

Comment by Fletcher, Heald & Hildreth (as considered by IRP IOT)

[Comment](#) says, in part: We are particularly concerned about the effect of the proposed *Updated Supplementary Procedures* in two specific circumstances:

- Challenges to decisions from Another Arbitration Tribunal; and
- Challenges to a Supporting Organization's Consensus Policy.

These are the IRP actions that may be taken pursuant to “decisions of process-specific expert panels” and resulting “from action taken in response to advice or input from any Advisory Committee or Supporting Organization” under ICANN Bylaws, Sections 4.3(b)(iii)(2) and (3).

(A) Challenges to decisions from Another Arbitration Tribunal

- The 2012 new gTLD [AGB](#) denied an appeal to losers of legal rights, string confusion, and community objections arbitrations.
- Now, however, the new ICANN Bylaws provide IRP reviews “from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws” (Section 4.3(b)(iii)(A)(3)).
- Presumably, only a losing party of a panel proceeding would seek IRP.
- This comment says: *“As a matter of fundamental fairness and due process, winning parties must be given notice of, and be allowed to participate in, such challenges.”*

(A) Challenges to decisions from Another Arbitration Tribunal (con't.)

- Fletcher suggests three “essential procedural safeguards”:
 - ***PROVIDE ACTUAL NOTICE TO ALL ORIGINAL PARTIES TO AN UNDERLYING THIRD PARTY PROCEEDING.***
 - ***PROVIDE A MANDATORY RIGHT OF INTERVENTION TO ALL PARTIES TO THE UNDERLYING ARBITRATION PROCEEDING FOR WHICH REVIEW IS SOUGHT.***
 - ***REQUIRE IRP PANEL TO HEAR FROM ALL PARTIES TO THE UNDERLYING PROCEEDING BEFORE DECIDING A REQUEST FOR INTERIM RELIEF/DEMAND FOR INTERIM PROTECTION.***

(B) Challenges to an SO's Consensus Policy

- This portion of the comment asks:
 - *Truly, and with respect, what do senior commercial arbitrators know about our ICANN Multistakeholder Process, and why should ICANN Counsel alone be required to defend the Community's Consensus Policy – without the Supporting Organization and Stakeholder Groups that negotiated the Consensus Policy in good faith (and great effort) – should these groups choose to participate?*

(B) Challenges to an SO's Consensus Policy

- Fletcher suggests three specific changes:
 - ***PROVIDE NOTICE TO THE ICANN SO, SG, WG CHAIRS AND ICANN COMMUNITY THAT DEVELOPED THE CONSENSUS POLICY IN ISSUE.***
 - ***MANDATORY RIGHT TO INTERVENE FOR THOSE WHO HELPED CREATE THE CONSENSUS POLICY AND THOSE WHOSE INTERESTS ARE REPRESENTED IN/AFFECTED BY IT.***
 - ***LIMIT WHAT THE IRP PANEL CAN DO WHEN OVERTURNING A CONSENSUS POLICY – STANDARD OF REVIEW AND REMEDIES.***

Comment by Fletcher, Heald & Hildreth (additional matters)

- Section III.A. of the comment:
 - ... we ask that the IOT share these comments [regarding process-specific expert panel decisions] with the CEP Work Stream 2 Subgroup **and recommend** that that subgroup make equivalent changes to the CEP that are equivalent to the proposed changes submitted here for the *Updated Supplementary Procedures* of the IRP.
 - David McAuley **shared** the comment – **does the IOT have a recommendation?**
- Section III.B:
 - Strongly urges the IOT not to copy entire bylaw sections into the *IRP Updated Supplementary Procedures* but simply reference relevant Bylaw section.
- Section III.C:
 - Review of the International Centre for Dispute Resolution Itself

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- Noteworthy Bylaws Sections implicated:
 - 4.3(b)(iii)(A)(2) – ICANN action taken in response to advice from an SO/AC;
 - 4.3(b)(iii)(A)(3) – ICANN action resulting from decisions of expert panels;
 - 4.3(m) – IRP Provider (currently ICDR);
 - 4.3(n) – Rules of Procedure;
 - 4.3(n)(iv)(A) – time for filing;
 - 4.3(n)(iv)(B) - joinder, intervention, consolidation of claims;
 - 4.3(o)(v) – Consolidate disputes/other actions to efficiently resolve disputes;
 - 4.3(p) – Interim relief.