

NOTE 18/03/2024: Some **updates** to rationale text have been proposed arising out of review of the Legal redline, but the text of the Rule itself is still to be updated.

## **7. Consolidation, Intervention and Participation as an Amicus - Proposed text for Public Comment (redline against the current Interim Supplementary Procedures) with Rationale**

### ***Introduction - Relevant Input from Previous Public Consultation by the IOT***

- *Decisions on whether to accept a request for Consolidation, Intervention or Amicus should be made by the Panel and not the Procedures Officer.*
  - *Having considered this, together with feedback arising from past cases that the role of the Procedures Officer has not been well-understood and has caused confusion, the IOT agreed with this suggestion from a number of respondents and has included this change in this proposal.*
- *Any third party directly involved in the underlying action which is the subject of the IRP should be able to petition to join, intervene or participate as an Amicus.*
  - *The IOT agreed with this suggestion from a number of respondents and has included this change in this proposal.*
- *Multiple Claimants should not be limited collectively in the page limit.*
  - *The IOT agreed with this suggestion from a number of respondents and has included this change.*
- *For a challenge to a Consensus Policy, the Supporting Organization responsible for that policy must be in a position to defend their work.*
  - *In the case of a Supporting Organization whose policy is the subject matter of the dispute, the IOT concluded that they ought to be able to choose to join the proceedings either as a party or as an amicus, however the nature of their role is such that they do not meet the definition of a Claimant. The IOT has therefore proposed to use the term Intervening Party where they join as a party.*

### **Rule 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 involved IRP which was commenced first (the First IRP). No consolidation will be permitted between binding and non-binding (as provided for under Bylaws 4.3(x)(iv)) IRPs, and the nature of the First IRP will not be changed from binding to non-binding, or vice versa, as a result of any consolidation, intervention or participation as an amicus.

*Rationale: The IOT agreed with the public comments that the IRP Panel should be the one to determine if consolidation can occur. The IOT also noted feedback reported from past IRP cases that the role of the Procedures Officer has not been well-understood by participants and has caused confusion. The concept of the Procedures Officer is therefore removed, in favour of these decisions being referred to the 3-person IRP Panel, once appointed.*

*In the case of consolidation, where two or more separate IRPs are involved, one IRP Panel must be tasked with the responsibility for making this determination, and it is proposed that this should be the IRP Panel appointed to the IRP that was commenced first in time.*

*In considering consolidation the IOT noted that the Bylaws allow for Claimants to file for non-binding IRPs and that the IRP Panel could be called on to determine if a binding IRP and a non-binding IRP can be consolidated. The IOT considered this and concluded that these two types of IRPs should not be allowed to be consolidated as the final result of the consolidated IRP in that case would change the nature of one of the original IRPs. Further, the IOT concluded that no act of participation by means of consolidation, intervention or participation as an amicus should have the effect of changing the binding/non-binding nature of the proceedings being joined.*

2. Except as otherwise specifically stated herein, actions on requests for consolidation, intervention, and/or participation as an amicus are committed to the reasonable discretion of the First IRP Panel. Where all the Parties, proposed Parties and proposed amici consent to the request for consolidation, intervention, and/or participation as an amicus, respectively, then there is a presumption that the First IRP Panel will permit the request.

*Rationale: The IOT believed that the First IRP Panel should retain its discretion in making these decisions but that it should provide guidance to that Panel for cases where all parties agree to the action.*

3. In the event that no IRP Panel is in place for the First 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 First IRP.

*Rationale: Given the First IRP Panel is responsible for these decisions in this proposal, a determination on the application cannot be made until the First IRP Panel is appointed.*

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 and INTERVENING PARTY individually unless the First IRP Panel concludes otherwise, in its discretion, consistent with the Purposes of the IRP.

*Rationale: The IOT considers it reasonable to allow each party to put forward its own statement in support.*

### **Consolidation**

5. Consolidation of Disputes may be appropriate when the First 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.

*Rationale: See comments above, the only change is replacing the Procedures Officer with the First IRP Panel.*

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. Motions should be submitted:
  - a. within [21/28] days of the publication of the later IRP; and
  - b. within 60 days of the publication of the First IRP

unless the First IRP Panel, in its discretion, deems that the Purposes of the IRP are furthered by accepting such a motion after such time limits. The IRP Provider will direct the request to the First IRP Panel.

*Rationale: The IOT proposes to revisit all timings before finalising the SP, to ensure that they are coherent. Input from the community on questions of timing would be welcome.*

*The IOT considers that, in the interests of avoiding undue delay or duplication, there should be expected time limits for making an application for consolidation, by reference both to the commencement of a later IRP which is seeking to be consolidated into the First IRP, and by reference to the length of time the First IRP has been underway. Since “commencement” of an IRP requires knowledge of a third party proceeding which the applicant may not have, the IOT proposes that time limits should run from publication, since this places everyone in the same position. The Bylaws contain an obligation on ICANN to publish promptly, and Rule 6 contains provision for specified interest parties to be notified. **The IOT intends that “Publication of the IRP” should be defined in Section 1, to reflect that publication by ICANN is considered to have taken place when any notice of the IRP and the written statement of dispute have been published on the relevant section of the ICANN website.***

*Rather than make this an outright time limit the IOT considered that the First IRP Panel should have the discretion to accept a later application.*

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.

*Rationale: this mirrors subsection 5 above and makes it clear that the moving party is responsible for providing sufficient information to justify granting the request.*

8. All motions for consolidation shall also include a declaration by the moving party that:
  - c. All statements it makes in its motion are true and correct; and
  - d. They are not intentionally misleading the Panel; and
  - e. They are not filing the motion and seeking to consolidate for improper purposes. Improper purposes include, but are not limited to:
    - i. Having the primary intent to delay either IRP action or the resolution of an underlying proceeding; or
    - i. Seeking to harass ICANN, another IRP Claimant or any other party or potential party to the IRP proceedings; or
    - ii. Having the primary intent of changing the IRP Panelists who will hear either Dispute.

*Rationale: The IOT was concerned about the potential for misuse of the option to consolidate IRP requests. It therefore proposes that the moving party should include a declaration as to its bona fides.*

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.

*Rationale: The IOT considers that, in order to ensure fairness, any non-moving parties who would be impacted by a decision to consolidate should have a right to be heard.*

*As above, the proposed timing of 21/28 days is an initial proposal on which community input is being sought. Once the IOT has completed drafting the SP all timings will be reviewed against the comments received and to ensure that similar timing requirements within the draft SP are coherent.*

10. The IRP Provider or the respective IRP Panels may stay either or both IRPs in their discretion pending a decision on the motion for consolidation, provided that the non-moving parties shall be granted an opportunity to make representations on any such stay to their IRP.

*Rationale: The IOT was concerned that the work of all relevant IRP Panels would have to continue in each IRP while the request for Consolidation was being considered, potentially resulting in a waste of resources. As such the IOT is proposing to allow the Panels responsible for these IRPs (or the IRP Provider where the Panel is not yet in place) to make the decision to stay either of both while the request for consolidation is being considered.*

11. In considering whether to consolidate, the First IRP Panel should consider all relevant circumstances, including, without limitation:
  - 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.

*Rationale: The IOT noted that the Interim Supplementary Procedures (ISP) do not provide any guidance when considering whether to grant a request to consolidate. After considering this in depth the IOT is proposing the factors in Subsection 11 of this rule as a non-exhaustive guideline for the First IRP Panel.*

12. The First IRP Panel should endeavour to make a decision on a motion for consolidation as soon as possible and, in any event, shall do so within [15] days of final submissions. The First IRP Panel shall provide a brief statement of the reasons for their decision.

*Rationale: Given the expectation in the Bylaws that an IRP be completed in six months, the IOT was concerned about not having any deadline for the First IRP Panel to make a decision regarding a consolidation request which could significantly extend the time to complete an IRP if such a decision is protracted. After considering this, the IOT is proposing to include this section to institute a deadline for the First IRP Panel to make a decision regarding a request for consolidation.*

*The proposed timing of 15 days is an initial proposal on which community input is being sought.*

13. When IRPs are consolidated, they shall be consolidated into the First IRP, unless otherwise agreed by all parties or the First IRP Panel finds otherwise.

*Rationale: The IOT considers that there should be consistency as to how cases are consolidated, where possible. After considering this the IOT is proposing as guidance that consolidated IRPs be consolidated into the First IRP unless otherwise*

*agreed by all parties or the First IRP Panel finds otherwise. The First IRP Panel is therefore provided with guidance, without limiting its discretion in this matter.*

14. The First 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 withdraws will select a further Panelist in accordance with Rule 3.

*Rationale: The IOT noted a potential gap in the ISP regarding Consolidation. As noted in the previous section it is expected that any consolidated IRPs will be consolidated into the First IRP. Since an IRP Panel is in place at least for the First IRP, since this is tasked with deciding the application, that IRP Panel should continue in place. However, it is necessary to ensure that Panelists in the First IRP reconsider whether they have any conflict of interest with respect to the consolidated actions*

15. If Disputes are consolidated, each existing Dispute shall no longer be subject to further separate consideration, provided that the First IRP Panel shall have the discretion to determine otherwise.

*Rationale: The ISP provide that consolidated IRPs are thereafter treated as a single case. The IOT noted feedback from past IRPs, however, that this has not always been the case in practice. The IOT therefore proposes to include some discretion for the First IRP Panel to determine how the consolidated actions shall be treated thereafter.*

16. Excluding materials exempted from production under Rule 8 (Exchange of Information), the First IRP Panel, shall direct that all materials related to the Dispute be made available to parties 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 First 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.

*Rationale: A similar provision is included in the ISPs, but has been duplicated here to ensure that the rules relating to consolidation are grouped together.*

## **Intervention**

17. 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 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)).

*Rationale: The only change is replacing the Procedures Officer with the IRP Panel.*

18. 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 IRP Panel may order in its discretion.

*Rationale: No significant change from the ISP.*

19. 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 an INTERVENING PARTY to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

*Rationale: No significant change except for replacing “Claimant” in the ISP by “Intervening Party” given the IOT noted that in this context an SO cannot be a Claimant as defined under the Bylaws.*

20. Any person, group or entity who intervenes pursuant to this section will become a Party in the existing IRP and have all of the rights and responsibilities of other Parties in that matter and be bound by the outcome to the same extent as any other Party.

*Rationale: No significant change except for replacing “Claimant” in the ISP by “Party” given the change made to Subsection 19.*

21. All motions requesting permission to intervene shall be submitted to the IRP Provider, who will direct the request to the IRP Panel and copy the existing Parties to the IRP. Motions should be submitted within [21/28 days] of the publication of the IRP unless the IRP Panel, in its discretion, deems that the Purposes of the IRP are furthered by accepting such a motion after that time limit. Filing a motion to intervene does not stop the clock on the intervener’s own time to bring an IRP unless the IRP Panel exceeds the time for decision-making referred to at Subsection 26 below, and so a potential intervener should consider whether they will be at risk of being out of time, should the motion be rejected.

*Rationale:*

- *The ISP required that a motion to Intervene be directed to the IRP Panel. The IOT considered that this was inconsistent with other similar procedures, such as filing of an IRP, and that there could be circumstances where a motion to intervene is made before the IRP Panel has been appointed. The IOT concluded that such a motion should be directed to the IRP Provider who will ensure its distribution, but also copied to the known parties to the IRP in question.*
- *The ISP provided that a motion to Intervene needed to be filed within 15 days of the initiation of the IRP. In considering this the IOT noted that the date of initiation of an IRP could be difficult for an applicant to identify. Therefore, for the reasons referred to at Subsection 6 above the IOT proposes that timing should run from “publication of the IRP” which is clear and easy to locate. As*

*to the timing of 15 days after the publication of an IRP, the IOT considered this too short and is proposing 21/28 days.*

*The proposed timing of 21/28 days is an initial proposal on which community input is being sought. Once the IOT has completed drafting the SP all timings will be reviewed against the comments received and to ensure that similar timing requirements within the draft SP are coherent.*

- *The current text in the ISP states: “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.”. The IOT modified this to remove the reference to the Procedures Officer.*
- *Addition of “Filing a motion to intervene does not stop the clock on the intervener’s own time to bring an IRP unless the First IRP Panel exceeds the time for decision-making referred to at Subsection 22 below, and so a potential intervener should consider whether they will be at risk of being out of time, should the motion be rejected.” The IOT’s discussions on the Time to File (Rule 4) were exhaustive and is proposing this text to avoid any confusion on the part of the applicant. Only if the First IRP Panel delays in making a decision would the clock stop on the proposed Intervener’s time to file.*

22. 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.

*Rationale: The current text in the ISP addresses both applications for consolidation and for intervention. The IOT considers that necessary rules for these different forms of participation should be grouped together under their respective headings, leading to a small amount of duplication across the sections.*

*The IOT noted that there was no requirement for the applicant to explain why the right to Intervene should be granted and that this is a critical element in such an application. As such, the proposed text includes this additional requirement for filing a motion to Intervene.*

23. 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:



- i. Having the primary intent to delay the IRP action or the resolution of an underlying proceeding;
- i. Seeking to harass ICANN, another IRP Claimant or any other party or potential party to the IRP proceedings; or
- ii. Having the primary intent of changing the IRP Panelists who will hear either Dispute.

*Rationale: As for Subsection 8.*

24. ICANN and any IRP Claimant who is a Party to an IRP which is the subject of a request for intervention shall be entitled to submit a statement in response within [21/28 days] of receipt of the motion to intervene.

*Rationale: As for Subsection 9.*

25. In considering whether to allow intervention, the IRP Panel should consider all relevant circumstances, including, without limitation:
- 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.

*Rationale: As for Subsection 11, noting that the non-exhaustive list of appropriate factors is more limited than in the case of consolidation.*

26. The IRP Panel should endeavour to make a decision on a motion for intervention as soon as possible and in any event shall do so within [15] days of final submissions. The IRP Panel shall provide a brief statement of the reasons for their decision.

*Rationale: As for subsection 12.*

27. The 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.

*Rationale: As with Subsection 14, the IOT noted a potential gap in the ISP regarding Intervention. Panelists in the First IRP must reconsider if they have a conflict of interest as a result of the intervener joining the proceedings, and withdraw if appropriate.*

28. Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the First 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 First 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.

*Rationale: Essentially the same text as in the ISP.*

### **Participation as an Amicus Curiae**

29. Any person, group, or entity that has a material interest relevant to the Dispute, even if they do not satisfy the standing requirements for a Claimant set forth in the Bylaws, may seek leave to participate as an Amicus Curiae before an IRP Panel, subject to the limitations set forth in these sections 29 – 34. The purpose of participation as an Amicus Curiae is to assist the IRP Panel by offering information, expertise or other input that has a bearing on the issues in the Dispute. For the avoidance of doubt, an Amicus Curiae is not a party to the Dispute. 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 such person, group, or entity to participate as an Amicus Curiae, then there is a presumption that the IRP Panel will permit the request:
- 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)) the outcome of which is material and relevant to the Dispute;
  - 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;

*Rationale: Much of this text is the same as in the ISP, but with some notable amendments:*

- *Under the ISP only those who are ineligible to be a Claimant are permitted to participate as an amicus. The IOT considered this to be unfair to entities who technically might qualify as a Claimant, and did have input into the dispute that they wished to share, but did not wish to participate and seek an adjudication as an active Claimant.*
- *The IOT has clarified that anyone seeking to participate as an amicus must make an application to that effect, they do not participate as of right simply because they have a material interest in the Dispute.*
- *The persons, groups and entities satisfying subparagraphs (i) through (iii) do not participate as of right, but there is a presumption that they will be permitted by the Panel to do so.*
- *Clarifying that the purpose of permitting participation as an amicus is to assist the Panel.*

30. 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 Subsection 8 and must be accompanied by the appropriate filing fee.

*Rationale: This is the text of the ISP with the added reference to the requirement to make the same declaration as to bona fides as is required of an applicant for consolidation or intervention.*

31. All requests to participate as an Amicus Curiae shall be submitted to the IRP Provider, who shall direct them on to the 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 IRP unless the IRP Panel, in its discretion, deems that the Purposes of the IRP are furthered by accepting such a request after 30 days.

*Rationale: As detailed elsewhere in these draft Supplementary Procedures the IOT is proposing to remove the role of the Procedures Officer and the handling of such applications by the IRP Panel. In the IOT proposal, therefore, requests are submitted to the IRP Provider, who will direct them to the IRP Panel, and the IRP Panel will be responsible for making the decision to accept the request.*

*The ISP does not provide any time limit for requesters to submit an application to participate as an Amicus Curiae. The IOT considered this an issue if a request to participate as an Amicus is made once the IRP process is well underway, as this could cause significant delays in completing the IRP. To address this issue the IOT is proposing that requests to participate as an Amicus Curiae should be made within 30 days of the publication of the IRP. Similarly to such requirements for Consolidation and Intervention, the IOT is proposing that the IRP Panel, in its discretion, can accept requests to participate as an Amicus Curiae after the 30-day limit if the Purposes of the IRP are furthered by accepting such a late request.*

*The proposed timing of 30 days is an initial proposal on which community input is being sought. Once the IOT has completed drafting the Supplementary Procedures (SP) all timings will be reviewed against the comments received and to ensure that similar timing requirements within the draft SP are coherent.*

32. ICANN and any IRP Claimant who is a Party to an IRP which is the subject of a request for participation as an amicus shall be entitled to submit a statement in response within [21/28 days] of receipt of the motion to intervene.

*Rationale: The IOT was concerned that the ISP did not provide any opportunity for ICANN and any IRP Claimant who is a Party to an IRP to have any input into the IRP Panel's consideration regarding requests to participate as an Amicus Curiae. To address this issue the IOT is proposing to include the option for those parties to submit a statement in response to the IRP Panel.*

*The proposed timing of 21/28 days is an initial proposal on which community input is being sought. Once the IOT has completed drafting the Supplementary Procedures (SP) all timings will be reviewed against the comments received and to ensure that similar timing requirements within the draft SP are coherent.*

33. If the 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 and that they have information, expertise or other input that has a bearing on the issues in the Dispute which is likely to assist the IRP Panel, it shall allow participation by the Amicus Curiae.

*Rationale: Amended to reflect the changes made to Subsection 29 above.*

34. In addition to the Written Statement referred to at paragraph 30 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.

*Rationale: Revised for greater clarity that any written briefings submitted by an Amicus or only at the request and in the discretion of the IRP Panel.*

35. 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<sup>4</sup> 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.

*Rationale: Amended to mirror the text in relation to consolidation and intervention. The IOT considers that an amicus should be given access to the documents in the IRP.*

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<sup>4</sup> During the pendency of these 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.