

7. Consolidation, Intervention and Participation as an Amicus

- 1) Any request for consolidation, intervention, and/or participation as an amicus shall be considered and determined by the IRP PANEL appointed to the IRP first commenced (the DOMINANT IRP).
- 2) Except as otherwise expressly stated herein, actions on requests for consolidation, intervention, and/or participation as an amicus are committed to the reasonable discretion of the DOMINANT IRP PANEL. Where all the Parties, proposed Parties and proposed amici consent to the request for consolidation, intervention, and/or participation as an amicus then[, save in extraordinary circumstances,] there is a presumption that the DOMINANT IRP PANEL will permit the request.
- 3) In the event that no IRP PANEL is in place for the DOMINANT IRP when a request for consolidation, intervention, and/or participation as an amicus is made the request will be suspended pending IRP PANEL appointment for the DOMINANT IRP. [In case of urgent requests a single Consolidation Arbitrator may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation/ single panelist from the Standing Panel once this is in place.]
- 4) In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to each CLAIMANT individually unless otherwise modified by the DOMINANT IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

- 5) Consolidation of DISPUTES may be appropriate when the DOMINANT IRP PANEL 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.
- 6) All motions requesting consolidation shall be submitted to the IRP Provider with copies to ICANN and any parties to an IRP which is the subject of a request for consolidation, within [21/28] days of the publication of the later IRP, unless the DOMINANT IRP PANEL, in its discretion, deems that the PURPOSES of the IRP are furthered by accepting such a motion after [21/28] days. The IRP Provider will direct the request to the DOMINANT IRP PANEL.

Commented [SP1]: Overarching Comment from the Sub Team for consideration by the IOT Plenary:

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.

The Sub Team has favoured duplicating any such provisions in any sections where they apply to ensure that a pote... [1]

Commented [SP2]: Who should hear such applications:

The starting position under the Interim Rules is that there should be a Procedures Officer (PO) to hear such ... [2]

Commented [SP3]: Input from the full WG:

Whether this reference to "extraordinary circumstances" is needed, or whether the reference to this being a ... [3]

Commented [SP4]: Input from the full WG:

On the possibility of needing an emergency process for these requests, where the request cannot wait for a p... [4]

Commented [SP5]: Sub Team considers that each Claimant ought to be able to submit their own Written Statement

Commented [SP6]: Consolidation ST discussed at length the reference to more "just and efficient" resolution - which is language in the current interim rules - in particular whether the test ought to be simply whether the ... [5]

Commented [SP7]: Input from the IOT:

Consolidation ST refers the question of what the appropriate timing is to the full plenary WG. Interim r... [6]

Commented [SP8]: Interim rules refer to initiation rather than publication. The Sub Team considered that a third party may not know the date of initiation of an IRP tha... [7]

7) All motions for consolidation must 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 [SP9]: Dealt with under Initiation

8) All motions for consolidation shall also include a declaration by the moving party that:

- a. All statements it makes in its motion are true and correct;
- b. They are not intentionally misleading the Panel; and
- c. They are not filing the motion and seeking to consolidate for improper purposes. Improper purposes include, but are not limited to:
 1. Having the primary intent to delay either IRP action or the resolution of an underlying proceeding;
 2. Seeking to harass ICANN, another IRP Claimant or any other party or potential party to the IRP proceedings; or
 3. Having the primary intent of changing the IRP Panelists who will hear their DISPUTE.

Commented [SP10]: Sub Team believe that those seeking to consolidate should be required to make a declaration that they are doing so for proper purposes and are not misleading the panel.

This declaration should require the same legal formalities as apply to Written Statements etc in the IRP - i.e. we would not expect this to be under Oath unless that is the standard applied elsewhere in the IRP.

9) ICANN and any IRP CLAIMANT who is a Party to an IRP which is the subject of a request for consolidation shall be entitled to submit a statement in response within [21/28 days] of receipt of the motion to consolidate.

Commented [SP11]: Input from the IOT:

Sub Team believe that the consolidation process should not be used primarily to change the Panelists who will hear the dispute, however it is likely that most cases of Consolidation will have that effect and so this may be very difficult to prove. Does the IOT Plenary support keeping this?

10) The DOMINANT IRP PANEL may in its discretion order briefing to consider the propriety of consolidation of DISPUTES. In considering whether to consolidate, the DOMINANT IRP PANEL 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.
- d. Whether granting a request to consolidate would create a conflict of interest for an already-appointed panelist.
- e. How consolidation better furthers the Purposes of the IRP generally, as compared to the proceedings continuing independently.

Commented [SP12]: Input from the IOT on timing

Commented [SP13]: The Sub Team consider that it is helpful to provide guidance to the IRP Panel of circumstances they should take into consideration in deciding whether to Consolidate.

We also discussed an additional circumstance: whether consolidating would remove or reduce the likelihood of a conflicting IRP decision being reached. We concluded however that this would always be the case, by the very nature of consolidating 2 or more disputes into one.

- 11) When IRPs are consolidated, they shall be consolidated into the DOMINANT IRP, unless otherwise agreed by all parties or the DOMINANT IRP PANEL finds otherwise.
- 12) The DOMINANT IRP Panel shall continue in place for the consolidated IRP proceedings unless one or more of the panelists is unable to continue and withdraws due to conflict of interest, in which case the Party whose panelist stands down will select a further panelist in accordance with Rule 3.
- 13) If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration, provided that the DOMINANT IRP Panel shall have the discretion to determine otherwise.
- 14) Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the DOMINANT IRP PANEL, shall direct that all materials related to the DISPUTE be made available to entities that have 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 DOMINANT 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 [SP14]: First part of sentence reflects existing Interim Rules. Additional text added by Sub Team to reflect the fact that in practice in at least one previous case, the Panel has maintained some separation between the two proceedings.

Intervention

- 15) 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 DOMINANT IRP PANEL, 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)).
- 16) 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 DOMINANT IRP PANEL may order in its discretion.
- 17) 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.

Commented [SP15]: IOT Input:
 On the role that a Supporting Organisation should have. Since the SO is effectively participating in defence of their Consensus Policy they do not meet the Bylaws definition of a CLAIMANT (i.e. suffering damage as a result of the action/inaction being challenged).
 Assuming we agree with the concept of allowing the SO to participate (which was a decision of the previous iteration of this IOT) how best should this be done? E.g. should they be a full party to the proceedings, but not a Claimant - perhaps simply called an "Intervening Party"; or could their interest in the proceedings be adequately addressed by allowing the SO to participate as an Amicus?

- 18) 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.
- 19) All motions requesting permission to intervene shall be submitted to the IRP Provider, who will direct the request to the DOMINANT IRP PANEL. Motions should be submitted within [21/28 days] of the publication of the INDEPENDENT REVIEW PROCESS unless the DOMINANT IRP PANEL, in its discretion, deems that the PURPOSES of the IRP are furthered by accepting such a motion after [21/28 days]. Filing a motion to intervene does not stop the clock on the intervener's own time to bring an IRP and so a potential intervener should consider whether they will be at risk of being out of time, should the motion be rejected.
- 20) All requests to intervene 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.
- 21) All motions for intervention shall include a declaration by the moving party that:
- a. All statements it makes in its motion are true and correct;
 - b. They are not intentionally misleading the Panel; and
 - c. They are not filing the motion and seeking to intervene for improper purposes. Improper purposes include, but are not limited to:
 1. Having the primary intent to delay the IRP action or the resolution of an underlying proceeding;
 2. Seeking to harass ICANN, another IRP Claimant or any other party or potential party to the IRP proceedings; or
 3. Having the primary intent of changing the IRP Panelists who will hear their DISPUTE.
- 22) The DOMINANT IRP PANEL may in its discretion order briefing to consider the propriety of allowing the intervention. In considering whether to allow intervention, the DOMINANT IRP PANEL should consider all relevant circumstances, including:

Commented [SP16]: Input from the IOT, as above

Sub Team believe that the consolidation process should not be used primarily to change the Panelists who will hear the dispute, however it is likely that most cases of Consolidation will have that effect and so this may be very difficult to prove. Does the IOT Plenary support keeping this?

- a. The views of all the parties.
- b. 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.
- c. Whether granting a request to intervene would create a conflict of interest for an already-appointed panelist.

23) The DOMINANT IRP Panel shall continue in place after an application for intervention is granted unless one or more of the panelists is unable to continue, and withdraws, due to conflict of interest, in which case the Party whose panelist withdraws will select a further panelist in accordance with Rule 3.

24) Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the DOMINANT IRP PANEL, shall direct that all materials related to the DISPUTE be made available to entities that have intervened unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the DOMINANT 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.

Participation as an Amicus Curiae

- 25) 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:
- i. 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));
 - 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;
 - 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; and

Commented [SP17]: IOT Input on timing

Commented [SP18]: IOT Input:

SubTeam would like this clause 25 reviewed by the full plenary to ensure agreement with the position that a person/group/entity that satisfies the standing to be a Claimant should participate via consolidation/intervention and not as an amicus - role of amicus is intended only for those who do not have standing to be a claimant.

ST also seek review by the full plenary of sub para iv. This was an addition proposed by SP and not in the current interim rules. Should we keep this, does it add anything? Note Liz’s previous comments on iv: "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?"
IOT

- 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
- 26) All requests to participate as an amicus must meet the requirements of the Written Statement (set out at Rule 6), specify the interest of the amicus curiae, include the same declaration as referred to at Rule 7(8) and must be accompanied by the appropriate filing fee.
- 27) All requests to participate as an amicus curiae shall be submitted to the IRP Provider, who shall direct them on to the DOMINANT IRP PANEL if already in place. Where no IRP PANEL is in place the IRP Provider, shall refer the request to the IRP PANEL once appointed. Requests to participate as an amicus must be made within 30 days of the publication of the INDEPENDENT REVIEW PROCESS unless the IRP PANEL, in its discretion, deems that the PURPOSES of the IRP are furthered by accepting such a request after 30 days.
- 28) If the DOMINANT IRP PANEL determines, in its discretion, subject to the conditions set forth above, that the proposed amicus curiae has a material interest relevant to the DISPUTE, it shall allow participation by the amicus curiae. In addition to the Written Statement referred to at paragraph 26 above any person participating as an amicus curiae may, at the request and in the discretion of the IRP PANEL, submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing 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.
- 29) 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] whether and if so the extent to which and terms on which such material documents must be made available to a person participating as an amicus curiae.

Commented [SP19]: IOT Input on timing

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.

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

Overarching Comment from the Sub Team for consideration by the IOT Plenary:

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.

The Sub Team has favoured duplicating any such provisions in any sections where they apply to ensure that a potential participant does not miss something. This does result in some repetition. An alternative might be to have an omnibus section which deals with those provisions which have duplication.

Question for the IOT: Do you support the SubTeam approach, or are there provisions applicable to two or three types of participation which make sense to be moved up to the omnibus section rather than dealt with separately (and duplicatively) under individual sections? If the latter, this could be addressed during clean-up of the rules

Who should hear such applications:

The starting position under the Interim Rules is that there should be a Procedures Officer (PO) to hear such applications. Feedback from early cases is that this concept is not well-understood.

Sub Team considered therefore whether to have these applications determined by a single arbitrator from the Standing Panel and use a term such as Consolidation Arbitrator. We therefore also discussed whether such decisions would be final, or open to re-evaluation by the full IRP Panel when appointed.

After extensive discussion the Sub Team concluded that these applications are of such importance that they ought to be determined by a 3-person IRP Panel and not by an individual arbitrator.

As a result we have introduced the concept of the DOMINANT IRP, to address which Panel would be responsible if more than one has already been appointed.

It is also important to note that, given the likely timing of these applications, it is possible that no IRP PANEL will yet have been appointed, and in which case there may be some delay in considering the application for consolidation etc.

Finally, having these applications determined by the 3-person IRP Panel meant we did not need to specifically address whether such decisions are final or subject to reconsideration when the full panel is appointed. Sub Team did consider whether there needs to be a challenge process specifically built-in, for when the Panel has been

misled, but concluded that there would be a general inherent power to reconsider in such a case. Does the IOT Plenary agree?

Page 1: [3] Commented [SP3] Susan Payne 7/5/23 4:46:00 PM

Input from the full WG:

Whether this reference to "extraordinary circumstances" is needed, or whether the reference to this being a presumption is sufficient, given that this should necessarily allow the possibility of the panel reaching a different conclusion?

If we do include the reference to "extraordinary circumstances" do we need to give the panel more guidance on this?

Page 1: [4] Commented [SP4] Susan Payne 7/5/23 4:51:00 PM

Input from the full WG:

On the possibility of needing an emergency process for these requests, where the request cannot wait for a panel to be in place to consider it. None of the Sub Team could think of a scenario where this would be necessary, but we think it is appropriate to get the input of the wider group on this point.

Page 1: [5] Commented [SP6] Susan Payne 7/5/23 5:01:00 PM

Consolidation ST discussed at length the reference to more "just and efficient" resolution - which is language in the current interim rules - in particular whether the test ought to be simply whether the consolidation is "just", or whether we should match the wider list of purposes of the IRP.

Ultimately the ST concluded that "just and efficient" remains appropriate.

Limiting only to "just" might not take into account that one IRP might be very advanced and so consolidating at this point would cause issues to have to be reopened.

Bylaws language is: "Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes" and so we discussed whether we should be mirroring all of those elements, but concluded that these are the purposes of ALL IRPs.

ICDR Rules talk about serving the interest of "justice and efficiency"

Page 1: [6] Commented [SP7] Susan Payne 7/5/23 5:12:00 PM

Input from the IOT:

Consolidation ST refers the question of what the appropriate timing is to the full plenary WG. Interim rules set a time limit of 15 days from initiation of the IRP.

ST consider that consolidation and intervention should have the same time limits, and that 21 or 28 days would be appropriate – both to be put to the full WG for a decision.

NB: We will need to review all timings at the end to ensure they work.

Page 1: [7] Commented [SP8] Susan Payne 7/5/23 5:17:00 PM

Interim rules refer to initiation rather than publication. The Sub Team considered that a third party may not know the date of initiation of an IRP that they are not yet involved in, and so it would be more appropriate to refer to publication.

IOT will need to ensure, when rules are finalised, that there is a clear obligation to publish that an IRP has been initiated (which is the practice)