRP should remain intact.

##### 3. Community Engagement and Escalation

Further, the CCWG-ACCT Report for Work Stream 1 states that “All of these community powers can only be exercised after extensive community discussions and debates through processes of engagement and escalation. The process of escalation provides many opportunities for the resolution of disagreements between parties before formal action is required.” Such “community powers” must presumably include the Community IRP. This escalation and engagement process could not possibly be completed and still allow the 45-day limit to be met (or possibly even a 12-month limitation), thereby potentially denying access to the Community IRP altogether.

The IPC recommends that the interplay between the Community Engagement and Escalation process and any subsequent Community IRP be identified and addressed, and that the deadline for commencement of the Community IRP be tolled.

The IPC believes that it is necessary to amend the filing limitations periods in these ways in order to best serve the underlying goal of providing adequate due process and properly effectuate the enhanced accountability mechanisms. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (discussing discretion of States in erecting reasonable procedural requirements for triggering or foreclosing the right to an adjudication).

#### Time for Payment of Fees

The requirement to pay the filing fee within 3 business days of filing the request may be impractical. Many entities and organisations require an invoice in order to make such a payment and experience of some IPC members is that ICDR does not issue invoices within such a short timeframe. A more practical solution would be to require payment within a set time of receipt of the invoice from ICDR, and we would suggest that 5 business days is the minimum appropriate time.

#### **In-person hearings and cross-examination**

The IPC supports the proposed language which seeks to limit the holding of in-person hearings and calling of live witnesses to only those exceptional circumstances where the requesting party can demonstrate that this is necessary for the fair resolution of the Claim and the furtherance of the purposes of the IRP, and where appropriate balancing consideration has been given to the additional time and costs which would be incurred by all parties. See IRP Supplementary Procedures § 5.

#### **Consolidation, intervention and joinder**

Under the existing IRP Supplementary Procedures, the only way for a third party to “intervene” in an IRP proceeding would be for that party to submit a statement at the request of the IRP Panel. See IRP Supplementary Procedures § 5 (“The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, **or from other parties.**”) (emphasis added). The draft Updated Supplementary Rules do not fully resolve IPC concerns about the ability of interested third parties being able to intervene or join an IRP proceeding. First, the draft merely permits **an existing party** to request the appointment of a Procedures Officer to determine whether other parties should be permitted to intervene or join the proceeding. The draft then states that any person or entity qualified to be a Claimant may intervene in an IRP with the permission of the Procedures Officer, but it is not clear what would happen if a party does not request the appointment of a Procedures Officer in the first place. In our view it is not appropriate for such important decisions to be made a Procedures Officer or by the Dispute Resolution Provider; decisions on whether to allow consolidation, joinder or intervention should always be made by the IRP Panel.

In addition, although the IPC understands that IRPs are directed against ICANN, there may be third parties who wish to intervene in support of ICANN's position or to safeguard their own position. This possibility does not appear to be accounted for in the draft which states

only that “Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER”. In particular, where the IRP is being brought effectively to challenge the decision of an ICANN-appointed panel, such as in the case of a Legal Rights Objection (LRO), the IRP would be brought by the losing party. The LRO itself, however, would have been an action between two or more parties and the winning party or parties have a direct interest in the outcome of the IRP and it is inequitable to deny them the opportunity to request permission to intervene.

To rectify these concerns, the IPC suggests that any third party directly involved in the underlying action which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s). Otherwise, the IRP may not afford appropriate due process for all interested parties (not just those who may be aligned with the claimant or claimants on the issue(s) under review).

We see no reason for restricting all Claimants collectively to the 25-page limit for Written Statements. Even where a third party is participating as an additional Claimant it is not inconceivable that the multiple Claimants will have slightly different arguments and positions they wish to advance. It would appear to be a denial of access to justice to impose this limit collectively. We consider that to the extent that there is some increased cost as a result of the parties submitting their own Written Statements, this can be addressed in any costs award made by the Panel as necessary and appropriate.

Again, these rights of intervention and joinder are necessary to serve the due process goals of the enhanced IRP. *Cf., e.g., Martin v. Wilks*, 490 U.S. 755 (1989) (discussing a four-part test for determining whether a lawsuit can proceed in satisfaction of due process in the absence of a necessary party, including (1) whether “a judgment rendered in the person’s absence might be prejudicial to him or those already parties”; (2) whether the court can reduce or eliminate prejudice by “the shaping of relief or other measures”; (3) whether the judgment rendered without the outsider will be “adequate”; and (4) the costs on the plaintiff of a dismissal for non-joinder.).

## **Appeals to the Standing Panel (Section 14)**

### Composition of the Appeals Panel

The Standing Panel is defined as an “omnibus standing panel of at least seven members”. It is thus envisaged that the Standing Panel may consist of more than seven members, even, theoretically, an unlimited number. It may not be practical, therefore, to have the entire Standing Panel hear an appeal *en banc* for the following reasons:

- 1) the number of members may make such a panel unnecessarily unwieldy;
- 2) a Standing Panel which consisted of an even number of members could result in no majority decision being reached (i.e., a tied decision);
- 3) some members of the Standing Panel may be subject to a conflict of interest;
- 4) three members of the Standing Panel will have been the original deciding panellists. This might itself be considered a conflict of interest since it must be extremely difficult for one of the deciding panellists to impartially determine that they made a “clear error of judgment” or applied “an incorrect legal standard”. Certainly there would be

a risk of the appearance or perception of bias which would undermine the appeal process. We also contend that it is contrary to principles of natural justice that those who reached the original decision should participate in the determination of the appeal.

If there is to be an appeal process, the IPC recommends that the appeal be to an Appeals Panel consisting of:

- 1) an odd number of Standing Panel members, being a minimum of 5 and a maximum of 7 members to be selected at random;
- 2) such 5 members to exclude any Standing Panel member who participated in the original decision and any panellists who have a conflict of interest;
- 3) to the extent that the number of available Standing Panellists is fewer than 5, additional Standing Panellists shall be appointed.

Such a solution would not be inconsistent with the Bylaws, which state that “Subject to any limitations established through the Rules of Procedure, an IRP Panel decision may be appealed to the full Standing Panel sitting en banc...” (ICANN Bylaws Section 4.3 (w)).

#### Costs of Appeal

Although matters of costs should be left to the ultimate discretion of the Appeals Panel, it seems reasonable, in the interests of justice, that there should be a presumption that an unsuccessful appellant will bear their opponents reasonable costs of the appeal. Such a provision ought to discourage frivolous appeals with little or no prospects of success.

#### **Costs (Section 15)**

It is common in such proceedings to seek to ensure the good conduct of parties by means of the threat of costs and other sanctions. The ICDR Rules do so at Article 20(7) and Article 21(8). Since the IRP Supplementary Procedures state that in case of conflict between the two sets of rules, the IRP Supplementary Procedures will apply (See IRP Supplementary Procedures § 2), and since the IRP Supplementary Procedures § 15 includes language regarding the treatment of the costs of the IRP, as provided for under ICANN Bylaws Section 4.3(r), the IPC believes it would be beneficial to clarify that no conflict exists in this regard. The addition of language within § 15 to the effect that “Nothing in these IRP Supplementary Procedures is intended to supersede ICDR Rules, Article 20(7) and Article 21(8), including the right to request an interim order allocating costs arising from a party's failure to avoid unnecessary delay and expense in the arbitration” would be beneficial in removing any possible doubt.

Respectfully Submitted,

Intellectual Property Constituency

**Comments of the Noncommercial Stakeholders Group (NCSG)  
on the  
Updated Supplementary Procedures for Independent Review Process (IRP)**

January 24, 2017

The NCSG appreciates the opportunity to comment on the [proposed supplementary rules](#) that have been released by the Implementation Oversight Team.

The IRP is a very important part of ICANN's accountability arrangements. As NCSG, one of our main concerns is that IRP challenges can be used to prevent ICANN from taking actions that exceed its mission. In particular, we want strong protections against ICANN moving into content regulation and other more extensive forms of regulating Internet users and uses that are not required to coordinate the domain name system.

With that in mind, we have several major objections to the proposed rules: statute of limitations, notice, rights of intervention and remedies.

1. Statute of Limitations. The current Supplementary Procedures for IRP provides a very limited time for a user to challenge an ICANN policy as violating the mission. The challenge must be made within 45 days of the time the person becomes aware of the harm caused but — far more important — after one year from its passage, a decision or policy becomes *completely exempt* from any IRP challenge. The proposed supplementary rules time-limit IRP challenges to a maximum of one year after ICANN's action, thereby immunizing it from any subsequent challenges. This is an extraordinary loophole.

It could easily take 2-3 years after a policy is adopted for it to be actually implemented by ICANN and cause harm. Under these proposed supplementary rules, no one could challenge the rule if the harms were caused a year after it was passed.

Making matters worse, these problems were pointed out on the email list of the working group during the ICANN CCWG process. Indeed, there was general agreement that the time limit was a problem and should be changed. But through a series of unfortunate coincidences and bad decisions, those objections were ignored and the Implementation Oversight Team (IOT) pressed ahead with the originally proposed text.

Time limits make sense when one is dealing with commercial contractual disputes, such as disputes between ICANN and a new top level domain applicant or a registrar. Those disputes pertain to specific decisions of ICANN, not to its overall mission and not to consensus policies that might violate the mission or core commitments. Clearly, we don't want commercial actors to be able to hold ICANN in a state of perpetual uncertainty regarding decisions or actions in the



narrow domain that it regulates. But the time limits make no sense at all when applied to disputes over consensus policies that are alleged to transgress mission limitations. The mission limitations are meant to protect fundamental individual rights, and to permanently constrain ICANN's mission. They are not matters of expediency and are not time-dependent. If a policy allows ICANN to expand its mission beyond its intended remit, the actions it takes under that policy should be subject to challenge at any time.

In attempt to downplay the significance of this problem, some have argued that after a policy becomes immune to IRP challenge, if ICANN takes an action *implementing* an ICANN policy that is itself a violation of the mission limitations or bylaws, that is a separate event. Hence the clock would start again, and we would have another year to challenge the implementing action.

There are many flaws in this interpretation. One obvious one is that such an IRP challenge would not be against the *policy itself*, it would only challenge the implementing action. This means that a successful challenge would not prevent any future implementations of the policy that might transgress mission limitations. Furthermore, the immunity of the policy itself from challenge would stack the deck against challengers.

But there is an ever more serious problem with relying on implementation actions to challenge policies. Only ICANN actions can be challenged under the IRP. So if the implementing action is by a Registry, it cannot be challenged under the IRP. This takes us back to the pre-transition position where only Registries are protected by the IRP, and any other "materially affected parties" are not. Registries, who are acted on by ICANN, would always be able to challenge an implementing action by ICANN. But Registrants, who are acted on indirectly through Registries and Registrars, would quickly run out of time to challenge the policy behind the Registry action and cannot challenge the Registry's implementation. As representatives of registrants (non-contracted parties), NCSG finds this unacceptable. Thus, we respectfully but firmly submit that the 12-month hard time limit on IRP challenges to Board policy decisions must be removed from Section 4.

Our second part of this objection is the brevity of the arbitrary 45-day time limit within which a claimant must act after having become aware of a material harm. Here our objection is not philosophical in nature -- we readily acknowledge that some time limit on action is appropriate, as claimants should not be permitted to "sleep on their rights" once aware of their injury. However, from a practical standpoint 45 days is simply too short a time period for claimants. This is particularly true if the potential claimant is a collective body (like the NCSG) where significant public actions need to be coordinated with numerous members and other stakeholders. Add to this the necessity of finding and retaining counsel (not to mention the mechanics of funding the endeavor) and our view is that 45 days is far too short a time frame within which to reasonably expect action. To be candid we would think that 180 days is an appropriate time frame -- after all most judicial systems world-wide have limitations periods that

are measured in years, rather than days or months. In the spirit of constructive compromise, however, we would be satisfied if the limitations period were increased to 90 days.

The NCSG notes that the legal team from Sidley and Austin that is working with the IOT essentially agrees with the criticism of the IRP supplementary rules we have advanced here. The implementation team had an “agreement in principle” that “An action/inaction by ICANN that is facially invalid (i.e. it could not be implemented in a way that did not violate the Articles or Bylaws) could be challenged anytime.” The Sidley-Austin analysis concludes,

As currently drafted, Section 4 of the Draft Supplemental Rules does not capture the Agreement in Principle described above. ...[A]s currently drafted, a facially invalid action or inaction could not be challenged by a claimant if the material impact to the claimant (harm or injury) arose at a time such that the claim could not be filed within 12 months from the ICANN decision that created the facial invalidity.

The Sidley-Austin report goes on to state that:

It may be that the IRP Subgroup has determined that 12 months is the period in which a claimant reasonably should have known of the action or inaction giving rise to the Dispute in all circumstances (or in all circumstances other than where the challenge is on facial invalidity grounds); however, we think such a determination would be subject to criticism and it could result in claims being foreclosed before an injury, and hence knowledge of any injury, had ever arisen.

We believe that the legal advice provided confirms our concerns; moreover, the legal experts concluded that “Exempting facial challenges from the 12-month rule would not create limitless jurisdiction.”

## 2. Notice

In the real-world, an Appellant seeking to overturn a decision he/she/it lost or a regulation he/she/it does not like must provide notice to the Appellee. It’s a fundamental part of due process to allow everyone directly-involved in an underlying proceeding to come together to participate in its appeal.

But those who lose arbitration decisions, e.g., Community Objections at the International Chamber of Commerce (created as part of the New gTLD procedures) have no such obligation. The losers of such Objections can (and do) file CEP and IRP actions without ever telling the winners that these actions have been filed. Further, it may be weeks before ICANN published the notice telling the world that such challenges have been filed.

It made be further weeks before the filings and pleadings of the IRP proceeding are published by ICANN on its webpage, and such a website is quite obscure and followed by only a handful of parties to begin with. It is likely to be well into the process before Communities (and other directly-impacted parties) have any idea that filings against their claims, winning decisions and interests have even been filed.

The same injustice will arise when a Consensus Policy is challenged (which it may be under the ICANN Bylaws). There is currently no requirement that the Claimant filing an IRP must give notice to the Supporting Organization which created and passed the Consensus Policy. Such lack of notice is a violation of due process - the Supporting Organization and its Stakeholder Groups the right to know that a challenge has been raised -- they have the right to timely and "actual notice."

As discussed above, in a commercial arbitration there are traditionally only two parties, so notice is not an issue. But with the expansion of access to the IRP proceeding - for a range of new types of disputes- actual notice now not only makes sense, it is critical to protection of the fundamental rights of all the parties.

It makes no sense when there are directly-involved additional parties -- such as noncommercial Communities who have fought the high barriers of a Community Objection and prevailed - to be left out of a challenge to their decision when the losing party (the applicant in this case) files an IRP proceeding with ICANN.

It further makes no sense when the IRP is acting as a "Constitutional Court" to review a Consensus Policy that the whole of the Supporting Organization that negotiated that Consensus Policy is left out. ICANN Counsel is outstanding, but it is the Supporting Organization and the ICANN Community that negotiated, wrote and passed the Consensus Policy and they, too, must know when a challenge to that policy is filed.

Actual notice - requiring the Claimant to file copies of its Request for an IRP together with all pleadings, exhibits, appendices, etc, is a standard part of due process in litigation and dispute forums around the world - and as easy as adding appropriate "cc's" to the email filing the claim with ICANN.

### 3. Right of Intervention

Currently, the IRP *Updated Supplementary Procedures* only have the disgruntled party and ICANN as the parties to the proceedings. All others have to apply to accepted -- and the first argument the Claimant's Counsel makes is "No!" That's not the procedure in any other litigation forum which practices due process. Everywhere else, all parties to the underlying proceeding have the ***right to intervene -- the right to be heard in the challenge to their proceeding.***

Here too, such a Right of Intervention (a material change to Section 7 of these Procedures) must be added.

It only makes sense as ICANN was not a party to the underlying proceeding and does not know the arguments made. Working with ICANN, a winning party or Community must have the right to represent its own interests.

Should the winning party not have the time and resources to fully engage in the IRP, they should at least be able to file proceedings analogous to *Amicus Briefs* to inform the IRP Panel of information that is materially-relevant to the proceeding and of which the winning party may be in sole possession.

Similarly, for a challenge to a Consensus Policy, the Supporting Organization and its Stakeholder Group must be in a position to defend their work. The negotiation of the PDP in a Working Group takes months and even years. The research done, the negotiations made, the public comment received, and the compromises sought are all part of the record which the Stakeholder Groups will know. No single party, perhaps a company upset with the compromise, should be allowed to unilaterally challenge or seek to renegotiate a Consensus Policy without all other equally-engaged parties being allowed on an equal basis into the "IRP Room."

### 3. Emergency Panels and Interim Measures of Protection Must be Openly Heard with All Relevant Parties Present

It is very easy to believe something is an emergency when you only hear one side. IRP Panels and Emergency IRP Panelists are being asked to make major decisions without hearing from all sides who are directly-impacted by a decision.

So an IRP Panel may hear that a Winning Party is seeking to stop the implementation of a Consensus Policy (pending an IRP Proceeding that may take months or longer). What would be the impact of such a delayed implementation -- or implementation actually stopped after having commenced?! ***Clearly, all of those directly impacted by delay of a Consensus Policy (including registries, registrars, and registrants) must be allowed to comment on the impact of that delay. If the Emergency Request impacts contracts already passed, EU Privacy Shields already in place, etc., it is the party directly impacted by the delay or cessation of the policy that will be in the best position to comment on the directly harm of its even temporary cessation.***

The IRP Panel or Emergency Panelist has the right and obligation to hear about the harms from all sides or it cannot properly evaluate "[t]he balance of hardships" as required by the *IRP Supplementary Procedures* in Section 10.

#### **4. Returning a Consensus Policy to the ICANN Board and the Supporting Organization Which Wrote It to be Rewritten**

After many months or even years of work, Supporting Organizations produce Consensus Policies. If on review through this new IRP “Constitutional Court” proceeding, the IRP Panel finds that some portion of the Consensus Policy does not comply with ICANN Bylaws or process and needs to be rewritten, who should do that?

In the real world, appellate courts remand such laws and regulations back to the experts who created them -- back to the legislators and regulators. Then, those groups review those portions of the rules that need be reviewed and rewritten and do so pursuant to their rules -- and with full notice to their Communities.

We’ve stepped into the IRP as a Constitutional Court without adequate consideration of the limitation of their powers. Like appellate courts in countries, the IRP should only be judging what and what is not consistent with ICANN Bylaws. The hard work of rewriting those sections of the Consensus Policy that were invalidated below to the communities that created the rules in the first place.

Accordingly, the IRP Panels should send invalidated portions of Consensus Policies back to the ICANN Board which should send it back to the Supporting Organization that created them. Such must be the rules written into the *IRP Supplementary Procedures* “Standard of Review” (Section 11).

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In summary, NCSG expects the supplementary rules to be modified to meet the following criteria:

- The IRP has to protect registrants, not just contracted parties.
- There should be no fixed time limit on the rights of Internet users to challenge a policy that is alleged to take ICANN beyond its mission or otherwise violate the fundamental bylaws.
- IRP challenges need to be able to challenge policies, not just implementations, otherwise registrants are unprotected against registries and registrars.
- While it is reasonable to set a limit on the period in which a registrant is harmed by a policy and files an IRP challenge to the policy, 45 days is too short. Three months is more appropriate given the need for ordinary registrants to consult with lawyers and assess the damage caused by a policy.

We further look forward to the supplementary rules being evaluated and wisely updated to resolve critical due process issues pointed out above and ensure to directly-impacted, materially-affected parties:

- Actual notice,
- Rights of intervention,
- Rights to be heard in emergency proceedings evaluating “interim measures of protection” and “balance of hardships,” and especially
- Remedies of the IRP Panel when a portion of a Consensus Policy is set aside. Clearly the Community must be called upon to rewrite this Consensus Policy together and through its well-established procedures.

We greatly appreciate your upcoming work in these areas.



**Etienne Sanz de Acedo**  
Chief Executive Officer

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Submitted to: comments-irp-supp-procedures-28nov16@icann.org

January 27, 2017

Karen Mulberry  
Director, Strategic Initiatives  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

Re: Updated Supplementary Procedures (USP) for Independent Review Process (IRP)

Dear Ms. Mulberry:

The International Trademark Association (INTA) appreciates this opportunity to comment on the on the draft Independent Review Process (IRP) Updated Supplementary Procedures (USP) prepared by the IRP Implementation Oversight Team (IOT). INTA generally supports the changes that have been proposed in the USP. Nonetheless, we do have some concerns around four issues; the definition of standing, the time for filing a written statement, the scope and application of the USP to pending independent review proceedings (IRP), and the limitations on discovery. We are pleased to contribute our thoughts and recommendations below.

1. Standing to File an IRP Should Include Actual or Imminent Injury or Harm.

The Updated Supplemental Rules build the legal concept of standing into the definition of CLAIMANT. In particular, a CLAIMANT is defined as being limited to a party “materially affected by a Dispute” and to be “material affected” a claimant “must suffer an injury or harm that is directly and causally connected to the alleged violation.” This is a fairly restrictive view of standing because it fails to offer a remedy for imminent injury or harm. For instance, the United States, which has conservative standing requirements, allows for standing where a complainant can show “actual or imminent invasion of a legally protected interest.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d (1992). This standard enables a CLAIMANT to avoid harm which may allow for a more just outcome rather than to wait until injury or harm is inflicted by an action or inaction. As such, INTA recommends that the definition of CLAIMANT is revised as follows:

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an actual **or imminent** injury or harm that is directly and causally connected to the **conduct complained of**.

Please note that this same definition is repeated in the USP at Section 9 which allows for a summary dismissal for such lack of standing. INTA suggests that Section 9 be clarified as allowing summary dismissal based upon a lack of standing and that the revised definition, as proposed above, is implemented. The standard of actual or **imminent** injury or harm should also be inserted into the USP at Section 11.d. which governs the standard of review for claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract.

## 2. The USP Should Be Applied Retroactively to All Pending IRPs

The USP provision regarding Scope (USP 2) states that the USP shall apply in all cases submitted to the ICDR after the date the USP goes into effect. We submit that the effective date of the USP should be October 1, 2016 which corresponds to the completion of the IANA Transition and the adoption of ICANN's new Bylaws. If the USP does not apply retroactively to the date the Bylaws took effect, there will be inconsistency between the Bylaws and the rules of procedure governing IRPs commenced prior to the USP effective date. Furthermore, to the extent that the USP may be said to represent ICANN's present policy regarding fairness and due process, this could undermine confidence in proceedings governed by the old procedural rules. INTA recommends that for any IRP commenced after the date the new bylaws became effective and before the date the USP becomes effective, there be a mechanism whereby one or more parties to the proceeding may ask for the USP to govern the proceeding, provided there is no material disadvantage to any party's substantive rights. The text of Rule 2 of the USP contains language that could be used to define the process and articulate the relevant tests.

## 3. Time for Filing a Written Statement is Inadequate

USP Rule 4 states that "a CLAIMANT shall file a written statement of a DISPUTE with the International Centre for Dispute Resolution (ICDR) no more than 45 days after a CLAIMANT becomes aware of the material effect of an action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction."

INTA believes that the 45 day period for filing a written statement with the ICDR is insufficient for a claimant to adequately analyze and develop a bona fide claim and prepare a written submission. Given the likely complexity of any such claim and issues such as geographic distance among relevant parties, INTA is concerned that 45 days will almost never be an adequate amount of time for gathering, collating and analyzing all the necessary information for mounting an IRP. The result is likely to be a chilling effect on claims of this sort because the costs and benefits of filing a written statement will be outweighed by the low likelihood of success due to the lack of sufficient time to obtain and organize the relevant facts, consider the issues and prepare appropriate submissions. INTA recommends adopting a 90 day deadline.



In addition, INTA has concerns that the ultimate deadline for commencing an IRP, namely 12 months from the date of the action or inaction giving rise to the claim, is also insufficient. INTA suggests that the IOT consider increasing this time period from 12 to 24 months, as it is plausible that the effect of an ICANN Board or ICANN staff action or inaction may not be known to a party within 12 months of the action or inaction.

#### 4. Certain Discovery Methods Should be Allowed based on a Good Faith Need for Information

USP Rule 8 provides that “depositions, interrogatories, and requests for admission will not be permitted.” INTA is concerned that a blanket prohibition on depositions, interrogatories and requests for admission will prevent a claimant from discovering facts that are necessary to its case. INTA believes that witness testimony and interrogatories are important methods of discovery that should not be peremptorily ruled out. Claimants preparing claims of this nature are unlikely to have all the necessary facts in their possession, and in some cases the facts will be difficult to acquire through the documentary discovery outlined in USP Rule 8. To ensure fairness and allow for adequate discovery, INTA recommends that a claimant be given an opportunity to demonstrate a good faith need for either a deposition or interrogatories based on the standard used to determine whether a witness is necessary at the hearing, namely, that the deposition or interrogatory requests (1) are necessary for a fair resolution of the claim; (2) are necessary to further the purposes of the IRP; and (3) considerations of fairness and furtherance of the purposes of the IRP outweigh the time and financial expense of the deposition and/or interrogatory requests. INTA would support that a limited number of requests for admissions be allowed. Moreover, the Updated Supplemental Rules permit relevant and material documents to be withheld on the nebulous grounds that the documents are “otherwise protected from disclosure by applicable law.”

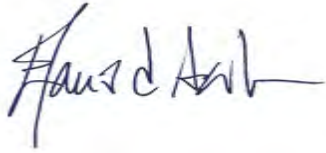
INTA believes that the reference to other “applicable law” is too vague and could encompass, for instance documents that are subject to a confidentiality agreement. In addition, this standard allows parties to forum shop and re-locate documents to jurisdictions that have laws protecting disclosure of documents outside of international legal norms. INTA recommends that, to the extent documents are subject to confidentiality restrictions, that the parties should be able to produce documents subject to a protective order. Moreover, INTA suggest striking “otherwise protected from disclosure by applicable law” and replacing it with “otherwise protected from disclosure by a valid order of a court with competent jurisdiction.”

#### 5. About INTA

INTA is a 137 year-old global not for profit association with more than 6,400 member organizations from over 190 countries. One of INTA’s goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. INTA has also been the leading voice of trademark owners within the Internet Community, serving as a founding member of the Intellectual Property Constituency of ICANN. INTA’s Internet Committee is a group of over 200 trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.

Should you have any questions about our comments, I invite you to contact Lori Schulman, INTA's Senior Director of Internet Policy at 202-261-6588 or at [lschulman@inta.org](mailto:lschulman@inta.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Etienne Sanz de Acedo". The signature is fluid and cursive, with a long horizontal stroke at the end.

Etienne Sanz de Acedo  
Chief Executive Officer

# ISPCP

**The Internet Service Provider and Connectivity Provider Constituency**

**ICANN**

30 January 2017

## **ISPCP Comments on ICANN Updated Supplementary Procedures for Independent Review Process**

The Internet Service Provider and Connectivity Providers Constituency (ISPCP) welcomes the opportunity to submit comments on the ICANN Updated Supplementary Procedures for Independent Review Process (IRP). See: <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>.

The ISPCP's comment on the Updated Supplementary Procedures for Independent Review Process, a.) expresses concern about the proposal of a 45-day clock, b.) recommends an explicit definition that the Standing Panel is comprised of at least seven members, and c.) recommends including sections relevant to the language accommodations for dispute resolution, as recommended by the International Center for Dispute Resolution.

### **ICSPCP Concern About Timing and Time Tables**

The ISPCP is concerned that the time limit of 45 days is impractical given the ICANN process and nature of such rules of procedure. Specifically, the ICANN bylaws indicate the rules of procedure “are intended to ensure fundamental fairness and due process” and “shall be informed by international arbitration norms”. As there are *currently no time limits to bring forth an IRP*, moving to a system that now has a 45-day clock would not be acceptable especially as current precedent demonstrates there being no time limit for any such matters. The proposed time limits are both unreasonable and novel, so could reduce ICANN's accountability to the community.

The proposed times do not reflect the reality of how slowly ICANN's processes move. Policy development, board adoption and actual implementation can take years. How can someone be expected to determine if they will be harmed by a policy within the suggested 45 days, when such harm could take years to fully appreciate? This novel approach seeks to impose an arbitration system on largely non-contracted parties, who have not consented in contractual form to these rules of procedure. This is vastly different from a situation where two parties explicitly consent to dispute resolution terms via a contract. Due to this, ICANN should and must err on the side of caution when allowing a party to bring an action.

Therefore, the ISPCP encourages ICANN to reconsider those time limits and revert to timelines that are more practical for stakeholders engaged in the Independent Review Process. This would include, if necessary, a moratorium on the adoption of any time limits in the Updated Supplementary Procedures, until some further studies can be done to analyze the potential impacts of such time limits.

### **Other Matters of Support, Clarification, or Concern**

The ISPCP supports the efforts of the IRP Implementation Oversight Team, the ICANN legal team, and the external counsel of the CCWG-Accountability in reviewing, updating, and providing these Supplementary Procedures for comment. The need for review procedures that adhere to international standards is an admirable goal for an organization such as ICANN given its depth and breadth of global activity and impact.

Thus, the ISPCP supports the use of the International Centre for Dispute Resolution's (ICDR) procedures to amend the current Review Process:

1. The ISPCP supports the explicit statement that the Standing Panel is comprised of at least seven members, and recommends retaining this language in the final draft submitted to the ICANN Board. However, while the number of members is indeed mentioned in a prior section of the ICANN Bylaws, the ISPCP believes it would be useful to clarify and emphasize the size of the Standing Panel for the benefit of those claimants bringing a dispute.
2. The ISPCP is concerned about the lack of mention of language accommodations. The ICDR, in its guidance documents for drafting dispute resolution documents, recommends including a description of the language of the arbitration immediately following the definition of the place(s) of arbitration. While the draft text adequately describes the importance of location and region by allowing virtual hearings, the question of language or accommodation is not addressed. The ISPCP asks that appropriate text regarding language be included. Again, even if the expectations for language and ICANN's are defined elsewhere in the Bylaws, it is beneficial to restate them here in the IRP section.

The ISPCP thanks members, volunteers and the IRP Implementation Oversight Team, the ICANN legal team, and the external counsel of the CCWG-Accountability for their work on this process and stands ready to assist.

This comment was drafted by the ISPCP's Public Comment Drafting team. It was approved for submission through the regular January 2017 ISPCP mailing list approval process.

Submitted on behalf of the ISPCP Constituency.

Mark McFadden

## **The standing requirement ("materially affected") is too restrictive**

- *To:* comments-irp-supp-procedures-28nov16@xxxxxxxxxx
- *Subject:* The standing requirement ("materially affected") is too restrictive
- *From:* Karl Auerbach <karl@xxxxxxxxxxxx>
- *Date:* Fri, 2 Dec 2016 07:43:00 -0800

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The standing requirement that one be "materially affected" is excessively legalistic and narrow.

ICANN exists to serve the community of internet users. Many ICANN policies affect huge numbers of people - the number is measured in the millions if we encompass only domain name registrants and exclude those who are merely affected less directly.

The "materially affected" limitation adopted from United States court practices. The rationale for those court practices does not apply to ICANN.

The "materially affected" standard ought not to apply to questions raised by a member of the public about an act of ICANN, an entity whose very existence is premised on benefiting the public interest.

The proposed "materially affected" standing limit will further empower those who have financial interests in matters regulated by ICANN and correspondingly disempower those who merely suffer, en masse, a shared harm that is difficult to measure on an individual basis.

The foundation for standing should be broadened to recognize several factors. At a minimum it should encompass any person who uses a domain name, IP address, or IANA protocol parameter. At a minimum it should encompass any person or entity listed in any "whois" entry. It ought to encompass any person or entity that constitutes the "public" as construed by the California law of "public benefit" corporations under which ICANN has obtained its legal existence. Ideally, as has been said "the internet is for everyone", and thus "everyone" ought to have standing to complain when ICANN goes awry.

--karl--

Karl Auerbach

(Former publicly elected member of the ICANN Board of Directors for North America)

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## **The 45 day/12 months time limits seem unreasonably short**

- *To:* comments-irp-supp-procedures-28nov16@xxxxxxxxxx
- *Subject:* The 45 day/12 months time limits seem unreasonably short
- *From:* Karl Auerbach <karl@xxxxxxxxxxxx>

- *Date:* Fri, 2 Dec 2016 07:19:00 -0800

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The proposed limits on filing - 45 days after becoming aware (and within a 12 month limitation window) are significantly too short.

Given the significant and evolving complexity of ICANN's structure and its layers of organic documents and procedures, only the most affluent of people or organizations could comprehend, research, and write a proper submission in a mere 45 days. As a consequence these time periods effectively shut out most members of the internet community - and, correspondingly, will increase the relative authority of those interests that have enough money to hire services - usually in the form of a large and expensive law firm - to react within the small time window.

By-the-way, are those 45 days calendar days or business days?

The twelve month limit will act as a kind of concrete that locks-in decisions in which the ill aspects take a long time to emerge and be understood. Moreover, many aspects may not emerge until put into actual practice; and we know from experience that in ICANN, it often takes years to transform a decision into practice so that its effects may be perceived. In addition, if an action of ICANN violates its principles then the door to correction ought to never be closed.

The 45 day period ought to be changed to be least six months (180 days) after awareness; and the 12 month limit ought to be at least doubled, or better, removed entirely.

--karl--

Karl Auerbach

(Former publicly elected member of the ICANN Board of Directors for North America)

## **Fletcher, Heald & Hildreth, P.L.C. Comments in Response to the New Draft of the “Updated Supplementary Procedures” for ICANN’s Independent Review Process**

Thank you to the IOT Team for its hard work on the *Draft Updated Supplementary Procedures*. We have analyzed them closely and respectfully submit there is a long way to go until they are complete. To ensure “fundamental fairness and due process” (guaranteed by *Draft Updated Supplementary Procedures*, Section 5, *Conduct of the Independent Review*), we share the following critically necessary changes to the provisions addressing Notice, Intervention by Right, Opportunity to heard in review of Emergency Petitions, and the scope of remedies IRP Panels may provide in certain types of hearings.

We are particularly concerned about the effect of the proposed *Updated Supplementary Procedures* in two specific circumstances:

- Challenges to decisions from Another Arbitration Tribunal; and
- Challenges to a Supporting Organization’s Consensus Policy.

These are the IRP actions that may be taken pursuant to “decisions of process-specific expert panels” and resulting “from action taken in response to advice or input from any Advisory Committee or Supporting Organization” under ICANN Bylaws, Sections 4.3(b)(iii)(2) and (3).

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### **I. Review of All Arbitration Tribunals (e.g., “Decisions of Process-Specific Expert Panels”)**

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In the ICANN Applicant Guidebook for New gTLDs, the Community and the Board created 3 forums for disputes to be handled by well-regarded, international Dispute Resolution Providers. They are:

- a. The World Intellectual Property Organization (WIPO) for New gTLD Legal Rights Objections;
- b. The International Chamber of Commerce (ICC) for Community Objections; and
- c. The International Center for Dispute Resolution (ICDR) for String Confusion Objections.

The Applicant Guidebook expressly rejected any avenue of appeal from the decisions of these arbitration tribunals. Upon losing the dispute, the rules required an applicant to withdraw their New gTLD Applications. A few applicants nonetheless were permitted to use the IRP to challenge the decisions – but without the Winning Parties’ who had prevailed in the original dispute being present! As a matter of fundamental fairness and due process, winning parties must be given notice of, and be allowed to participate in, such challenges.<sup>1</sup>

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<sup>1</sup> It is easy for a losing applicant to file a Request for an IRP based on the argument that another arbitration forum made a decision that is “inconsistent with the Articles of Incorporation or Bylaws.” But such a proceeding acts as an appeal of the decision of the underlying arbitration tribunal and is grounded in facts and arguments of the underlying proceeding to which ICANN was not a party. The winning party is a much-needed part and a rightful voice of this IRP proceeding.

To protect and effectuate interested parties' fundamental right to participate effectively in an IRP review of an arbitration tribunal's decision, we propose three essential procedural safeguards.

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**A. PROVIDE ACTUAL NOTICE TO ALL ORIGINAL PARTIES TO  
AN UNDERLYING THIRD PARTY PROCEEDING**

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First, the rules of the *Updated Supplementary Procedures* should provide actual and timely notice of any appeal of or other post-decision challenge of any underlying decision to (a) all parties to the underlying arbitration proceeding and (b) plus notice to the underlying tribunal provider (called the "Dispute Resolution Provider" in the New gTLD Applicant Guidebook).

Fair is fair: all affected entities should know when an appeal or challenge to a dispute has been brought, and very few people actually read and follow ICANN's IRP page. (Further, initial notices, briefs and other filings in IRP actions are often posted weeks after they were filed – creating a disadvantage for other materially affected parties from the start.)

Such actual notice is fully consistent with the rules governing the original dispute. For example, all Dispute Resolution Providers for New gTLD Objections (e.g., WIPO, ICC, and ICDR) require that ALL Notices, Filings, Pleadings, and Communications of the Parties to the DRP – from the very start of the Community, String and Legal Rights Objections – be copied in realtime and, at the time of filing be sent to all other parties in the proceeding. Fundamental fairness and due process in the IRP require nothing less.

Accordingly, the *Updated Supplementary Procedures* must include a new Notice Provision, to include:

1. **"Where the filing invokes New ICANN Bylaws Section 4.3(b)(iii)(A)(3) – i.e., the Covered Action 'resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws' – the Claimant must:**
  - a. **Send a copy of its Notice of Independent Review Process and its Request for Independent Review Process together with all statements, exhibits, attachments, legal authorities, witness statements, and other reports or materials to all Parties to the original "process-specific expert panel" proceeding and decision;**
  - b. **Use the most recent email addresses available for the Representatives of the Parties: i.e., either those email addresses used by the expert panel when that panel provided its decision to the Parties or, if the Claimant has actual knowledge of a change of email address, to the new email address of a Representative of a Party (e.g., where a law firm has merged and changed email addresses) and submit a signed, scanned statement attesting to the electronic delivery of all of the materials commencing the proceeding to all Parties to the Underlying Decision and to the Dispute Resolution Provider and list the names and email addresses of those who were sent these filing materials; and**
  - c. **If a Claimant does not comply with the above procedures within 24 hours of submitting its Request for IRP, the process shall terminate.**



2. ICANN Staff shall send a follow-up notice of Commencement of the IRP proceeding to the Dispute Resolution Provider that administered the “process-specific expert panel” and to all Parties to that decision.

3. The Claimant, ICANN, and the IRP Panel and Administrators shall send to the Dispute Resolution Provider and all Parties to the underlying proceeding all correspondence, filings, and communication with ICANN, the IRP Panel, and the IRP Forum Provider. No part of an IRP dispute involving a third-party “process-specific expert panel” shall take place *ex parte*. All Parties to the underlying proceeding shall be copied on all matters in the IRP unless they “opt-out” by email to ICANN and the IRP Forum and request to be removed from distribution.”

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**B. PROVIDE A MANDATORY RIGHT OF INTERVENTION TO ALL PARTIES TO THE UNDERLYING ARBITRATION PROCEEDING FOR WHICH REVIEW IS SOUGHT**

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Second, the Updated Supplementary Procedures must permit any party to an arbitration proceeding resolving a gTLD dispute to intervene as a matter of right in an appeal of or other post-decision challenge to the arbitral decision. While losing Claimants may dream of enter into a room with ICANN alone to privately challenge their losing decision in an underlying tribunal, such private challenges are fundamentally unfair and a violation of due process to the winning party and every other party that participated earlier. Such challenges also are inconsistent with the legal systems of all developed countries. All parties to the underlying proceeding should have an equal opportunity to be heard.

(Due to the “consolidation” that is recommended in the ICANN rules for third-party proceedings, such as the Community Objections, there can be multiple parties in such a proceeding. Each party has a right to be heard and participate.)

Winning parties (and other losing parties) may or may not choose full participation in an IRP proceeding, as they may not have the time, inclination, or funding to do so. To assure that at least cost is no barrier for such parties’ voices, concerns, and defenses to be heard, the following critical options should be added to the Updated Supplementary Procedures to ensure that all relevant information is made available to the IRP Panel:

**To Section 7. Consolidation, Intervention, and Joinder, add:**

**“A. As a matter of right, any Party or Parties to the decision of a “process-specific” expert panel shall be entitled to participate in an IRP proceeding challenging that decision as a matter of right. In such a case, any Party to the underlying proceeding may:**

1. **Submit a “Request to Intervene as a Full Party.” The other Party or Parties may then participate fully in:**
  - a. **The selection of the IRP Panelists;**
  - b. **Any pre-hearing motions, including Emergency Petitions, Procedural Pleadings (e.g., Motions to Dismiss for Lack of Standing or Timeliness), and Substantive Pleadings (e.g., reasons to reject the pleadings for lack of merit);**
  - c. **Any Discovery that is conducted; and**
  - d. **Any Hearings that are held.**
  - e. **Parties who chose to intervene in this full manner shall be responsible for their share of the costs of the IRP Panel, which shall be shared equally**

with the side that they are supporting (e.g., ICANN’s side or Claimant’s side). Such a “Request to Intervene as a Full Party” must be reviewed by the ICDR to verify the claim of Party status in the underlying proceeding is truthful. Upon such verification, intervention will be allowed. No argument against such intervention will be allowed by the IRP Forum and, if made, will be denied.

2. Alternatively, any Party or Parties to the decision of a “process-specific” expert panel shall be entitled individually, collectively, or in combination thereof, to file a “Friend of the IRP” Brief in response to:
  - a. Claimant’s Request for Independent Review Process;
  - b. Any Pre-Hearing Motions, including Requests for Emergency Relief and Procedural Pleadings (e.g., Motions to Dismiss for Lack of Standing or Timeliness); and
  - c. Any Additional Memoranda, Supplemental Memoranda, Post-Hearing Briefs and similar substantive material presented to the IRP Panel.

**Submissions by the Winning Party or Parties of “Friend of the IRP” Briefs and Responses shall be of the same lengths as that allowed to the Claimant’s Briefs and Responses with respect to length, with the same right to file exhibits, witness statements, evidence, and similar materials under IRP rules.”**

[Note: while ICANN Counsel is excellent, ICANN was not involved in the preparation or presentation of the briefs, arguments, hearings or other proceedings of the underlying dispute. It was the Parties, e.g., the Community and the Applicant (Community Objections) or another Registry and the Applicant (String Confusion) that presented the case below. Their briefs and arguments are not published and are generally only partially reflected in the decision of the Underlying Dispute Resolution Panel. As the decision of the underlying tribunal may be reversed, the actual arguments, evidence and reasoning presented in the underlying dispute are highly relevant to the IRP Panel and best presented by those who made the arguments. The Party that won the Underlying Proceeding is in the best position to defend its interests and must be allowed to do so.]

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**C. REQUIRE THE IRP PANEL TO HEAR FROM ALL PARTIES TO THE UNDERLYING PROCEEDING BEFORE DECIDING UPON ANY REQUEST FOR INTERIM RELIEF OR DEMAND FOR INTERIM MEASURES OF PROTECTION**

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Third, IRP Panel should be barred from stopping enforcement of the underlying decision or granting other interim relief to a Claimant until the Winning party in the underlying dispute has an opportunity to be heard regarding such relief. While it may be appropriate for losing parties (e.g., the Claimant) to seek to stop the underlying decision from going into effect, ***it is not fair to do so without hearing from the Winning Party or Parties about the harm that will take place if the decision is delayed in its implementation.*** As a matter of fairness and due process, no request for Interim Measures of Protection (provisions set out in Section 10 of Updated Supplementary Procedures) must be allowed to take place without hearing from all other parties to the underlying proceeding; these are the parties who the delay will most immediately impact.

To implement this principle, the following language must be added to Section 10 of the *Updated Supplementary Procedures*:

**To Section 10. Interim Measures of Protection, add:**

**“B. No Request for any of the Interim Measures of Protection sought by the Claimant (including, but not limited to, “prospective relief, interlocutory relief, or declaratory or injunctive relief” shall be heard by the IRP Panel, Emergency Panelist, or any other appointed party, without giving the Winning Party or Parties, and other parties as appropriate, a full, fair, equal, and timely right to be heard.**

- 1. The Winning Party or Parties from any Underlying Arbitration Tribunal shall be entitled to be heard on any or all of the following factors, including:**
  - (i) Harm arising from any Interim Request of the Claimant (or Other Parties that may be added);**
  - (ii) Both: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and**
  - (iii) The balance of hardships and the harm to the Winning Party (Parties) should the Underlying Decision be further delayed in its implementation.”**

[**Note:** As was true in Part I.B, above, ICANN was not a party to the underlying proceeding, so ICANN Counsel would not know the deep, substantial, and real monetary and other harms that may befall the Winning Party should implementation of the decision it won be further delayed or suspended – perhaps for weeks, months or years. Further, how can a Panelist weigh the “balance of hardships” (Section 10 (iii)) without hearing from both sides?]

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## **II. Review, Appeal or Challenge to the Consensus Policy of a Supporting Organization**

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The second, key area of concern regarding the Updated Supplementary Procedures centers on the provisions for reviewing, challenging, or changing “Consensus Policies created by Supporting Organization.” See ICANN Bylaws, Section 4.3(b)(iii)(2). Truly, and with respect, what do senior commercial arbitrators know about our ICANN Multistakeholder Process, and why should ICANN Counsel alone be required to defend the Community’s Consensus Policy – without the Supporting Organization and Stakeholder Groups that negotiated the Consensus Policy in good faith (and great effort) – should these groups choose to participate?

As everyone in our Community knows, and as the revised Bylaws affirm, the Multistakeholder Community charts, negotiates, drafts, edits, reviews comments on, and finalizes Consensus Policy Recommendations. The Council of the Supporting Organization – e.g., the GNSO Council – accepts them (as appropriate), and the ICANN Board approves them (when appropriate and upon review by the Advisory Committees). The ICANN Staff serves as a facilitator of the Supporting Organization’s Policy Development Process, but not the negotiators. In the case of a challenge, therefore, should not the Community be allowed to defend its Consensus Policy alongside ICANN Counsel?

To enable a Supporting Organization to defend one of its Consensus Policies, it needs: a) timely notice to the Supporting Organization of an IRP filing against such a one of its consensus policies, and b) the full

opportunity by the Supporting Organization (and its Stakeholder Groups) to present arguments and evidence in defense of the Consensus Policy in the IRP proceeding.

Further, how far may an IRP Panel go in its ruling on a Consensus Policy dispute? We respectfully submit that fundamental principles of fairness and due process require an IRP Panel not revoke a Consensus Policy unilaterally, but to send back to the Community those parts of the Consensus Policy that it determines need to be revised and reworked.

By analogy, a court that reviews a challenge to regulation generally is not permitted to substitute its own judgment for the expert agency that wrote that regulation. Under the concepts of “judicial remand” and “limited review,” judges generally may not rewrite laws and regulations, but must send them back to the legislators and agencies that wrote them to be reviewed and reworked with the public. For example, In the United States, federal courts regularly find sections of new regulations that they determine are contrary to law or arbitrary and capricious. In such cases, those courts generally send these sections back to the regulatory agency that wrote them – e.g., the Food & Drug Administration, the Federal Trade Commission or the Federal Communications -- to be revised through the public notice and comment procedures of the US Administrative Procedure Act. See 5 US Code Section 706, Scope of Review.

For Consensus Policies, it is only fair that the IRP Panel that invalidates a portion of the policy must send it back to the ICANN Board for revision. The ICANN Board should, in turn, return the invalidated portion of the Consensus Policy to the Supporting Organization for review and revision (with the Community).

We recommend the following three specific changes below to implement this principle.

---

**A. PROVIDE ACTUAL NOTICE TO THE ICANN SUPPORTING ORGANIZATION,  
STAKEHOLDER GROUP, WORKING GROUP CHAIRS AND ICANN COMMUNITY  
THAT DEVELOPED THE CONSENSUS POLICY BEING CHALLENGED**

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The Updated Supplementary Procedures should supplement its new Notice Provision (adding to Section I.A above), to include:

**“4. Where the filing invokes a challenge to an ICANN Consensus Policy, adopted by a Supporting Organization and accepted by the ICANN Board pursuant to the public notice and comment processes of the ICANN Process, Actual Notice to the Supporting Organization and Stakeholders that adopted the Consensus Policy must be provided, as follows:**

- a. The Claimant shall send a copy of the Request for IRP and its Initial Written Statement, with all evidence, exhibits, and attachments, to the Council Chair of the Supporting Organization that enacted the Consensus Policy, the heads of each Stakeholder Group in the Supporting Organization and the Chair(s) of the Working Group that developed the Consensus Policy;**
- b. The Claimant shall submit a signed, scanned statement to ICANN and the ICDR attesting to the electronic delivery of all of the materials commencing this proceeding to all Parties listed in subsection 1 above, and list the names and email address of those who were sent these materials, within 24 hours of submitting its Request for IRP, or this proceeding will terminate; and**

- c. **Within 3 business days of receiving the Notice of IRP and/or Request for IRP in any action involving a Consensus Policy, ICANN Counsel shall publish a Notice of the IRP Action and Details of the Challenge to an Adopted Consensus Policy in the then-current place where ICANN posts matters open for public comment (currently <https://www.icann.org/public-comments#open-public>). (The goal being to provide notice of a challenge to ICANN policy in the place where the Community is most likely to read about policy changes.)**
5. **The Claimant and ICANN shall continue to send electronic copies of all filings, pleadings, requests, and correspondence of the IRP to the Council Chair of the Supporting Organization that passed it, the heads of the Stakeholder Groups, and Chair(s) of the Working Party that created the Consensus Policy unless any party or parties requests to be removed from the distribution list.**

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**B. MANDATORY RIGHT OF INTERVENTION TO THE IRP FOR THOSE WHO PARTICIPATED THE CREATION OF THE CONSENSUS POLICY AND THOSE WHOSE INTERESTS ARE REPRESENTED IN OR AFFECTED BY IT.**

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The Updated Supplementary Procedures also should permit those most closely involved in enacting a particular Consensus Policy to participate by right in any proceeding to modify or repeal it. Allowing a single disgruntled stakeholder to challenge and renegotiate a Consensus Policy with ICANN Counsel alone in their own corporate or personal interest is unfair and does not serve the interests of the Multistakeholder Community. Accordingly, the following changes must be made to the Updated Supplementary Procedures to ensure fair and balanced representation of all materially-affected parties in the right to participate in an IRP Proceeding:

**To existing Section 7. Consolidation, Intervention, and Joinder, add:**

**“The Council of the Supporting Organization that passed the Consensus Policy, any and all Stakeholder Groups that participated in the development of the Consensus Policy, and any and all Chair(s) of the PDP WG that wrote or reviewed the Consensus Policy may intervene as of right in this IRP proceeding.**

- a. **The Council that enacted the Consensus Policy may participate in the choice of Panelists without cost or any escrow payment requirement;**
- b. **The parties listed above, separately, collectively, or in several groups, shall be entitled to submit “Friend of the IRP” briefs to respond to any initial submissions by the Claimant, any supplemental submissions of the Claimant, or other submissions by the Claimant.**
- c. **The parties listed above, separately, collectively, or in several groups, shall be entitled to participate in any hearing that is held, whether online, by telephone, in person, or by other means.**
- d. **The length of the responsive submissions of the parties above shall be the same as the length allowed the Claimant for the submission with respect to which the responsive submission is filed.**

[Note: Similar to Sections I.B and I.C above, ICANN Counsel is outstanding, but never participated in the day-to-day negotiations and compromises of the Policy Development Process. Rather, it was the Community members who researched, reviewed, discussed, debated, drafted and edited the Consensus

Policy; these Community members will be most familiar with the Consensus Policy’s arguments and defense. Since the IRP Emergency Panelist holds the power to “stay” or stop implementation of a Consensus Policy and the full IRP Panel holds the power to reverse or overturn an ICANN Consensus Policy – the result of years of work – it is critical to due process that the Community that participated in the creation of this policy have the right, ability, and opportunity to fully and fairly defend it.]

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### **C. LIMIT WHAT THE IRP PANEL CAN DO WHEN OVERTURNING A CONSENSUS POLICY – STANDARD OF REVIEW AND REMEDIES**

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Certainly the IRP Panel has the power to set aside a Consensus Policy as a violation of the ICANN Bylaws. But how likely is that after months and years of stakeholder input, Community review, Council review and Board review?

More likely is the situation where the IRP Panel finds some aspect of the Consensus Policy to be contrary to ICANN Bylaws – some part, but not all or even most of the Consensus Policy.

Precedent in other areas teaches that when a Community writes a rule that Community should have the right to revise the rule – consistent with any direction or guidance that a judge or tribunal might offer. It is a principle of judicial restraint that a court that sets aside a portion of a regulation or legislation *must send it back to the expert agency that created it to revise it* – consistent with the Community-based proceedings it used originally. To achieve fairness and due process, such must be the case here.

Consistent with this principle, the Updated Supplementary Procedures should be modified as follows:

**To the end of Section 11, *Standard of Review*, add:**

**“The IRP Panel may not substitute its judgment for that of the Supporting Organization’s Council or the ICANN Board by rewriting a Consensus Policy. After hearing from all Materially-Affected Parties of the Supporting Organization (including Stakeholder Groups) and Co-Chairs of the Working Group who choose to participate, the Panel may determine that all or a portion of a Consensus Policy is contrary to ICANN Bylaws.**

**If the IRP Panel makes such a determination, it shall provide one or more of the following remedies:**

- 1. Identify to the ICANN Board the specific portions of the Consensus Policy that it found to violate the ICANN Bylaw;**
- 2. Indicate what portions of the Consensus Policy (if any) do not violate the ICANN Bylaws;**
- 3. Remand the Consensus Policy to the ICANN Board for review with the Council that adopted it in accordance with the IRP Panel’s decision; and**
- 4. Indicate whether the Panel recommends that the Consensus Policy should be suspended pending Board and Supporting Organization review and rewriting.**

**Prior to any determination by an IRP Panel that a Consensus Policy should be suspended pending Board and Supporting Organization review and revision, the IRP Panel must request input from the materially-affected parties and the Supporting Organization and its Stakeholder Groups whether any harms or dangers may arise from the Policy’s suspension.**

The IRP Panel must provide notice to the materially affected groups and an adequate opportunity for them to be heard regarding (a) the harms they may suffer from the Policy’s suspension and (b) other courses of action that the Panel should consider taking in lieu of such suspension.”

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### **III. Additional Issues for This Proceeding and the Cooperative Engagement Process (“CEP”) Discussion**

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#### **A. Fairness and Due Process Require That Equivalent Changes in Notice and Mandatory Right of Intervention be Made to ICANN’s Cooperative Engagement Process**

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While not the subject of this comment proceeding, Claimants challenging “decisions of process-specific expert panels” or Consensus Policies must not be allowed to negotiate privately with ICANN via the Cooperative Engagement Process (CEP). The CEP -- ICANN’s pre-IRP negotiation – empowers its participants to resolve their differences prior to bringing an IRP claim. The whole idea is avoid the IRP filing. *Accordingly, it is consistent with fairness and due process for CEP negotiations to include all directly impacted and materially affected parties in the negotiations, should they choose to participate, so that they have the power to represent and protect their own interests.*

Therefore, we ask that the IOT share these comments with the CEP Work Stream 2 Subgroup and recommend that that subgroup make equivalent changes to the CEP that are equivalent to the proposed changes submitted here for the *Updated Supplementary Procedures* of the IRP.

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#### **B. Strongly Urge the IOT Not to Copy Entire Bylaw Sections into the IRP Updated Supplementary Procedures**

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We are surprised to see large sections of the *Updated Supplementary Procedures* copied from the ICANN Bylaws. While we can understand references to the Bylaws, wholesale copying can lead to problems, particularly if there develop inconsistencies between the two versions. Which one should parties follow?

To avoid this unnecessary problem, we recommend that the *Updated Supplementary Procedures* simply reference relevant ICANN Bylaw sections. Then the researcher can check the relevant Bylaws section and return to the *Updated Supplementary Procedures* for additional guidance.

For example, the definitions section might state:

##### **1. “Definitions**

**The definitions of Claimant, Covered Actions and Disputes are set out in Section 4.3(b) of the ICANN Bylaws.”**

**[Continue with definitions of “Emergency Panelist” and other terms not defined in the Bylaws.].**

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### **C. Review of the International Centre for Dispute Resolution Itself**

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Every institution needs a review process. If the International Centre for Dispute Resolution (“ICDR”) institution and IRP process is the review for the ICANN Board and its decision, who acts as the reviewer of the ICDR? What is the review process for the ICDR work and the quality of its Panels’ ability to follow the rules as set out in the ICANN Bylaws and the IRP Updated Supplementary Procedures?

We would urge the IOT to give this important oversight issue some thoughts – and action.

In conclusion, thank you for your consideration of these comments.

Respectfully submitted,  
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## LINX reply to IRP implementation consultation

**Prepared by Malcolm Huty, Head of Public Affairs**

LINX Public Affairs Briefing # 2017/1 Release 1 Final  
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## Executive Summary

This submission is addressed exclusively to the “Time for Filing” section (the “timing rule”) of the “Draft Supplemental Rules of Procedure for the Independent Review Process” (the “Draft Rules”), and responds to the public consultation launched on 28<sup>th</sup> November 2016.

We consider that the proposed timing rule is ill-judged, and should be withdrawn.

- The 45 day limit for filing a claim is too short, and will prevent parties who did not have advance notice of the issue and extensive familiarity with ICANN, from fair access to the IRP procedure.
- The 12 month fixed limit from the date of the action is not merely too short, but miscalculated. The timing rule should be based on the date of knowledge of the harm that ICANN’s action gave rise to, rather than calculated from the date of the action itself. To do otherwise would unjustly exclude important cases from being heard by the IRP.

Both these flaws are serious, but it is the latter that we consider catastrophic. The effect of the latter will be to seriously undermine, and in many cases utterly negate, the enforceability of the Mission limitation that was a key commitment by ICANN in the 2016 transition. The seriousness of this commitment is shown by statements in the bylaws promising ICANN’s accountability as enforced through an accessible, transparent and just resolution of dispute by the Independent Review Process.

We submit detailed, point-by-point analysis of the bylaws to show that the proposed timing rule is inconsistent with the bylaws, and that the only timing rule acceptable under the bylaws would be one based on the aggrieved party’s actual or imputed knowledge of the harm they have suffered.

As the IRP Implementation Oversight Team, in presenting the Draft Rules, did not see fit to offer a justification, we have addressed some points that we believe might have been made in their defense. We consider fears that a more permissive timing rule would expose ICANN to unlimited uncertainty; we find these unconvincing. ICANN is protected very effectively by the strictly limited nature of remedies available under the IRP. Nor do we find plausible the notion that greater access to the IRP would expose ICANN to a broader legal risk in civil courts. More generally, we do not agree that it is better to err on the side of an expeditious process: in our view, too strict a timing rule is as bad as too lax. We examine the case for relaxing the rule on Standing, but conclude it would neither be appropriate nor an adequate substitute for correcting the flawed timing rule. And finally we explain why the possibility that the Empowered Community might bring a challenge is no substitute for ensuring that the individual right to bring an IRP case is genuinely available to a materially affected party, as the 2016 transition and the ICANN bylaws promise.

For these reasons we recommend that the proposed timing rule in the Draft Rules be withdrawn. A replacement should be developed and systematically compared against the obligations in the bylaws, before being published for further public comment together with a reasoned justification.

## About LINX

The London Internet Exchange, LINX, is a membership organisation for network operators. LINX operates Internet Exchange Points, IXPs, in the UK and the USA, and represents the interests of its membership on certain matters of public policy. We do not claim that our positions are supported in every respect by every one of our 740 members, but believe that the positions we take are substantially supported by our community, and in the interests of the sector as a whole, rather than any particular company or business model. Over more than 20 years, policy makers in government and other institutions have come to recognise the value of LINX's voice on behalf of the operator community.

## Introduction

This submission concerns only one element of the proposed "Draft Supplemental Rules of Procedure for the Independent Review Process" (hereinafter, for brevity, the "Draft Rules"), namely section 4, "Time for Filing". It responds to the public consultation on the Draft Rules launched on 28<sup>th</sup> November 2016.

We argue that this section is defective, in that its effect would be to unduly limit (and in some cases potentially entirely exclude) a materially affected party from being able to bring an IRP case in respect of certain classes of alleged violations of the bylaws. We focus specifically cases based on allegations that ICANN had acted in a manner that was ultra vires the Mission, and so in breach of Section 1.1(b) of the bylaws, and cases based on allegations that ICANN had passed a policy that aims to restrict Internet content, in breach of Section 1.1(c).

We note, and agree with the reasoning by Sidley, independent counsel to the CCWG, that this defect would make the Draft Rules themselves inconsistent with the bylaws. In particular, we consider the Draft Rules incompatible with Section 4.1 (which sets out the purpose of ICANN accountability and review) and Section 4.3(a) ("Purposes of the IRP"), especially subsections (i)-(iii) and (vii).

## The proposed timing rule

The Draft Rules state

“4. An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of the material affect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.”

We understand this to mean that the latest time a claimant may initiate an IRP dispute is the earlier of

- i) 45 days after they become aware of the material effect of the action or inaction giving rise to the dispute; and
- ii) 12 months from the date of ICANN’s action or inaction giving rise to the dispute.

It is important to note that time runs out when either of these conditions are met.

It is also important that a dispute can only be commenced by a “CLAIMANT”, a defined term limited to a person “that has been materially affected by a Dispute”. The Draft Rules also state “To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation”.

## The proposed timing rule suppresses access to the IRP

*The “one year” fixed limit may prevent a materially affected party from ever having an opportunity to bring an IRP case*

Under the Draft Rules, a party does not qualify as a CLAIMANT, and so may not bring an IRP case, unless they have suffered an injury or harm.

It is possible that more than 12 months will elapse between an action by ICANN and that action actually causing harm to a particular party.

A party that is likely to be harmed by an ICANN action, even if they are aware of the likelihood and would wish to challenge the action more promptly, is prevented from bringing an IRP case until they have suffered harm. It is possible that, in a given case, a specific harm may materialise only after at least 12 months have passed since the date of the action complained about. In such circumstances, the aggrieved party would be entirely precluded from accessing the IRP: for at least the first twelve months, because they had not yet suffered harm, and subsequently because the time for filing had expired.

A party that suffers harm from an ICANN action that materialises (at least, in respect of themselves) only more than 12 months after the action complained about, is therefore deprived entirely of the opportunity to access the IRP.

### *Illustrative example*

To illustrate the problem in practice, we turn to the ancient dispute between those that believe a boiled egg should only be opened by cracking the shell at the round end (the “Big-Endians”) and those that believe a boiled egg should be opened by cracking the shell at the pointy end (the “Little-Endians”)<sup>1</sup>.

Let us suppose that ICANN falls under the influence of Big-Endians and adopts the following policy:

No domain name shall be used to advance Little-Indian beliefs or practices. All Registry Agreements shall be amended to require all Registries to suspend or cancel domains that have been used for that purpose.

Such a policy would be a blatant violation of Section 1.1(c) of ICANN’s bylaws, which prohibit ICANN from seeking to restrict Internet content.

We should consider, however, how it is likely to play out. Once such a policy is passed, there is likely to be a lengthy implementation phase. ICANN will need to decide whether to specify the precise terms that must be imposed on domain registrants (in the Registration Agreement) to carry out this policy, or whether to leave it up to the Registry to specify those terms itself. If ICANN decides to dictate the terms, it must also decide what they must be. This is likely to be the subject of public consultation. ICANN will also need to decide whether to establish a global process for hearing complaints about violations of this policy and issuing adjudications (as with the Uniform Dispute Resolution Policy for allegations of trademark infringement) or to leave it up to Registries to police and enforce the policy. If it chooses to establish a global process, this will likely take a substantial period to develop and implement; it will doubtless involve at least one public consultation, but it is easy to imagine it requiring several.

Once ICANN has decided how the policy is to be implemented, Registries will need a period of grace to adjust their own Registrations Agreements so as to ensure that new registrations are covered by these terms. If they have been left with the duty to consider an act upon complains of violation of the policy, they will need to establish a process for this too.

Finally, it is likely that Registries will only be able to impose the new terms on registrants of existing domains as and when those domains come up for renewal. With gTLD domains most commonly being registered on a two-year renewal cycle, but very often for periods of up to ten years, it is easy to see that it could take many years before any given domain is subject to the policy.

Accordingly, a particular party, being a strong exponent of Little-Indian principles, might not themselves be directly affected by the policy for many years, before finally themselves being told that their domain is forfeit for violation of the policy. During this interim, they will be precluded from challenging ICANN’s blatant overreach.

When they do finally suffer harm themselves, namely the loss of their domain and with it their preferred publishing outlet for Little-Indian beliefs, their complaint is clearly against

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<sup>1</sup> For further information on the dispute between the Big-Endians and the Little-Endians, see Swift (1726).

ICANN. Their objection is not against their Registry for having misapplied the policy: they do not deny that they are Little-Endians, nor that the main purpose of the domain they have registered is to support the publication of Little-Endian views, nor do they deny that this is a clear violation of the policy. They do not deny that the policy requires the cancellation of their domain, nor allege that the Registry has acted unreasonably or excessively in the light of the policy. Nor is their complaint that ICANN staff have somehow misapplied the policy, limiting a discretion that the Registry ought otherwise to have had to permit them to use their domain in some limited way to support Little-Endian Practices. No: the aggrieved party's complaint is simple, straightforward, and utterly compelling: ICANN acted illegitimately in passing the policy in the first place, tainting all that followed. The required remedy is equally clear: ICANN must withdraw the policy, freeing Registries to accept Little-Endian business once more.

The fact that the Draft Rules would prevent the aggrieved Little-Endians from bringing an IRP case as soon as the policy is passed is unfortunate; the fact that they would also prevent them from doing so once they lose their domain is unconscionable. It is also a clear violation of the intent of the CCWG Final Report, and of the bylaws.

The example of the Big-Endian/Little-Endian dispute may seem whimsical, but the general situation described above is far from fanciful: on the contrary, we describe what is very likely to occur if ICANN should ever decide to seek to restrict a certain type of Internet content. This was precisely the overreach Section 1.1(c) of the Bylaws sought to prevent. Indeed, it has been argued that Section 1.1(c) is superfluous: any action that violated it would also constitute a violation of the more general restriction to the Mission contained in Section 1.1(b). But this threat was considered so serious that it was important to make explicit and highly visible that ICANN was precluded from such activity. How damning, then, would it be to adopt rules of procedure that prevent complaints of this most serious violation from ever being heard?

#### ***45 days is an unreasonably short limit for parties not "ICANN insiders"***

Under the Draft Rules, an IRP dispute may only be initiated by filing "a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of the material affect of the action or inaction giving rise to the DISPUTE".

In order to do this, after becoming aware of the harm they have suffered, the aggrieved party will need to complete the following steps:

- i) to trace the cause of the harm, and to identify ICANN as the root cause;
- ii) connected with the preceding, to discover ICANN's existence, to understand its role and how it relates to the matter at issue;
- iii) to understand, probably on the basis of legal advice, that an ordinary legal dispute with ICANN is not indicated;
- iv) to discover that there is an IRP process;
- v) to understand the limited remedies available in an IRP case;
- vi) to learn how the IRP process is conducted and, in particular, the means to initiate it;
- vii) to learn about the permissible grounds for bringing an IRP cases, and to assess their own case against those criteria;

- viii) to discover and learn about the likely costs of bringing an IRP case, including the possibility of being liable for ICANN's costs, and to assess and make a decision upon their willingness to incur them;
- ix) to draft a statement of complaint setting out their claim, in terms based upon the ICANN bylaws alleging violation of the same
- x) to finally take the decision to go ahead and to actually file with the ICDR

While longstanding and active members of the ICANN community, including Registries, Registrars and other regular ICANN meeting attendees ("ICANN insiders") can reasonably be expected to know all of (i)-(v) and to understand a fair portion of (vii-viii), by virtue of that participation, parties with no previous engagement with ICANN, such as Registrants (who might well have cause to bring an IRP case) and other non-contracted stakeholders often will not.

45 days is a tight deadline even if you are fully prepared, know the issue is coming, and all you have to do is draft and submit your case. For parties who have an extensive learning curve to climb before reaching the point of being able to draft a submission, so short a deadline would be exclusionary.

### ***The 45 day limit unfairly discriminates in favour of ICANN insiders, in contravention of the Fundamental Commitments***

One of the "Fundamental Commitments" in the ICANN bylaws is that it should Section 1.2(a)(v) of the bylaws provides that it is a Fundamental Commitment to:

"Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, **without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties)**" **(emphasis added)**

Section 2.3 of the Bylaws further provides

"ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."

For the reasons stated in the previous section, the timing rule proposed in the Draft Rules would make a material difference on the accessibility of the IRP between at least two clearly identifiable classes of potential claimants, namely contracted parties and other regularly engaged members of the ICANN community, on the one hand, and other stakeholders on the other. In short, ICANN insiders would have a much more realistic prospect of being able to access the IRP to challenge ICANN and hold it accountable, while those without a pre-existing relationship would not have a realistic opportunity to do so.

It is also worth noting that most ICANN actions occur in consequence of, and indeed in furtherance of, the actions of the community that is less disadvantaged by the proposed timing rule.

Given these facts, the proposed timing rule constitutes a prejudicial distinction between different parties. No justification for such a distinction has been offered nor, it is submitted, could one be found, let alone one that constitutes a "substantial and reasonable cause".



## The Bylaws require a realistic opportunity to bring an IRP case

### *The purposes of ICANN accountability generally, and the IRP specifically, are set out in the bylaws*

Section 4.1 of the bylaws sets out the purpose of ICANN's various accountability and review procedures, stating:

#### ARTICLE 4 ACCOUNTABILITY AND REVIEW

##### Section 4.1. PURPOSE

**In carrying out its Mission, ICANN shall be accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws, including the Mission set forth in Article 1 of these Bylaws.** This Article 4 creates reconsideration and independent review processes for certain actions as set forth in these Bylaws and procedures for periodic review of ICANN's structure and operations, **which are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws**, including the transparency provisions of Article 3 and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 4.3(a) of the bylaws defines the purpose of the IRP specifically:

#### Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS

(a) In addition to the reconsideration process described in Section 4.2, ICANN shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant (as defined in Section 4.3(b)(i)) to be within the scope of the Independent Review Process ("IRP"). The IRP is intended to hear and resolve Disputes for the following purposes ("**Purposes of the IRP**"):

(i) Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.

(ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).

(iii) Ensure that ICANN is accountable to the global Internet community and Claimants.

(iv) Address claims that ICANN has failed to enforce its rights under the IANA Naming Function Contract (as defined in Section 16.3(a)).

(v) Provide a mechanism by which direct customers of the IANA naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.

(vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.

(vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

(ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

**This Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.**

**(emphasis added)**

### *The purpose of the IRP Rules of Procedure is set out in the bylaws*

Section 4.3(n) of the Bylaws provides

(n) Rules of Procedure

(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations and Advisory Committees and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("Rules of Procedure") **that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties.** Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.

(ii) **The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP.** Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN, and take effect upon approval by the Board, such approval not to be unreasonably withheld.

(iii) The Standing Panel may recommend amendments to such Rules of Procedure as it deems **appropriate to fulfill the Purposes of the IRP**, however no such amendment shall be effective without approval by the Board after publication and a period of public comment that complies with the designated practice for public comment periods within ICANN.

(iv) **The Rules of Procedure are intended to ensure fundamental fairness and due process** and shall at a minimum address the following elements:

(A) The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute;

[...]

(C) Rules governing written submissions, including the required elements of a Claim, other requirements or limits on content, time for filing, length of statements, number of supplemental statements, if any, permitted evidentiary support (factual and expert), including its length, both in support of a Claimant's Claim and in support of ICANN's Response;

[...]”

**(emphasis added)**

***The permitted purposes of the Draft Rules is exhaustively defined in the bylaws, and adherence to those purposes is mandatory***

The framework for the purpose of the IRP set out in the bylaws is exhaustive. It is abundantly clear from the above-quoted provisions of the bylaws that it is mandatory for the Draft Rules to support the purposes set out in those sections, and no other. While these purposes allow for considerable latitude in the Draft Rules to adopt, and allow a broad discretion as to whether one particular proposal or another would better support the purposes set out, they do not allow ICANN the discretion to balance these purposes against other purposes that cannot be found in the bylaws.

***It is not a permitted purpose of the Rules of Procedure to seek to secure certainty for ICANN***

Accordingly, it is not legitimate for ICANN to adopt a timing rule that would admittedly limit access to the IRP on the basis of a claim that it achieves a fair balance between the purpose of the IRP and ICANN's administrative convenience.

This does not necessarily prevent ICANN from adopting Draft Rules that contain some form of time bar. It would be potentially legitimate to adopt a time bar if it could show that allowing claims to be filed any later would *reduce* fundamental fairness and *undermine* due process, contrary to Section 4.3(n)(iv). By contrast, it would not be not legitimate to adopt a time bar on the basis that the purposes of the IRP have been sufficiently achieved and a shorter deadline would benefit ICANN by creating certainty that its actions will stand, not if allowing claims to be filed after the deadline date would better advance the purposes of the IRP, and not undermine any of them. Certainty for ICANN is not an objective authorised by the bylaws.

***It is not a permitted purpose of the Rules of Procedure to seek to secure prompt action by claimants for its own sake***

It is also worth noting that the bylaws do not contain anything that directly imposes on claimants a duty to act promptly. Accordingly, ICANN is not authorised to adopt rules for the purpose of requiring claimants to act promptly for its own sake: promptness may be required in order to achieve one of the specified purposes, but that must be justifiable. It is not legitimate to say that “Claimants could reasonable file within (a given period) and so they may not file outside that period” without further justification.

### *The Bylaws require a rolling time bar*

The Bylaws authorise ICANN to adopt “Rules governing written submission including ... time for filing”, Section 4.3(n)(iv)(C). However that provision is directed toward written submissions, rather than the more platonic notion of the initiation of a process. The Bylaws speak more specifically of limits on when an IRP can be initiated in Section 4.3(n)(iv)(A)

(iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements:

(A) The time within which a Claim must be filed **after a Claimant becomes aware or reasonably should have become aware** of the action or inaction giving rise to the Dispute;

**(emphasis added)**

This clearly indicates that the bylaws envisage that the deadline for initiating an IRP case should be calculated relative to when the Claimant became aware or reasonably should have become aware of the action or inaction giving rise to the dispute, and not relative to the date on which the action giving rise to the dispute took place.

Accordingly, the 12-month fixed deadline contained in one leg of the proposed timing rule in the Draft Rules is not authorised by this clause of the Bylaws.

Section 4.3(n)(iv) is non-exhaustive as to the “elements” that the Rules of Procedure may address, merely setting out a minimal set of elements that *must* be addressed by those rules. Nonetheless, it is submitted that since Section 4.3(n)(iv)(C) describes *how* the deadline for the initiation of an IRP case should be addressed (namely, relative to the date of the Claimant’s knowledge rather than relative to the date of the action), ICANN does not have the authority to adopt a rule that addresses that issue in a contrary manner.

In the alternative, even if that clause is not determinative on its own, it is submitted that the clause clearly strongly indicates a rolling deadline, and contraindicates a fixed one. When read in combination with other parts of the bylaws, the bylaws as a whole prohibit a fixed deadline.

It is therefore submitted that the requirement proposed in the Draft Rules that an IRP claim “may not be filed more than twelve (12) months from the date of such action or inaction” must be removed, and that no limit may be adopted that is calculated relative to the date of the action.

### *The Bylaws prohibit time-barring cases that should be heard*

The bylaws are highly explicit on the important purposes served by the IRP.

Amongst other things, the IRP forms a vital mechanism for ensuring that ICANN conforms to its Mission and does not stray beyond that Mission, nor engage in explicitly prohibited activity<sup>2</sup>. It avoids the need for recourse to the civil courts, an especially important goal given that stakeholders are based in no specific jurisdiction but come from all nations of the

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<sup>2</sup> Section 4.3(a)(i)

world<sup>3</sup>. In particular, the IRP secures the transparent and just resolution of disputes, and ensures that the mechanism to ensure that is accessible to all materially affected parties<sup>4</sup>.

These purposes cannot be fulfilled if cases are unnecessarily barred.

Part of this purpose requires that the settlement of disputes must be just. It may be that in particular classes of cases, the passage of time may prevent an IRP hearing from arriving at a just resolution: over time, memories fade, witnesses cease to be available, documents are lost. This would justify a time bar for cases of this type. But these concerns speak to the effects of time on *factual evidence* that may be required in a particular case in order to achieve a just resolution. No such consideration applies to cases that are purely legal in nature, such as a claim that a particular activity is in its entirety ultra vires the Mission or prohibited by Section 1.1(c) of the bylaws (as with the case given in the illustrative example described earlier in this document).

It may therefore be suggested that the question should be considered whether any time bar at all should be applied for cases that do not rely on factual evidence, other than to establish standing.

**Whatever the outcome, we submit that the IRP should always retain the discretion to hear a case notwithstanding that a time bar has been exceeded, if the IRP believes both that it is necessary to hear the case to achieve a just result, and that the passage of time is unlikely to compromise the integrity of the outcome.**

## **The IRP IOT acted arbitrarily and without justification in its selection of a proposed time bar text**

The Draft Final Report of the IRP Implementation Oversight Team (IOT) describes the timing rule it proposes for the Draft Rules, but offers no justification for the rule it proposes. There is no reasoning whatsoever.

There is no evidence that the IOT considered the extensive requirements set out in the bylaws for the rules of procedure, not that it even took those requirements into account when developing its proposal, much less that it sought to systematically evaluate its proposal against those requirements.

We believe that the IOT should withdraw the current Draft Rules, either to proceed with a version that omits the timing rule, or to bring forward a replacement proposal with a new timing rule. If the IOT wishes to bring forth a timing rule, it should restart its consideration of this issue, develop a new proposal on a timing rule, and subject this proposal to systematic analysis against the requirements in the bylaws, before presenting a reasoned proposal for new Draft Rules in relation to this matter in a new round of public comment.

Because the IRP IOT failed to offer reasoning, it is left to us to construct, as well as to analyse, possible justifications for the rule.

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<sup>3</sup> Section 4.3(a)(ix)

<sup>4</sup> Section 4.3(a)(vii)

## **Fears of harmful effects of late challenges are unwarranted or overblown**

While we have focussed on potential IRP challenges to ICANN policy, as in the illustrative example, we are aware that others are more focussed on potential challenges to ICANN administrative decisions such as new gTLD delegations, as in previous IRP cases conducted under the old, pre-transition bylaws. There may be a fear that without a strict, fixed deadline for filing an IRP challenge, ICANN would be exposed to the risk of very late reversals of decisions that others rely upon, such as the delegation of top level domain registries.

We think this concern is misplaced.

### ***Basing the timing on the knowledge of being affected will force early challenge by gTLD applicants and others similarly situated***

It would be a mistake to confuse a timing rule that was calculated from when the materially affected party became aware of the harm they had suffered, or should have been aware of it, with abolishing the time bar altogether. A time bar calculated based on the party's knowledge is still an effective and significant limit.

A person who is directly involved in an ICANN process will know (or ought to know) how the process affects them immediately, or very soon. The clock may then start on a knowledge-based timing rule.

For example, if an applicant to run a gTLD Registry believes they have been mistreated in the applications process, the time would run from the point when the applicant became aware that it was not going to be assigned to run the gTLD. This is not a long delay.

The occasion when the date of the action and the date of knowledge of the affect will differ materially will be when a party was not affected for an extended period, and so had no right to challenge earlier.

### ***The limited remedies available under the IRP protect ICANN***

There are only strictly limited remedies available to successful claimants under the IRP. This limits ICANN's exposure dramatically, and so significantly undermines any argument that ICANN needs to be protected from late claims.

Under the IRP the only remedy available is a finding that ICANN has acted inconsistently with the bylaws.

The IRP does not have the power to make money awards to successful claimants as compensation for their loss. Permitting IRP claims to be filed late therefore does not expose ICANN to a long-running potential for compensation.

Nor does the IRP precisely have the power to require ICANN to correct its fault. Admittedly, a finding that ICANN has acted inconsistently with the bylaws carries with it an implicit requirement that ICANN cease acting in that prohibited fashion, and an instruction to forbear from acting in such a fashion in the future. However, it does not necessarily amount to an instruction to undo what has been done, certainly not if undoing it is outside ICANN's reasonable control. For example, if ICANN were found to have breached its bylaws in the award of a registry contract to a particular applicant, thereby unfairly prejudicing the

interests of a competing applicant, we would expect ICANN to take the decision again (possibly, but not necessarily, awarding the registry to the previously unsuccessful applicant) if ICANN had only reached the stage of deciding to make the award; by contrast, if the award had been made and executed, and the initially successful applicant had established a proprietary interest in the new registry, we would not expect that an IRP ruling finding fault in the award process would require ICANN to shut down or transfer that registry.

We therefore find fears that late claims would compromise ICANN's ability to operate its essential functions effectively to be unconvincing.

### ***The Draft Rules can neither extend nor reduce access to the civil courts***

It would be a mistake to think that adopting any particular timing rule in the Draft Rules would affect ICANN's liability to be sued in the ordinary civil courts.

The civil courts have their own rules on standing (which are likely to be more restrictive, in important respects, than the Draft Rules) and on time for filing. Their rules are unaffected by the Draft Rules. If a person is aggrieved at an ICANN action, they may be heard in civil courts if they have a cause of action, they have standing, they file in time, and the court has jurisdiction, and if they satisfy any other relevant requirements. We should not believe that adopting a more restrictive timing rule for the IRP will help to keep civil litigants out of the civil courts; it will not, nor should it. Similarly, adopting a timing rule in the Draft Rules that gives more extensive access to the IRP will not give anyone a right to be heard in civil court that did not already have it.

## **Other policy considerations**

### ***Too strict a time limit is as bad as too lax***

It would be a mistake to approach the question of the time for filing solely from the perspective of "how long do claimants need in order to ensure a fair process?": this can easily result in an unduly short period being selected for failure to foresee all future eventualities. It is better to begin with the question "At what point is a claim so late that the lateness itself undermines the fairness and equitability of the process?". This approach lends itself more easily to a proper demand for a legitimate justification for debarring a claim, which is more likely to lead to a just result, not to mention compliance with the purposes set out in the bylaws.

### ***Relaxing the rule on standing is prohibited by the bylaws and would create its own problems***

The illustrative example we have offered demonstrates that for important classes of challenge, under the current limitations to standing in the Draft Rules it may not be possible to initiate an IRP challenge for many years, even if it is known in advance that a challenge is appropriate.

This begs the questions: would it be better to relax the rules on standing?

Unfortunately, in our view, this creates its own problems. Considering the example of a challenge to an ICANN policy as being ultra vires (as in the illustrative example), if the rules of standing were relaxed so as to accept not only those that had experienced actual harm, but also those that might reasonably expect to experience harm in the future, then a broad class of potential claimants is created. At that point, if there were a flood of claimants, how would the IRP decide between them? Would the IRP designate someone as a class

representative? There is already a procedure for collective representation through the Empowered Community; the standing rules are intended to provide for vindication of individual rights, not collective action.

We therefore view with caution the option of relaxing the rules on standing so as to enable early review of challenges to ICANN actions that might otherwise be subject to challenge only after a protracted delay. Nonetheless, we accept that substantial delay in review is a problem; we recommend that this issue be subject to further study.

***Community challenge is not an adequate substitute for an individual right***

The community cannot be relied upon to challenge breaches of ICANN’s bylaws by using the power of the Empowered Community to initiate the IRP. In particular, it cannot be relied upon to challenge breaches of the Mission limitation or the prohibition on restricting Internet content: ICANN generally acts at the behest of its community, so if ICANN were to breach the Mission limitation it is quite plausible that it would be doing so with the consent and support of its community (at least in the sense of regular community “insiders”). This is especially true because a considerable degree of community consensus is needed to exercise Empowered Community rights; even significant opposition to an ICANN action within the ICANN community may be insufficient to cause the Empowered Community to initiate the IRP. Nonetheless the Mission limitation exists to protect the interest of a broader community of stakeholders, who might be harmed by ICANN overreach but who do not – and should not be obliged to – regularly engage in ICANN decision-making processes. This must be capable of being enforced through an individual IRP case, even if the Empowered Community fails to act.

Moreover, the bylaws seek to protect not only the rights of the community, but also the rights of the individual affected party: a materially affected party who has been harmed by ICANN’s breach of the bylaws should not be deprived of his right to challenge ICANN in the IRP merely because the community has failed to act.



## **Conclusion: the proposed timing rule in the Draft Rules is both bad policy and fails to conform to the requirements of the bylaws**

The proposed timing rule in the Draft Rules unfairly and unreasonably prevents challenge to ICANN actions that breach the bylaws and bring material, concrete and particularised harm to affected parties only after an extended period has elapsed. In so doing, the Draft Rule denies such parties the benefit of the protection of the IRP promised by the Bylaws – a protection that was one of the major achievements of and conditions for the 2016 transition.

If these Draft Rules are adopted, the whole ICANN community will suffer, because it will largely negate some of the most important commitments in the bylaws and the transition process, namely the promise that ICANN will act only within a limited, defined Mission, and that it would not exploit its role in the DNS to bring about content or business service restrictions on the Internet. The timing rule proposed in these Draft Rules would make any IRP challenge unavailable in most such cases.

We believe that it is incumbent on ICANN to honour its commitment to accountability, and adopt Draft Rules that enable, support and reinforce access to the a fair and just review of its actions through the IRP. The timing rule in these Draft Rules does not do so. It should be withdrawn.

## **Recommendations**

1. The current timing rule in the Draft Rules should be withdrawn.
2. Any future timing rule should be calculated relative to the later of the following the dates:
  - a. The date that the claimant became aware, or reasonably should have become aware, that they have suffered harm
  - b. The date that the claimant became aware, or reasonably should have become aware, of ICANN's action or inaction that is said to have given rise to that harm.
3. Any future timing rule should cut off no sooner than necessary to secure the purposes of the IRP; this will be much longer than 45 days.
4. The IRP Panel should be given the discretion to hear claims filed after they are out of time under the timing rule adopted, if they believe that doing so would advance the purposes of the IRP.
5. The IRP IOT should reconsider the timing rule, and bring forward a fresh proposal. In conducting that reconsideration, the IRP IOT should systematically assess the options against the requirements set out in the bylaws.
6. The IRP IOT should publish its new proposal for a further round of public comment. In doing so, it should also publish the reasons justifying its recommendation.

Comments of Paul Rosenzweig and Brett Schaefer  
On the Draft Supplementary Procedures for the Independent Review Process

On November 28, 2016, ICANN published a draft of the Updated Supplementary Procedures for the Independent Review Process (IRP) for public comment. This comment reflects the observations of Brett Schaefer and Paul Rosenzweig of The Heritage Foundation (Heritage) to the Draft Supplemental Procedures. Heritage is a research and educational institution—a “think tank”—focused on U.S. domestic and international public policy and is a member of the Non-Commercial Users Constituency of the Generic Names Supporting Organization.

In our view, one particular aspect of the draft (Section 4, relating to the “time of filing” a complaint) should not be adopted in its current form because doing so would divest stakeholders of significant ability to challenge Board actions that allegedly violate the Bylaws of the Corporation.

The draft proposal addresses the question of the “time for filing” of a complaint as follows: Section 4 establishes that IRP claims must be filed “within 45 days of the date on which a claimant first becomes aware of the material affect of the action or inaction giving rise to the dispute, but in any case, no more than twelve (12) months from the date” of the alleged Bylaws violation. In other words, filing of a claim of a Bylaw violation may never occur more than 12 months after the date of adoption of the Bylaw.

We believe this proposal improperly limits the ability of claimants to challenge alleged Board Bylaw violations and divests the internet community of a valuable tool for restraining Board behavior. As a result, we think the proposal should be modified to a pure discovery rule by striking the last clause establishing an outside time limit of 12 months. In other words, the time for filing a complaint should be “within 45 days of the date on which a claimant first became aware” of the ground for his complaint.

We are well aware of counter arguments. There is value in statutes of limitation and repose – especially in a commercial context where detrimental reliance on decision making will be high. But the proposal, as drafted, leaves open the prospect of an irremediable wrong – a Bylaw violation whose affect manifests itself to the public and to potential claimants more than 12 months after adoption of the offending Bylaw. In a Machiavellian world, one can imagine the beneficiary of a Board decision waiting 13 months before implementing it to purposefully avoid IRP review. In a more realistic world we can imagine many scenarios in which the implementation of a Board decision takes longer than 12 months to have an appreciable effect on the internet community. Under either scenario, the prospect of a wrongful Board action that is immune from IRP review simply because of the passage of time should be rejected. As a public non-profit organization devoted to openness and transparency ICANN should not limit the ability of its stakeholders artificially to avoid review of its actions.

The draft proposal attempts to mitigate this concern by asserting that ICANN board interpretations of policy that allegedly violate the Bylaws will still be subject to a separate statute of limitations that runs from the date of the offending interpretation. While a salutary admonition, this effort is insufficient to ease our concern for two reasons: First, as guidance in a report, the interpretation of the “time of filing” provision is not binding on subsequent IRPs. It may be a correct interpretation (and it is certainly one we would support) but it may also be one that is rejected by the IRP who may, for example, adopt a

“relation back” doctrine as a way of time-barring some complaints. Second, the proposed mitigative report language does not address the problem of delayed implementation – that is the situation where a Board decision that violates the Bylaws is not implemented for more than 12 months, such that its adverse effects are not felt before the period of limitations has expired. When combined with the provision limiting the initiation of IRPs to those who are materially affected by a Board decision, the draft in its current form is likely to oust many valid claimants from the ability to challenge Board actions.

Indeed, this seemingly procedural provision may have critical practical consequences. The IRP process is intended to be the principal means of countering the potential for ICANN mission creep. And the constrained mission is seen as the single most significant innovation of the Accountability process. The ability of the IRP to act as a check on mission creep is critically weakened by a time-constrained IRP because a Board decision’s impact on the mission may not become evident until after implementation and application in future circumstances.

Finally, we note that the 12-month period of limitation has been deemed by outside counsel to be inconsistent with the just-adopted new ICANN Bylaws. According to Sidley & Austin: “Applying a strict 12-month limit to any IRP claim that commences at the time of the ICANN action or inaction and without regard to when the invalidity and material impact became known to the claimant, is inconsistent with the Bylaws (and is inconsistent with the terms of Annex 7 of the CCWG Report).” For this reason alone, Section 4 must be modified.

In short, and not to put to fine a point on it, in this instance the need for commercial certainty must, in our view, yield to the equitable notion that every valid complaint should have access to an independent forum for review. As drafted, with the 12-month cutoff, we do not support the current text of Section 4 and strongly urge its modification.

## Time for filing - revisited

- *To:* <comments-irp-supp-procedures-28nov16@xxxxxxxxxx>
- *Subject:* Time for filing - revisited
- *From:* "Richard Hill" <rhill@xxxxxxxxxx>
- *Date:* Sat, 14 Jan 2017 10:26:31 +0100

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Following up on my previous message regarding time bars, I've given more thought to the matter and I think that it is important, for legal certainty, to set clear time bars that distinguish appeals against a policy per se from appeals against a decision based on a policy.

Presumably people who are concerned about ICANN's policies follow the policy development process, or are associated with entities that follow the process, so they can be presumed to be informed when a new policy is adopted. However, for the sake of legal certainty, ICANN should publish a clear statement to the effect that a new policy has been approved by the Board and is available on its web site. This would be the equivalent of the publication of law or government rule in the official register.

And obviously people who are affected by a specific decision based on a policy will be informed of the decision. So in that case the time bar should start to run from the time of notification of the decision.

It seems to me that a 30-day time bar would not be too stringent in light of common administrative law practices, but, given the diverse nature of people affected by ICANN's decisions, I think that a 60-day period should be allowed for claims filed against a policy per se.

In the interests of simplicity, I think that the time bar should be the same for claims against a specific decision.

On the basis of my previous comments on time bars, and on the above, I would propose to replace the current text of article 4, Time for Filing, with the new text shown below.

Best,  
Richard

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#### 4. Time for Filing

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 60 days after:

- a) ICANN has announced that a new policy has been approved by the Board and published on its web site, if the claim is directed against the policy per se; or
- b) the CLAIMANT has been notified of a decision giving rise to the DISPUTE; or

c) ICANN has failed to take action by a deadline specified in its bylaws or applicable policies; or

d) if none of the above applies, CLAIMANT becomes aware of the material effect of an action or inaction giving rise to the DISPUTE; provided, however, that in this case a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

An IRP PANEL may exceptionally accept a tardy statement of a DISPUTE if CLAIMANT proves that it was unable to act within the time for filing despite having exercised due diligence, provided that a motivated request for acceptance of a tardy statement of DISPUTE, and the statement of DISPUTE itself, are filed within 60 days of the day on which CLAIMANT is able to act.

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## Specific comments

- *To:* <comments-irp-supp-procedures-28nov16@xxxxxxxx>
- *Subject:* Specific comments
- *From:* "Richard Hill" <rhill@xxxxxxxx>
- *Date:* Fri, 13 Jan 2017 21:10:59 +0100

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I offer the following specific comments:

Regarding article 5, Conduct, I support the language that restricts in-person hearings. As mentioned in my previous comment, I see the IRP as a kind of administrative law proceeding, and, in my experience, in-person hearings are not usually required for such proceedings, because the evidence is normally found in written documents, and written pleadings on the legal issues suffice to inform the arbitrators. This is particularly the case when, as here, the applicable law is relatively concise, consisting in our case of the ICANN bylaws and policies.

Regarding article 6, Written Statements, I do not support page limits on briefs. Pursuant to the fundamental right to be heard, parties should be free to submit briefs of whatever length they consider appropriate. (This comment also applies to the last paragraph of article 7.)

Regarding article 14, Appeal, you may wish to consider making the grounds for appeal more precise. You could consider the grounds for appeal of the UN labor-dispute process, which are:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

The rules for the UN labor dispute appeal process cited above are at:

<http://www.un.org/en/oaj/appeals/basicdocs.shtml>

Alternatively, you might consider a simpler, but still precise formulation, based on the grounds of appeal permitted by the Swiss Federal Tribunal (supreme court) namely:

- (a) error of law, including error of procedure;
- (b) manifest error on a question of fact, susceptible of affecting the outcome of the case.

You may wish to specify that, on appeal, the full Standing Panel will be bound by the facts found by the first-instance panel, except to the extent that the appellant can prove that there was a manifest error on a question of fact, susceptible of affecting the outcome of the case, or to the extent that the appellant can prove that there was an error of procedure in establishing the facts, susceptible of affecting the outcome of the case.

Regarding article 15, Costs, I would suggest that, on appeal, the appellant should bear the costs if it loses, otherwise it is likely that many first-instance decisions will be appealed. You might wish to consider adding something like the following:

"On appeal, the full Standing Panel will normally provide for the losing party to pay administrative costs and fees of the prevailing party, unless the particular circumstances of the case justify a different allocation of costs and fees."

Best,  
Richard Hill

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## Time bars

- *To:* <comments-irp-supp-procedures-28nov16@xxxxxxxx>
  - *Subject:* Time bars
  - *From:* "Richard Hill" <rhill@xxxxxxxx>
  - *Date:* Thu, 12 Jan 2017 10:04:50 +0100
-

Since ICANN is analogous to a government regulatory body for what concerns certain aspects of Internet naming and addressing, the IRP is analogous to an administrative law review/litigation.

Most legal systems have special rules for administrative law, even if the regular courts handle litigation. Most distinguish two separate types of challenges: a challenge to a rule (or policy) versus a challenge to a specific decision taken under some rule (or policy). In the US, these two types of challenges are referred to as a challenge to the rule making versus a challenge to an adjudication, see for example:

[https://en.wikipedia.org/wiki/United\\_States\\_administrative\\_law](https://en.wikipedia.org/wiki/United_States_administrative_law)

In administrative law, there are time bar for both types of challenges, see for example

<https://www.isba.org/sections/adminlaw/newsletter/2010/07/achecklistforjudicialreviewofanadministrativeagencyde>

The fact that there is a time bar for challenges to a policy does not prevent subsequent challenges to decisions taken under that policy.

The reason for the time bar on challenges to a policy per se is to provide legal certainty: people are entitled to know what the rules are that they have to follow. If a policy can be challenged at any time, then nobody can know what the rules are.

And, again, the fact that a policy cannot be challenged per se after a certain time does not prevent challenges to specific decisions taken under the policy.

Best  
Richard Hill

## Registries Stakeholder Group Statement

Issue: Updated Supplementary Procedures for Independent Review Process (IRP)

**Date statement submitted: 31 January 2017**

**Reference URL:** <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>

### **RySG Comment:**

The Registries Stakeholder Group (RySG) welcomes the opportunity to comment on the Updated Supplementary Procedures for Independent Review Process (IRP).

### **Timing of Claim-Filing:**

With respect to the issue concerning the time within which an IRP claimant must file its claim or lose the ability to have IRP review the claim, the RySG is aware of the concerns raised by a number of commenters, including the concerns raised by Milton Mueller in his [blog](#)<sup>1</sup> on this issue.

The RySG thinks a claimant under the IRP process should be given a fair time within which to make their claim and urges the IRP IOT to review the timing issue again because the proposed timing is not fair. The IRP IOT should ensure that the claims-filing period allows a reasonably fair window for making claims so that ICANN can be appropriately held to remaining within Mission by IRP proceedings. The IOT might also consider eliminating the 45 day limitation from 'discovery' of a claim in favor of a single 'hard' limitations period of one year, with up to thirty days thereafter to pay the filing fee.

In addition, the RySG is concerned that there is a lack of clarity in the claims-filing period with respect to the impact on the period of intermediary proceedings aimed at more informally handling disputes, e.g. the CEP, the filing of a reconsideration request, and the like. We strongly believe that any claims filing period must be suspended during the pendency of these intermediary steps aimed at resolving disputes.

Also respecting timing, the RySG urges the IRP IOT to revise the limit with respect to possible IRP claims by the Empowered Community to ensure that there is sufficient time for the EC to file a complaint, taking into consideration the time required for the EC to execute its escalation process and prepare materials required for filing of a claim.

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<sup>1</sup> [http://www.internetgovernance.org/2017/01/07/putting-your-rights-on-the-clock-the-irp-supplementary-rules/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+internetgovernance%2FabwE+%28IGP+Blog%29](http://www.internetgovernance.org/2017/01/07/putting-your-rights-on-the-clock-the-irp-supplementary-rules/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+internetgovernance%2FabwE+%28IGP+Blog%29)



**Parties**

With respect to Sec. 7 (Consolidation, Intervention and Joinder) -- The IRP panel should consider whether it (as a panel) or a "Procedures" officer from within the standing panel should make these decisions in particular cases. The IRP panel will have better judgment as a panel what might be the best approach in any one case.

**Discovery**

With respect to Sec. 8 (Discovery Methods) -- The panel should have the power to allow other forms of discovery on a limited basis if it deems appropriate, and also should have sanctions power to compel compliance or to provide consequences for non-compliance.

## Time limits

- *To:* comments-irp-supp-procedures-28nov16@xxxxxxxxxx
- *Subject:* Time limits
- *From:* Steven Sullivan <steven.sullivan@xxxxxxxxxx>
- *Date:* Tue, 10 Jan 2017 16:21:39 -0500

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Time limits for correcting an error in policy does not make sense. There should be no time limit for correcting an error. So if any problem arises in the future and time has elapsed then we all have to live with the problem because you implemented a time limit. This is just bad policy. Wrong and bad policy is not what we want.

Se