

7. Consolidation, Intervention and Participation as an Amicus

1) A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an amicus. Except as otherwise expressly stated herein, requests for consolidation, intervention, and/or participation as an amicus are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

2) In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all each CLAIMANTS collectively individually (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

3) Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. ~~If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.~~

4) All motions for consolidation shall be directed to the IRP Provider, who will appoint a PROCEDURES OFFICER, with copies to ICANN and any parties to an IRP which is the subject of a request for consolidation, within 15 days of the publication of the later IRP, unless the PROCEDURES OFFICER, in its discretion, deems that the PURPOSES of the IRP are furthered by accepting such a motion after 15 days.

5) All motions for consolidation be accompanied by the appropriate filing fee and must explain why the DISPUTES should be consolidated, in other words:

a. What the common nucleus of operative fact is; and

b. Why consolidation would foster a more just and efficient resolution than addressing the DISPUTES individually.

Commented [SP1]: In the current interim rules some aspects that apply to both Consolidation and Intervention are dealt with together, under one or other of the headed sections, which risks the information being missed. For present purposes I have dealt with in BOTH sections, even if that means a degree of duplication. The alternative might be to have a section applicable to both, and then process-specific information separated-out.

Commented [SP2]: On the small group call on 9 Nov, we were favouring combining the PO role with the emergency arbitrator role. This role could handle any requests for emergency relief, applications for consolidation, intervention and joinder, and applications for translation services

Commented [SP3]: Agreed on WG calls that we will make this change

Commented [SP4]: We will need to review timings holistically to ensure they work. Since consolidation relates to two or more existing cases a relatively short time limit for making an application may be more appropriate than for intervention.

Commented [SP5R4]: On WG call there appeared to be agreement that 15 days for Consolidation is too short, and we were favouring 21 days.

We discussed whether there should be a cut-off for bringing an application to consolidate, but did not reach agreement, beyond noting the Bylaws aim for a 6 month timeframe for an IRP

Commented [SP6]: Interim Supplementary procedures refer to "initiation", but there may be a time delay between initiation and publication

Commented [SP7]: LIZ comments: do we need to detail this out? Anything else?

6) ICANN and any IRP CLAIMANT who is the subject of a request for consolidation shall be entitled to submit a statement in response within [15 days] of receipt of the motion to consolidate.

7) The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES. In considering whether to consolidate, the PROCEDURES OFFICER should consider all relevant circumstances, including:

- a. The views of all the parties
- b. The progress already made in the IRPs, including whether allowing the request would require previous decisions to be reopened, steps to be repeated, or other duplication of work.
- c. whether an IRP PANEL has been appointed in more than one of the IRPs and, if so, whether the same or different panelists have been appointed.

8) When IRPs are consolidated, they shall be consolidated into the IRP that commenced first, unless otherwise agreed by all parties or the PROCEDURES OFFICER finds otherwise.

9) Where an IRP Panel is already appointed in the first IRP, that IRP Panel shall continue in place for the consolidated IRP proceedings unless the PROCEDURES OFFICER decides otherwise. Where no IRP Panel is already appointed in the first IRP, or the PROCEDURES OFFICER determines that the existing IRP Panel should not continue in place, a new IRP Panel will be appointed following the procedure set out at Rule 3. All CLAIMANTS will endeavour to agree on a single panelist following the procedure set out at Rule 3. If the CLAIMANTS cannot so agree, the PROCEDURES OFFICER will select the panelist on behalf of the CLAIMANTS. Absent the agreement of all parties, the PROCEDURES OFFICER shall not be appointed in the consolidated proceeding.

10) If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration.

2-11) Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the PROCEDURES OFFICER or, once appointed the IRP PANEL, shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Commented [SP8]: LIZ comment: do we need more guidance? are there specific "purposes of the IRP" that we should specifically call out? For example, because IRP proceedings are binding, possibility of conflicting rulings or a race to a ruling that would render a separately pending IRP moot could be a factor that would tend toward consolidation. Are there factors that might go against consolidation? Or other items that might support?

Commented [SP9]: LIZ Comment: Outside of conflict of interest concerns that adding a new party to a proceeding might add, are there other scenarios where the IOT believes that it is appropriate to consider replacing an existing IRP Panel? Org favours a very narrow set of circumstances (likely only conflict of interest related) for panel replacement orders. To the extent re-panels is required, from ICANN org we'd recommend reliance in full on Rule 3 instead of creating a new appointment path, while also concurring on the exclusion of the PROCEDURES OFFICER from that new IRP Panel. Some other considerations could include:

- What would happen with issues already decided in the IRP by the "prior" panel?
- Who is responsible for the cost of bringing a second panel up to speed?
- How are the parties impacted in their legal spend?

Intervention

~~3)12)~~ Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

~~4)13)~~ Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

~~5)14)~~ In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

~~15)~~ Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT.

~~16)~~ All motions to intervene ~~or for consolidation~~ shall be directed to the IRP Provider, who will appoint a PROCEDURES OFFICER, IRP PANEL within [15 days] of the initiation-publication of the INDEPENDENT REVIEW PROCESS unless the PROCEDURES OFFICER, in its discretion, deems that the PURPOSES of the IRP are furthered by accepting such a motion after [15 days].

~~17)~~ All requests to intervene ~~or for consolidation~~ must be accompanied by the appropriate filing fee, contain the same information as a written statement of a DISPUTE and, explain why the right to intervene should be granted, in other words:

a. What the common nucleus of operative fact is; and

b. Why allowing intervention would foster a more just and efficient resolution than addressing the DISPUTES individually.

~~and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.~~

Commented [SP10]: LIZ comment: Scope of Intervening Claimant Filings: On Intervention, the IOT might wish to consider if limitations on the scope of the proposed intervening claim are appropriate. Should intervention be limited only to those tailored to the issues already in DISPUTE, given that IRPs are not about delivering relief to particular entities, but are about challenging ICANN violations of Bylaws/Articles?

Commented [SP11]: See comments on Procedures officer above

Commented [SP12]: IRP Panel will not be in place within 15 days. Motion to be made to the IRP Administrator, who appoints Procedures Officer?

Commented [SP13]: Consider timing. 15 days seems adequate for a non-party to intervene into someone else's IRP proceedings. Even the 21 days proposed for Consolidation may be too short for intervention.

Should there be an upper cut-off?

18) The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of allowing the intervention. In considering whether to allow intervention, the PROCEDURES OFFICER should consider all relevant circumstances, including:

- The views of all the parties
- The progress already made in the IRP, including whether allowing the request would require previous decisions to be reopened, steps to be repeated, or other duplication of work.

Commented [SP14]: I did not include (c) whether the IRP panel is already in place, as this seems less relevant in context of intervention, and could be adequately covered by (b)

19) Where an IRP Panel is already appointed in the IRP, that IRP Panel shall continue in place after an application for intervention is granted unless the PROCEDURES OFFICER decides otherwise. Where no IRP Panel is already appointed, or the PROCEDURES OFFICER determines that the existing IRP Panel should not continue in place, a new IRP Panel will be appointed following the procedure set out at Rule 3. All CLAIMANTS will endeavour to agree on a single panelist following the procedure set out at Rule 3. If the CLAIMANTS cannot so agree, the PROCEDURES OFFICER will select the panelist on behalf of the CLAIMANTS. Absent the agreement of all parties, the PROCEDURES OFFICER shall not be appointed in the consolidated proceeding.

Commented [SP15]: LIZ Comments as above: Outside of conflict of interest concerns that adding a new party to a proceeding might add, are there other scenarios where the IOT believes that it is appropriate to consider replacing an existing IRP Panel? Org favours a very narrow set of circumstances (likely only conflict of interest related) for panel replacement orders. To the extent re-panels is required, from ICANN org we'd recommend reliance in full on Rule 3 instead of creating a new appointment path, while also concurring on the exclusion of the PROCEDURES OFFICER from that new IRP Panel. Some other considerations could include:

20) Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the the PROCEDURES OFFICER or, once appointed the IRP PANEL, shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

- What would happen with issues already decided in the IRP by the "prior" panel?
- Who is responsible for the cost of bringing a second panel up to speed?

How are the parties impacted in their legal spend?

Participation as an Amicus Curiae

21) Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an amicus curiae before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an amicus before the IRP PANEL:

Commented [SP16]: We have a time limit for the above 2 forms of participation, but nothing specified for the amicus request. Is it reasonable for it to be comparable to an application to intervene?

- A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));

Commented [SP17]: Would this adequately cover a successful party in a new gTLD objection proceeding, where the IRP is brought by the unsuccessful party?

ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; ~~and~~

iii. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external ~~person, group~~ or entity;

iii.iv. A person, group or entity that is directly and personally materially impacted by the Covered Action which is the subject of the DISPUTE, but does not meet the requirements to be a CLAIMANT.

8)22) All requests to participate as an amicus must contain the same information as the Written Statement (set out at Section 6), specify the interest of the amicus curiae, and must be accompanied by the appropriate filing fee.

23) All requests to participate as an amicus curiae shall be directed to the IRP Provider, who will appoint a PROCEDURES OFFICER, within X days of the publication of the INDEPENDENT REVIEW PROCESS unless the PROCEDURES OFFICER, in its discretion, deems that the PURPOSES of the IRP are furthered by accepting such a request after X days.

24) If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed amicus curiae has a material interest relevant to the DISPUTE, he or she shall allow participation by the amicus curiae. Any person participating as an amicus curiae may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, rights of the parties to file briefings in response and other procedural rules as the IRP PANEL may specify in its discretion.

9)25) A person participating as an amicus curiae shall be given access to all publicly-available written statements, evidence, motions, procedural orders and other materials in the DISPUTE in a timely manner. Where a CLAIMANT or ICANN claims that any such materials are confidential, the IRP PANEL shall determine in its discretion [4] the extent to which and terms on which such material documents must be made ~~what materials related to the DISPUTE to make~~ available to a person participating as an amicus curiae.

Commented [SP18]: LIZ Comment: **Amicus as of Right:** Susan's strawperson proposes a new classification of persons allowed Amicus status as of right. Does the IOT agree that we need additional categories here, as there is already discretion? If so, what is the proper scope for addition, and can it be quantified or measured objectively?

Commented [SP19]: See comments above. If there is already an IRP Panel in place, presumably we would expect the Panel to decide Amici applications?

Commented [SP20]:

Commented [SP21]: Consider timing – is it necessary/appropriate to impose any timing on participation as an amicus?

Commented [SP22]: Rules leave access to documents to the discretion of the IRP panel (but favouring broad participation per the footnote). Has been flagged as an issue for consideration.

4 During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of amicus curiae and in then considering the scope of participation from amicus curiae, the IRP PANEL shall lean in favor of allowing broad participation of an amicus curiae as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

Commented [SP23]: Language caused some debate in the Web case. Should we reconsider

Public comments – brief summary

Dot Music – Procedures Officer will lead to undue costs. Matters should be determined by the IRP panel.

IPC – Any third party directly involved in the underlying action which is the subject of the IRP should be able to petition to join or intervene, either as a Claimant or in opposition. Multiple Claimants should not be limited collectively in the page limit (costs can be addressed by panel). Requests to join should be determined by the IRP panel and not the PO.

NCSG – All parties to the underlying proceedings should have the right to intervene, or file an amicus brief. For a challenge to a Consensus Policy, the Supporting Organization and its Stakeholder Group must be in a position to defend their work.

Fletcher law firm – Provide notice to all original parties to underlying proceedings. Right of intervention to all such parties. Panel should hear from such parties before any decision on interim relief. For a challenge to a Consensus Policy, the Supporting Organization and its Stakeholder Group must be in a position to defend their work. Provide notice to the SO, SG, C that developed the Policy. Mandatory right to intervene by those who participated in creation of the Policy. Comparable right to intervene into CEP.

RySG – IRP Panel may be better able to determine applications