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FORUM

# **Independent Review Process Implementation Oversight Team (IRP-IOT)**

## **IRP Supplementary Procedures Public Session**

Monday 10 June 2024, 08:45 UTC/10:45 Kigali



# Agenda

1. Introduction to the IRP-IOT and its work
2. Upcoming Public Comment Opportunity
3. Overview of the IRP-IOT's Proposals
4. Date of the Public Consultation and Documents
5. Other tasks assigned to the IRP-IOT
6. Questions
7. References

# Introduction to the IRP-IOT

- Bylaws 4.3(n)(i) provides for establishment of IRP-IOT, comprised of “members of the global Internet community” to develop rules for the IRP that “conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties”.
- Amendment of ICANN’s Bylaws, as a result of the IANA Transition and work of the CCWG-Accountability, made changes to the IRP. IRP-IOT was convened to review and revise the IRP Supplementary Procedures.
- “Supplementary” because they supplement general arbitration rules of IRP Provider, the ICDR.
- Between 2016 and 2019: first iteration of the IRP-IOT worked to develop draft IRP Supplementary Procedures and held two public consultations.
- October 2018: ICANN Board adopted the Interim IRP Supplementary Procedures.
- January 2020: IRP-IOT was reconvened with additional volunteers

# Upcoming Public Comment Opportunity



- Reconstituted IRP-IOT has prioritized continuing to update the Supplementary rules as its first objective, in particular:
  - addressing the input from the Second Public Consultation, and
  - feedback from IRP users about specific challenges.
- Sharing our proposals, which will go out for public comment shortly after this meeting.
- The changes proposed are the result of significant, and at times challenging, work over the past three and a half years, and represent compromises by all members.
- In some cases, such as Rule 4 - Time for Filing, some members of the IRP-IOT could not support the consensus but did support bringing the proposal to the community for input.
- We make a number of proposals on time limits for specific steps, and do intend to review for consistency at the end, but we welcome feedback on timings.

# Overview of the IRP-IOT's Proposals

- Rule 3 - Panel selection
- Rule 4 - Time for Filing, including:
  - 4A – Initiation of an IRP
  - 4B – Time to File
  - 4C - Timing considerations for a Claimant to File an IRP following a Request for Reconsideration (RFR)
  - 4D - Limited Circumstances for Requesting Permission to File After the 24-month limit
- Rule 5B - Translation
- Rule 7 - Consolidation, Intervention and Participation as an Amicus

## Rule 3 - Panel selection

- The Current Rule 3 in the Interim Supplementary Procedures (ISP) is a single paragraph which addresses appointment of Panelists from the Standing Panel, conflicts of interest, and Panelist appointment where there is no Standing Panel.
- The IOT is proposing to expand on this section for greater readability and clarity.
- Applying time limits to these various elements.
- Addressing the process where there is a delay in appointing Panelists
- Addressing the possibility envisaged under the Bylaws that the Standing Panel might lack capacity, albeit that this is expected to be a rare occurrence. Much of the discussion centred on this.
- Expanding provisions on conflict of interest to ensure a duty to disclose both at appointment and as an ongoing obligation, both actual conflicts and circumstances giving the appearance of conflict.

## 4A – Initiation of an IRP

- The IOT is proposing a significant expansion of this section to clearly specify what costs should be paid by whom and when.
- In doing so, we considered the Bylaws language regarding where the costs of the IRP proceedings lie, together with recent IRP panel decisions applying these principles.
- In particular, formalizes that there should be a filing fee, to serve as a gate to frivolous/vexatious claims but without being so high as to be chilling, recoverable from ICANN at the IRP conclusion.
- The IOT is also proposing a number of principles of Initiation which are not for these rules but should be part of the IOT's final output. These include:
  - Reviewing costs against a number of parameters to ensure fairness, accessibility and consistency with other similar fora.
  - Making terminology in all IRP and ICDR documents uniform.
  - Clarifying that the Claimant is not agreeing to be bound by those parts of the ICDR Rules and procedures which have been superseded by the ICANN IRP Rules.

## 4B – Time to File

- Disputes challenging Board or Staff action or inaction, need to be filed within 120 days after the date on which the Claimant became aware of, or reasonably should have become aware of, being materially affected by the action being challenged in the Dispute.
- A written statement of Dispute may not be filed more than **24 months** from the date of such action or inaction being challenged in the Dispute.
  - Interim Rules have a 12 month repose.
  - The most difficult issue for the IOT to agree on. Some, including during the 2<sup>nd</sup> public comment, interpret Bylaws language as not allowing for any such repose, which could see a potential Claimant out of time before they are even aware/eligible to Claim. Others argue that ICANN cannot remain open to indefinite challenge on every decision it makes.
  - 4C and 4D were developed to give Claimants some safeguards, alongside the adoption of a repose.
- Under no circumstances may a Claimant seek to file a written statement of a Dispute more than four years after the date of the action or inaction being challenged in the Dispute.



## 4C - Timing considerations for a Claimant to File an IRP following a Request for Reconsideration (RFR)



- If an RFR has not wholly resolved the dispute the Claimant shall be guaranteed a minimum of 30 days in which to file an IRP after the formal conclusion of the RFR, provided the RFR was submitted within the timeframes established in Rule 4B.
- Proposed to address community concerns that the deadline for filing an IRP should not serve to dissuade potential claimants from using other accountability mechanisms, i.e. the RFR.
- A period of fixed additional time was favoured by the IOT as being a simpler option, rather than tolling for the time spent on the RFR.
- Delay caused by engaging in Cooperative Engagement Process (CEP) is not addressed here, but should be addressed in the updated CEP Rules.

## 4D - Limited Circumstances for Requesting Permission to File After the 24-month limit

- The IOT is proposing that a Claimant may be permitted by the IRP Panel to file its written statement of Dispute after the timeframes established in Rule 4B under certain exceptional circumstances which were beyond the claimant's control and prevented them from becoming aware, becoming eligible to be a Claimant, or being able to file a Complaint within the deadlines.
- A single panelist would make a determination if the Claimant is eligible for this. The panelist shall have regard to the Purposes of the IRP and any jurisprudence of prior IRP Panels relevant to interpretation in making its determination.
- For avoidance of doubt, ICANN would have a right to respond to any such request.

## Rule 5B – Translation (main points)

- The IOT is proposing details as to how a claimant should submit a claim for translation.
- Requests for translation services generally shall be determined by the IRP Panel, unless ICANN has already agreed to the request or unless there are exceptional circumstances.
- The IRP Panel shall have discretion to determine whether the Claimant has a need for translation services, which documents or hearings relate to that need, and the language for which translation services will be provided.
- Rather than limiting only to the official UN languages, as currently, the IOT proposes that translations be to/from UN languages where possible but does not exclude other languages where necessary for fair participation
- All translation services ordered by the IRP Panel shall be coordinated through ICANN's Language Services providers and shall be considered an administrative cost of the IRP, paid for by ICANN unless the IRP Panel later orders otherwise.

# Rule 7 - Consolidation, Intervention and Participation as an Amicus (highlights)

- Decisions on whether to accept a request for Consolidation, Intervention or Participation as an Amicus should be made by the IRP Panel and not the Procedures Officer. Concept and role of the PO has been poorly understood in past cases.
- In cases of consolidation, it is the Panel for the first-commenced IRP which is tasked with determining the request, and which would remain in place after any consolidation.
- 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.
- Multiple Claimants should not be limited collectively in the page limit.
- For a challenge to a Consensus Policy, the Supporting Organization responsible for that policy must be in a position to defend their work, but rules amended to reflect that they do not meet the definition of a “Claimant”.
- Rules restructured for greater clarity as to the provisions that apply to each type of participation.

# Public Consultation and Documents

- The IOT expects that the public consultation will open in early July and will close on September 15.
- The Public consultation will include the following documents:
  - An introduction by the IOT to the public consultation.
  - The current Interim Supplementary Procedures (ISP).
  - A red-line of the proposed changes to the Interim Supplementary Procedures (ISP) vs. the current ISP including detailed rationales for the proposed changes.
  - A clean version of the proposed changes to the ISP.
- In the meantime, a copy of this presentation as well as the red-lined version of the proposed changes to the ISP can be found on the IOT's Wiki.

# Other tasks assigned to the IRP-IOT

- Review and revise rules for the Cooperative Engagement Process (CEP)
- Propose rules and any limitations regarding Appeals
- Propose any additional rules for the IRP Standing Panel regarding Conflicts of Interest
- Input on educational and briefing materials for the Standing Panel (Done)

## 6. Questions?

## 7. References

- IOT Wiki - <https://community.icann.org/x/ZhG8BQ>
- IOT mailing list archive - <https://mm.icann.org/pipermail/iot/>
- IOT Chair – Susan Payne – [susan.payne@comlaude.com](mailto:susan.payne@comlaude.com)
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# End of Presentation