

To the IRP IOT:

Below are draft suggestions for language changes to the supplementary rules as made by Fletcher, Heald & Hildreth, P.L.C. in this [comment](#).

This is nothing new – it is just placing the suggested language from the comment (lacking rationale which is in the comment) in one place for our consideration when we take up this issue. Thus, this is just a complementary tool, not a substitute for reading the comment. (The red language is headings and lead-in language.)

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**Under I. Review of All Arbitration Tribunals:**

**A. PROVIDE ACTUAL NOTICE TO ALL ORIGINAL PARTIES TO AN UNDERLYING THIRD PARTY PROCEEDING**

Accordingly, the Updated Supplementary Procedures must include a new Notice Provision, to include:

1. *“Where the filing invokes New ICANN Bylaws Section 4.3(b)(iii)(A)(3) – i.e., the Covered Action ‘resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws’ – the Claimant must:*

*a. Send a copy of its Notice of Independent Review Process and its Request for Independent Review Process together with all statements, exhibits, attachments, legal authorities, witness statements, and other reports or materials to all Parties to the original “process-specific expert panel” proceeding and decision;*

*b. Use the most recent email addresses available for the Representatives of the Parties: i.e., either those email addresses used by the expert panel when that panel provided its decision to the Parties or, if the Claimant has actual knowledge of a change of email address, to the new email address of a Representative of a Party (e.g., where a law firm has merged and changed email addresses) and submit a signed, scanned statement attesting to the electronic delivery of all of the materials commencing the proceeding to all Parties to the Underlying Decision and to the Dispute Resolution Provider and list the names and email addresses of those who were sent these filing materials; and*

*c. If a Claimant does not comply with the above procedures within 24 hours of submitting its Request for IRP, the process shall terminate.*

2. *ICANN Staff shall send a follow-up notice of Commencement of the IRP proceeding to the Dispute Resolution Provider that administered the “process-specific expert panel” and to all Parties to that decision.*

3. *The Claimant, ICANN, and the IRP Panel and Administrators shall send to the Dispute Resolution Provider and all Parties to the underlying proceeding all correspondence, filings, and communication with ICANN, the IRP Panel, and the IRP Forum Provider. No part of an IRP dispute*

*involving a third-party “process-specific expert panel” shall take place ex parte. All Parties to the underlying proceeding shall be copied on all matters in the IRP unless they “optout” by email to ICANN and the IRP Forum and request to be removed from distribution.”*

**B. PROVIDE A MANDATORY RIGHT OF INTERVENTION TO ALL PARTIES TO THE UNDERLYING ARBITRATION PROCEEDING FOR WHICH REVIEW IS SOUGHT**

To assure that at least cost is no barrier for such parties’ voices, concerns, and defenses to be heard, the following critical options should be added to the Updated Supplementary Procedures to ensure that all relevant information is made available to the IRP Panel:

To Section 7. Consolidation, Intervention, and Joinder, add:

*“A. As a matter of right, any Party or Parties to the decision of a “process-specific” expert panel shall be entitled to participate in an IRP proceeding challenging that decision as a matter of right. In such a case, any Party to the underlying proceeding may:*

*1. Submit a “Request to Intervene as a Full Party.” The other Party or Parties may then participate fully in:*

*a. The selection of the IRP Panelists;*

*b. Any pre-hearing motions, including Emergency Petitions, Procedural Pleadings (e.g., Motions to Dismiss for Lack of Standing or Timeliness), and Substantive Pleadings (e.g., reasons to reject the pleadings for lack of merit);*

*c. Any Discovery that is conducted; and*

*d. Any Hearings that are held.*

*e. Parties who chose to intervene in this full manner shall be responsible for their share of the costs of the IRP Panel, which shall be shared equally with the side that they are supporting (e.g., ICANN’s side or Claimant’s side). Such a “Request to Intervene as a Full Party” must be reviewed by the ICDR to verify the claim of Party status in the underlying proceeding is truthful. Upon such verification, intervention will be allowed. No argument against such intervention will be allowed by the IRP Forum and, if made, will be denied.*

*2. Alternatively, any Party or Parties to the decision of a “process-specific” expert panel shall be entitled individually, collectively, or in combination thereof, to file a “Friend of the IRP” Brief in response to:*

*a. Claimant’s Request for Independent Review Process;*

*b. Any Pre-Hearing Motions, including Requests for Emergency Relief and Procedural Pleadings (e.g., Motions to Dismiss for Lack of Standing or Timeliness); and*

*c. Any Additional Memoranda, Supplemental Memoranda, Post-Hearing Briefs and similar substantive material presented to the IRP Panel.*

*Submissions by the Winning Party or Parties of “Friend of the IRP” Briefs and Responses shall be of the same lengths as that allowed to the Claimant’s Briefs and Responses with respect to length, with the same right to file exhibits, witness statements, evidence, and similar materials under IRP rules.”*

**C. REQUIRE THE IRP PANEL TO HEAR FROM ALL PARTIES TO THE UNDERLYING PROCEEDING BEFORE DECIDING UPON ANY REQUEST FOR INTERIM RELIEF OR DEMAND FOR INTERIM MEASURES OF PROTECTION**

To implement this principle, the following language must be added to Section 10 of the Updated Supplementary Procedures:

To Section 10. Interim Measures of Protection, add:

*“B. No Request for any of the Interim Measures of Protection sought by the Claimant (including, but not limited to, “prospective relief, interlocutory relief, or declaratory or injunctive relief”[]) shall be heard by the IRP Panel, Emergency Panelist, or any other appointed party, without giving the Winning Party or Parties, and other parties as appropriate, a full, fair, equal, and timely right to be heard.*

*1. The Winning Party or Parties from any Underlying Arbitration Tribunal shall be entitled to be heard on any or all of the following factors, including:*

*(i) Harm arising from any Interim Request of the Claimant (or Other Parties that may be added);*

*(ii) Both: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and*

*(iii) The balance of hardships and the harm to the Winning Party (Parties) should the Underlying Decision be further delayed in its implementation.”*

**Under II. Review, Appeal or Challenge to the Consensus Policy of a Supporting Organization**

**A. PROVIDE ACTUAL NOTICE TO THE ICANN SUPPORTING ORGANIZATION, STAKEHOLDER GROUP, WORKING GROUP CHAIRS AND ICANN COMMUNITY THAT DEVELOPED THE CONSENSUS POLICY BEING CHALLENGED**

The Updated Supplementary Procedures should supplement its new Notice Provision (adding to Section I.A above), to include:

*“4. Where the filing invokes a challenge to an ICANN Consensus Policy, adopted by a Supporting Organization and accepted by the ICANN Board pursuant to the public notice and comment processes of the ICANN Process, Actual Notice to the Supporting Organization and Stakeholders that adopted the Consensus Policy must be provided, as follows:*

*a. The Claimant shall send a copy of the Request for IRP and its Initial Written Statement, with all evidence, exhibits, and attachments, to the Council Chair of the Supporting Organization that enacted the Consensus Policy, the heads of each Stakeholder Group in the Supporting Organization and the Chair(s) of the Working Group that developed the Consensus Policy;*

*b. The Claimant shall submit a signed, scanned statement to ICANN and the ICDR attesting to the electronic delivery of all of the materials commencing this proceeding to all Parties listed in subsection 1 above, and list the names and email address of those who were sent these materials, within 24 hours of submitting its Request for IRP, or this proceeding will terminate; and*

*c. Within 3 business days of receiving the Notice of IRP and/or Request for IRP in any action involving a Consensus Policy, ICANN Counsel shall publish a Notice of the IRP Action and Details of the Challenge to an Adopted Consensus Policy in the then-current place where ICANN posts matters open for public comment (currently <https://www.icann.org/public-comments#open-public>). (The goal being to provide notice of a challenge to ICANN policy in the place where the Community is most likely to read about policy changes.)*

*5. The Claimant and ICANN shall continue to send electronic copies of all filings, pleadings, requests, and correspondence of the IRP to the Council Chair of the Supporting Organization that passed it, the heads of the Stakeholder Groups, and Chair(s) of the Working Party that created the Consensus Policy unless any party or parties requests to be removed from the distribution list.*

**B. MANDATORY RIGHT OF INTERVENTION TO THE IRP FOR THOSE WHO PARTICIPATED THE CREATION OF THE CONSENSUS POLICY AND THOSE WHOSE INTERESTS ARE REPRESENTED IN OR AFFECTED BY IT.**

Accordingly, the following changes must be made to the Updated Supplementary Procedures to ensure fair and balanced representation of all materially-affected parties in the right to participate in an IRP Proceeding:

To existing Section 7. Consolidation, Intervention, and Joinder, add:

*“The Council of the Supporting Organization that passed the Consensus Policy, any and all Stakeholder Groups that participated in the development of the Consensus Policy, and any and*

*all Chair(s) of the PDP WG that wrote or reviewed the Consensus Policy may intervene as of right in this IRP proceeding.*

*a. The Council that enacted the Consensus Policy may participate in the choice of Panelists without cost or any escrow payment requirement;*

*b. The parties listed above, separately, collectively, or in several groups, shall be entitled to submit "Friend of the IRP" briefs to respond to any initial submissions by the Claimant, any supplemental submissions of the Claimant, or other submissions by the Claimant.*

*c. The parties listed above, separately, collectively, or in several groups, shall be entitled to participate in any hearing that is held, whether online, by telephone, in person, or by other means.*

*d. The length of the responsive submissions of the parties above shall be the same as the length allowed the Claimant for the submission with respect to which the responsive submission is filed.*

### **C. LIMIT WHAT THE IRP PANEL CAN DO WHEN OVERTURNING A CONSENSUS POLICY – STANDARD OF REVIEW AND REMEDIES**

**Consistent with this principle, the Updated Supplementary Procedures should be modified as follows:**

**To the end of Section 11, Standard of Review, add:**

*"The IRP Panel may not substitute its judgment for that of the Supporting Organization's Council or the ICANN Board by rewriting a Consensus Policy. After hearing from all Materially-Affected Parties of the Supporting Organization (including Stakeholder Groups) and Co-Chairs of the Working Group who choose to participate, the Panel may determine that all or a portion of a Consensus Policy is contrary to ICANN Bylaws.*

*If the IRP Panel makes such a determination, it shall provide one or more of the following remedies:*

- 1. Identify to the ICANN Board the specific portions of the Consensus Policy that it found to violate the ICANN Bylaw;*
- 2. Indicate what portions of the Consensus Policy (if any) do not violate the ICANN Bylaws;*
- 3. Remand the Consensus Policy to the ICANN Board for review with the Council that adopted it in accordance with the IRP Panel's decision; and*
- 4. Indicate whether the Panel recommends that the Consensus Policy should be suspended pending Board and Supporting Organization review and rewriting.*

*Prior to any determination by an IRP Panel that a Consensus Policy should be suspended pending Board and Supporting Organization review and revision, the IRP Panel must request input from the materially-affected parties and the Supporting Organization and its Stakeholder Groups whether any harms or dangers may arise from the Policy's suspension.*

*The IRP Panel must provide notice to the materially affected groups and an adequate opportunity for them to be heard regarding (a) the harms they may suffer from the Policy's suspension and (b) other courses of action that the Panel should consider taking in lieu of such suspension."*

Finally, the "Fletcher" comment gives an example of language that might serve in place of quoting bylaws:

For example, the definitions section might state:

1. *"Definitions*

*The definitions of Claimant, Covered Actions and Disputes are set out in Section 4.3(b) of the ICANN Bylaws."*

*[Continue with definitions of "Emergency Panelist" and other terms not defined in the Bylaws.].*