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AT-LARGE ADVISORY COMMITTEE
ALAC statement on the IRP-IOT – Proposed updates to the IRP Supplementary Procedures

Preamble

On 03 July 2024 the Public Comment proceeding opened for the IRP-IOT – Proposed updates to the IRP Supplementary Procedures. An At-Large workspace was created in preparation for this Public Comment submission. The At-Large Operations, Finance and Budget Working Group (OFB-WG) reviewed the Proposed updates to the IRP Supplementary Procedures and decided it would be in the interest of end users to develop and submit an ALAC Public Comment Statement.

Ratification Record

On July 03, the Public Comment proceeding opened for the IRP-IOT-Proposed updates to the IRP Supplementary Procedures. On August 15th, Pari Esfandiari and Bukola Oronti volunteered to review the Public Comment. On August 29, the penholders discussed the comments for the ALAC statement during the OFB-WG call. The At-Large Operations, Finance and Budget Working Group (OFB-WG) decided it would be in the interest of end users to develop and submit an ALAC statement for this Public Comment proceeding. Penholders volunteered to draft the initial ALAC statement.

On August 29, the initial draft statement was shared with the OFB-WG for review and input. On September 09, the At-Large Public Comment Statement was finalized. The ALAC Chair, Jonathan Zuck, requested that the Public Comment Statement be ratified by the ALAC before submission to the ICANN Public Comment feature.

On September 14th, staff confirmed the online vote resulted in the ALAC endorsing the statement with [#] out of 15 votes in favor. [#] votes against, and [#] abstentions. Please note that [100]% of ALAC members participated in the poll. The ALAC members who participated in the poll are (in alphabetical order by first name): [Aziz Hilali, Bill Jouris, Bukola Oronti, Claire Craig, Eduardo Diaz, Joanna Kulesza, Jonathan Zuck, Justine Chew, Lilian Ivette De Luque, Marcelo Rodriguez, Pari Esfandiari, Raihanath Gbadamassi, Satish Babu, Shah Zahidur Rahman, and Tommi Karttaavi]. You may view the results here: [link to vote results].

ALAC and At-Large Community Comments

EXECUTIVE SUMMARY

The Independent Review Process (IRP) is a key accountability mechanism under ICANN's Bylaws, which provides for third-party review of Board or Staff actions or inactions which are alleged to exceed ICANN's Mission or otherwise be inconsistent with its Articles or Bylaws. The procedural rules for the IRP are set out in Supplementary Procedures. Shortly following the amendment of ICANN's Bylaws as a result of the IANA Transition, the IRP - Implementation Oversight Team (IOT), was formed to ensure the supplementary procedures align with international arbitration standards and are fair and understandable. This document outlines the At-Large Advisory Committee's (ALAC) response to the proposed updates to the Independent Review Process (IRP)-Implementation Oversight Team (IOT) Supplementary Procedures, published for public comment on July 3, 2024.

The matter of panel selection and conflict of interest is of significant importance to the Internet community, including end-users, because it directly impacts the fairness and impartiality of the Independent Review Process, which ultimately safeguards the interests of the global Internet community. Ensuring that the process is transparent, equitable, and free from conflicts of interest helps build trust in ICANN's accountability mechanisms. Greater clarity and consistency regarding the rules covering timing (including time to file, deadlines for filing, and exceptions) and a better structured, defined process for initiating and managing IRPs will benefit end users by ensuring that disputes are resolved efficiently and without unnecessary procedural barriers. Enhancing the rules regarding translation services and amicus curiae appearances will ensure broader participation and greater fairness for participants.

Therefore, ALAC strongly supports the proposed updates to Rules 3, 4A, 4B, 4C, 4D, 5B, and 7, viewing them as substantial improvements to the IRP-IOT Supplementary Procedures. While ALAC endorses these changes, it also underscores the importance of addressing the recommendations concerning Rules 3.3, 3.5, and 4B, 4D as discussed below.

- Rule 3.3 - Definition for "capacity", further clarity could be helpful.
- Rule 3.5 - The 7-day window for conducting thorough conflict checks, especially for larger law firms or organizations. A minimum of two weeks is recommended.
- Rule 4B does not address the delays caused by engaging in the Cooperative Engagement Process (CEP). Additional clarity and procedural alignment are recommended.
- Rule 4D, the definition of "limited circumstances" is ambiguous. Additional clarity is recommended.

After a comprehensive review and discussion within the At-Large Operations, Finance and Budget Working Group (OFB-WG), the draft ALAC comment was developed and subsequently

ratified by the ALAC through an online vote. This comment reflects the collective insights and recommendations of the ALAC and the wider At-Large community, emphasizing the need for a balanced and equitable IRP process that serves the interests of all stakeholders.
The ALAC appreciates the opportunity to contribute to this critical discussion and urges ICANN to consider these recommendations to strengthen the IRP's role as a key accountability mechanism within the global Internet governance framework.

ALAC COMMENTS

Rule 3: Composition of IRP Panel

The additions to Rule 3 of the Supplementary Procedures, in ALAC/At-Large opinion, significantly improve the Independent Review Panel (IRP) process. The sub-paragraphs enhance the structure, clarity, and readability, and make the rule easier to follow and implement, reducing ambiguity and potential disputes over procedural matters. Below are additional comments on each subsection:

3.1. The clarification that the IRP Panel will consist of three Panelists and will not be considered convened until all are appointed promotes balanced decision-making and maintains the integrity of the proceedings.

3.2. The introduction of specific time limits for panelist selection (e.g., 30 days for parties to select panelists, 14/21 days for the ICDR Administrator to step in) is a significant enhancement. These deadlines help prevent delays and provide clear guidance on what happens if deadlines are not met in the IRP process, which is crucial given the Bylaws' six-month target for completing an IRP. The addition of fallback mechanisms, such as permitting the Standing Panel or the ICDR Administrator to make selections when parties fail to do so, is seen by ALAC/At-Large as a pragmatic solution that effectively balances flexibility with accountability, helping to minimize delays. The rule's encouragement of proactive conflict checks by panelists should further prevent delays and supports the overarching goal of completing IRPs within the designated six-month timeframe.

3.3. The rule acknowledges that the Standing Panel may not always have the capacity to handle an IRP and provides flexibility by allowing the selection of panelists from outside the Standing Panel in such cases. This is a critical consideration that reflects real-world challenges. However, the absence of a precise definition for "capacity" introduces ambiguity, potentially leading to differing interpretations of when this exception should be

applied. Although the rule relies on the Bylaws' language, the ALAC/At-Large believes that additional clarity would be beneficial.

3.4. This provision ensures continuity and safeguards to prevent delays and disruptions in the IRP proceedings by establishing a clear process for appointing a substitute Panelist.

3.5. The conflict of interest provisions has been thoughtfully expanded to include specific requirements for both Standing Panel members and external panelists. The requirement for panelists to confirm their independence and disclose material relationships within a specified timeframe (7 days) helps maintain the integrity of the process. However, the ALAC/At-Large is concerned that the 7-day window may be insufficient for conducting comprehensive conflict checks, particularly for larger law firms or organizations.

ALAC SUPPORTS THIS RULE WITH RECOMMENDATIONS ON NUMBER 3.3. & 3.5.

Rule 4. Time for Filing

The ALAC/At-Large views the additions made to Rule 4 as a thoughtful approach that addresses many complex issues and introduces a range of important improvements aimed at increasing clarity, establishing fair, accessible, and efficient IRP processes, and ensuring consistency with international arbitration norms. It is important to note that while some members of the IRP-IOT did not fully support the consensus on Rule 4, they agreed to bring the proposal to the community for further input. This openness to feedback reflects the desire to balance differing perspectives and recognize the complexity of establishing fair rules for all parties involved. Below are additional comments on each subsection:

Rule 4A: Principles of Initiation

Introducing a filing fee to deter frivolous claims while ensuring they are recoverable from ICANN at the conclusion of the IRP, in the ALAC/At-Large opinion is a well-balanced approach. Additionally, the emphasis on making the process accessible, including through possible fee waivers, aligns with the goal of fairness and prevents financial barriers from limiting participation. In addition, Rule 4A specifically addresses the initiation of an IRP and covers the procedures for how a dispute is formally initiated, including aspects of clarity and accessibility

for claimants. This emphasis is a positive step toward greater transparency. The ALAC/At-Large views the focus on uniform terminology across all IRP and ICDR documents as another important aspect of ensuring clarity. Clear and consistent language reduces the potential for misunderstandings and makes the process more navigable for all parties involved.

ALAC SUPPORTS THIS RULE.

Rule 4B: Time to File

The addition of a 120-day deadline for disputes challenging Board or Staff actions aligns with the Interim Supplementary Procedures and ensures that claimants act promptly once they become aware of the material impact of an ICANN decision. The ALAC/At-Large believes that this clear timeframe promotes timely engagement with the IRP and reinforces the importance of addressing issues without unnecessary delay.

The compromise on the 24-month outer limit for filing an IRP strikes a balance between preventing indefinite challenges to ICANN’s decisions and ensuring claimants have a fair opportunity to bring their case forward. While this limit remains contentious, as some interpret the Bylaws as not permitting any repose period, it provides necessary closure and certainty for ICANN’s operations. ALAC views the inclusion of the 24-month limit as a necessary measure to provide predictability for ICANN's operations. At the same time, safeguards such as Rules 4C and 4D ensure that claimants are protected in cases of exceptional circumstances. Therefore, ALAC supports the inclusion of the 24-month limit.

Rule 4 does not specifically address the delays caused by engaging in the Cooperative Engagement Process (CEP)—a dispute resolution mechanism encouraging parties to resolve issues through good faith discussions before escalating to an IRP. In the ALAC/At-Large’s opinion, this is a key area where additional clarity and procedural alignment will be necessary to ensure that the IRP process remains coherent and fair.

ALAC SUPPORTS THIS RULE WITH RECOMMENDATIONS TO CONSIDER CEP.

Rule 4C: Timing considerations for a Claimant to file an IRP following a request for reconsideration (RFR)

The proposal to grant claimants a minimum of 30 days to file an IRP following the conclusion of a Request for Reconsideration (RFR) addresses concerns raised by the community. The ALAC/At-Large believes that this approach ensures claimants are not penalized for initially pursuing other accountability mechanisms. The IOT's decision to favor a fixed additional time (FAT) over tolling reflects a practical approach, striking a balance between simplicity and providing claimants with sufficient time to file an IRP after an RFR.

ALAC SUPPORTS THIS RULE.

Rule 4D: Limited circumstances for requesting permission to file after 24-month limit

This Rule introduces a fair mechanism for claimants who face exceptional circumstances beyond their control, preventing them from filing within the standard deadlines. The ALAC/At-Large views this as providing a necessary safety valve for situations where claimants might otherwise be unfairly excluded from pursuing their claims. Additional comments:

4D.4. Review by a single panelist: This requirement establishes eligibility based on the purposes of the IRP and relevant jurisprudence. The ALAC/At-Large believes this ensures the process is conducted with due care and fairness.

4D.5. ICANN's Right to Respond: The inclusion of ICANN's right to respond to requests for late filings under Rule 4D ensures a balanced process by allowing both parties to present their perspectives. The ALAC/At-Large views this addition as reinforcing procedural fairness and aligning with the broader principles of international arbitration.

4D.1. However, **the absence of a precise definition for "limited circumstances"**, in the ALAC/At-Large pinion creates potential ambiguity, which could result in varying interpretations of when this exception should be applied. Although some examples are provided, ALAC recommends offering additional clarity to ensure consistent understanding and application.

ALAC SUPPORTS THIS RULE WITH A RECOMMENDATION FOR FURTHER CLARITY OF THE TERM "LIMITED CIRCUMSTANCES".

Rule 5B: Translation

Rule 5B establishes a comprehensive framework for translation services in IRP proceedings, ensuring fair participation for all Claimants, regardless of language proficiency. The rule addresses both written and oral translations, balancing accessibility with practical and financial considerations. The ALAC/At-Large believes that by providing clear guidelines and flexibility, Rule 5B enhances fairness and inclusivity while maintaining the efficiency of the IRP process. Additional comments:

5B.1. Ensuring Fair Participation:

By allowing for the translation of key documents and providing interpretation services for oral proceedings, the rule safeguards the rights of non-English-speaking Claimants to fully engage with the process. The ALAC/At-Large believes this approach aligns with ICANN's commitment to inclusivity and fairness in its processes.

5B.3. Structured Process for Requesting Translation Services:

The rule outlines a clear process for Claimants to request translation services, including the need to identify their preferred language and provide an explanation of why these services are necessary. This structured approach helps ensure that requests are justified and that resources are allocated appropriately. Additionally, encouraging Claimants to seek stipulations from ICANN prior to filing formal requests, in the ALAC/At-Large opinion, can help streamline the process and reduce the need for formal determinations by the IRP Panel.

5B.7. Flexibility in Handling Translation Requests:

The IRP Panel is given discretion to determine the extent of the translation services provided, including which documents or hearings require translation and which language will be used. This flexibility is crucial in balancing the need for translation services with the practicalities of managing an efficient IRP process. The rule also takes into account the Claimants' and their representatives' proficiency in English or another UN language, ensuring that translation services are only provided where genuinely needed.

5B.9. Managing Costs and Administrative Burden:

The rule effectively manages the costs associated with translation services by designating them as an administrative cost to be borne by ICANN, unless otherwise ordered by the IRP Panel. This ensures that Claimants are not deterred from seeking justice due to the financial burden of translation. Furthermore, Claimants who arrange

their own translations are responsible for the costs, which helps prevent unnecessary expenses for ICANN while allowing flexibility for the Claimant.

5B.13. Certification of Translations:

Requiring that the Claimants' own translations be certified by qualified independent service providers adds a layer of quality control and reliability to the proceedings. This ensures that the translations used in the IRP are accurate and trustworthy, thereby avoiding misunderstandings or misinterpretations that could compromise the fairness of the outcome.

5B.14.. Addressing Potential Delays:

Translation services can introduce delays in the IRP process, and Rule 5B allows the IRP Panel to adjust deadlines accordingly. This provision ensures that the need for translation does not unfairly penalize either party in terms of timing, maintaining the integrity and fairness of the process.

ALAC SUPPORTS THIS RULE.

Rule 7: Consolidation, Intervention, and Participation as an Amicus

Rule 7, in ALAC/At-Large opinion, significantly enhances the IRP process by ensuring that related disputes can be handled together, that interested parties can participate when appropriate, and that the panel has access to valuable external input through amicus participation. These provisions help to ensure that the IRP process remains fair, inclusive, and efficient. Below are additional comments on each subsection:

- **Consolidation:**
  - The rule allows for the consolidation of disputes when there is a "common nucleus of operative facts," which ALAC/At-Large believes promotes efficiency and reduces duplication of effort.
  - By consolidating related disputes, the rule fosters a more just and efficient resolution. Ensures that the First IRP Panel considers all relevant circumstances, including the views of all parties and the progress of each IRP, to avoid unintended consequences such as reopening decisions or creating conflicts of interest.

- The prescriptive deadlines for filing motions for consolidation help ensure that such requests are handled in a timely manner, preventing undue delays in the proceedings.

- **Intervention:**
  - Intervention is another important tool for ensuring that all relevant parties with a legitimate interest in the outcome of an IRP can participate.
  - By allowing entities that meet the standing requirements to intervene, ALAC/At-Large believes, the rule enhances the inclusivity and fairness of the process.
  - By acknowledging the unique role of Supporting Organizations and granting them the right to intervene in cases where a Consensus Policy is being challenged, the Rule reinforces the importance of community participation in ICANN's processes.
  - By requiring intervenors to declare the truthfulness of their statements and to avoid improper purposes, the Rule safeguards the integrity of the intervention process.

- **Participation as an Amicus Curiae:**

  The rule allows for participation as an amicus curiae, enabling parties with relevant expertise or material interests to contribute to the proceedings without becoming full parties. This is particularly valuable in complex cases where expert input can help inform the panel's decision-making. The presumption that certain stakeholders (e.g., participants in underlying proceedings or contention sets) will be permitted to participate as amici helps streamline the process while ensuring that important voices are heard.

ALAC SUPPORTS THIS RULE.

To summarize, ALAC/At-Large views the proposed changes to Rules 3, 4A, 4B, 4C, 4D, 5B, and 7 as representing significant improvements and aligning with ALAC's objective of safeguarding the interests of Internet end users. ALAC strongly supports these changes while emphasizing the need for careful consideration of the recommendations made regarding Rules 3.3, 3.5, and 4B.