

Updated Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process¹

Revised as of []

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¹ CONTEXTUAL NOTE: These Supplemental Procedures are intended to be supplemental to the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

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These updated procedures supplement the International Centre for Dispute ~~Resolution's~~
~~International Arbitration Rules~~Resolution's international arbitration rules in accordance with
the independent review ~~procedures~~process set forth in Article IV, Section ~~34.3~~² of ICANN's
Bylaws. These procedures apply to all independent review process proceedings filed after
[insert effective date of the ICANN-Bylaws-].

1. ~~1.~~ Definitions

In these Supplementary Procedures:

~~DECLARATION refers to the decisions/opinions of the IRP PANEL.~~

~~ICANN-A CLAIMANT is any legal or natural person, group, or entity that has been
materially affected by a Dispute. To be materially affected by a Dispute, the Claimant
must suffer an injury or harm that is directly and causally connected to the alleged
violation of ICANN's Articles of Incorporation ("Articles") or Bylaws.~~

~~COVERED ACTIONS are any actions or failures to act by or within ICANN committed
by the Board, individual Directors, Officers, or Staff members that give rise to a
DISPUTE.³~~

DISPUTES are defined as:

(A) Claims that COVERED ACTIONS constituted an action or inaction that
violated ICANN's Articles of Incorporation or Bylaws, including, but not limited
to, any action or inaction that:

- 1) exceeded the scope of the Mission;

² Formatting updated to conform with 2016 ICANN Bylaws.

³ 2016 ICANN Bylaws Article IV, Section 4.3 (b)(ii).

- 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN’s contractual rights with respect to the IANA Naming Function Contract; and

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation.⁴

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief⁵ or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief.

IANA refers to the Internet ~~Corporation for Assigned Names and Numbers~~ Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ~~ICANN’s~~ICANN’s Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 4.3 of ~~ICANN’s~~ICANN’s Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

⁴ 2016 ICANN Bylaws, Article IV, Section 4.3 (b)(iii).

⁵ 2016 ICANN Bylaws, Article IV, Section 4.3 (p).

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant’s filing of a written statement of a DISPUTE with the ICDR.⁶

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.⁷

IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws.⁸

ICDR RULES refers to the ICDR’s rules in effect at the time the relevant request for independent review ICANN Board actions or inactions alleged to be inconsistent with ICANN’s Bylaws or Articles of Incorporation is submitted.⁹

~~INTERNATIONAL DISPUTE RESOLUTION PROCEDURES OR RULES OFFICER~~ refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and joinder, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the ICDR’s panelist appointed by the ICDR pursuant to its International Arbitration Rules that will govern the process in combination with these Supplementary Procedures.

~~IRP PANEL~~ refers to the neutral(s) appointed to decide the issue(s) presented. The IRP will be comprised of members of a standing panel identified in coordination with the ICDR. Certain decisions of the IRP are subject to review or input of the Chair relating to appointment of the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP PANEL must be convened for a given proceeding, the IRP proceeding will be considered by a one or three member panel comprised in accordance with the rules of the ICDR; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the ICDR shall identify and appoint one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding panelists for interim relief.

⁶ 2016 ICANN Bylaws, Article IV, Section 4.3 (d).

⁷ 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i)

⁸ The 2016 ICANN Bylaws refer to an “IRP Panel decision” rather than a “declaration” (although the 2016 ICANN Bylaws state that an IRP Panel will “declare” certain findings). See 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v) & 2016 ICANN Bylaws, Article IV, Section 4.3(o)(iii).

⁹ Recommended inclusion to clarify what happens to already pending IRPs when an updated version of the Supplemental Procedures goes into force, with an ongoing IRP filed under different standards and processes.

2. PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article IV, Section 4.3(a).

STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.¹⁰

2. Scope

The ICDR will apply these Updated Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, ICDR RULES, in all cases submitted to the ICDR in connection with ~~the~~ Article IV, Section 4.3(4)i¹¹ of the ICANN Bylaws: after the date these Supplementary Procedures go into effect. In the event there is any inconsistency between these Updated Supplementary Procedures and the RULES, these Updated Supplementary Procedures will govern. These Updated Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR.

3. ~~3. Number~~ Composition of Independent Review ~~Panelists~~ Panel

~~Either party may elect that the request for INDEPENDENT REVIEW be considered by a three-member panel: the parties' election will be taken into consideration by the Chair of the standing panel convened for the IRP, who will make a final determination whether the matter is better suited for a one- or three-member panel.~~

4. The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated.¹² The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP

¹⁰ 2016 ICANN Bylaws, Article IV, Section 4.3 (j)(i).

¹¹ 2016 ICANN Bylaws, Article IV, Section 4.3 (m).

¹² 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i). There has been discussion in the IOT re: whether it makes sense to require a disclosure form to be signed (1) when a person is appointed to the standing panel; AND (2) when that person is selected for a particular IRP. For the IOT's consideration is the following proposed language: "A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is independent and impartial. An IRP PANEL member's appointment will not take effect unless and until the IRP PANEL member signs a Notice of IRP PANEL Appointment affirming that the member is available to serve and is independent and impartial."

commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the RULES shall apply to selection of the third panelist.¹³ In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [] of these Updated Supplementary Procedures.

4. Time for Filing

A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than [] days after a CLAIMANT becomes aware or reasonably should have been aware of the action or inaction giving rise to the DISPUTE.¹⁴

4.5. Conduct of the Independent Review

The IRP ~~Panel~~PANEL should conduct its proceedings by electronic or telephonic means ~~to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that~~ unless the IRP PANEL in its discretion determines other means would, in unusual circumstances, further the PURPOSES OF THE IRP.¹⁵

In the unusual circumstance that the IRP PANEL deems an in-person hearing ~~is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited to argument only;~~to further the PURPOSES OF THE IRP, it is generally expected that all evidence, including

¹³ 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(ii).

¹⁴ As an item for consideration by the IOT, would be to include language such as: “In order for an IRP to be deemed to have been filed timely, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.” The IRP process has previously been silent on the issue of the relationship between filing a notice and completing the fee payment, and including this could result in more predictability of the timing.

¹⁵ ICANN NOTE: the language proposed by CCWG Counsel would modify the status quo and does not appear to be contemplated in the Bylaws or CCWG Proposal. The IOT could consider further guidance on this for further updates to the Supplementary Procedures, but the suggested text (proposed for deletion) is a significant variation from current practice.

witness statements, must be submitted in writing in advance without any live witness testimony. Telephonic hearings are subject to the same limitation- as to live witnesses.¹⁶ The IRP Panel may deem in-person or electronic testimony to be necessary to further the PURPOSES OF THE IRP.

The IRP PANEL retains responsibility for determining the timetable for the IRP proceeding.¹⁷ Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Updated Supplementary Procedures.¹⁸

5.6.5. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font.¹⁹ All necessary and available evidence ~~to demonstrate in support of the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation~~ Claimant's Claim(s) should be part of the submission.²⁰ Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence.²¹ The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.²²

7. 6. Consolidation, Intervention, and Joinder²³

[At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable

¹⁶ This is an issue for consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change.

¹⁷ 2016 ICANN Bylaws, Section 4.3(o)(vi).

¹⁸ This is an issue for consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change.

¹⁹ This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²⁰ Language modified to reflect broadened scope of IRPs. See 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

²¹ This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²² 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(ii).

²³ There is no existing Supplemental Rule. The CCWG Final Proposal and 2016 ICANN Bylaws recommend that these issue be considered by IOT.

discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. A CLAIMANT may join in a single written statement of a DISPUTE, as independent or alternative claims, as many claims as it has that give rise to a DISPUTE.]²⁴

8. Discovery Methods²⁵

The IRP PANEL may allow a Party's request for discovery if it deems such discovery to be necessary to further the PURPOSES OF THE IRP.

Depositions, interrogatories, and requests for production or admission will generally not be permitted unless the IRP PANEL determines that discovery is necessary to further the PURPOSES OF THE IRP.²⁶

In the event that a party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other party must have a right of reply to such an opinion with an expert opinion of its own.^{27]}

²⁴ Pursuant to the 2016 ICANN Bylaws, Article IV, Section 4.3(n) (Rules of Procedure), these Supplementary Rules will govern the format of proceedings. This is an issue for consideration within the IOT. 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).

²⁵ There is no existing Supplemental Rule. The CCWG Final Proposal and 2016 ICANN Bylaws recommend that discovery methods be considered by IOT. For example, consideration should be given to whether to require each party to provide the other party with all reasonably available documents in its possession, custody, or control that relate materially to the Dispute. Such mandatory disclosure obligations can further procedural fairness without the economic burdens of full discovery.

²⁶ The independent discretion of the panel to require discovery is consistent with the Purposes of the IRP.

6.9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the ~~requestor~~ Claimant²⁸ has not demonstrated that it ~~meets the standing requirements for initiating the INDEPENDENT REVIEW.~~ has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and casually connected to the alleged violation.²⁹

~~Summary dismissal of a request for INDEPENDENT REVIEW is also appropriate where a prior IRP on the same issue has concluded through DECLARATION.~~

An IRP PANEL may also ~~dismiss a querulous,~~ summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious request for INDEPENDENT REVIEW.³⁰

~~7.~~

8.10. ~~7.~~ Interim Measures of Protection

~~An IRP PANEL may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration. Where the IRP PANEL is not yet comprised, the Chair of the standing panel may provide a recommendation on the stay of any action or decision.~~

~~8.~~ A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action in order to maintain the status quo until such time as the action can be considered by the IRP Panel as described in ICANN Bylaws, Article IV, Section 4.3(o)(iv).

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in

²⁷ Pursuant to the 2016 ICANN Bylaws, Article IV, Section 4.3(n) (Rules of Procedure), these Supplementary Rules will govern the format of proceedings. This is an issue for consideration within the IOT. 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

²⁸ 2016 ICANN Bylaws, Article IV, Section 4.3(b)(i). Note that the term “requestor” be replaced with “Claimant” for consistency with IRP terminology.

²⁹ 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(i).

³⁰ 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(i).

place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.³¹

9.11. Standard of Review

~~The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company? If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.~~

11.9. Declarations

~~Where there is a three member IRP PANEL, any DECLARATION of the IRP PANEL shall by Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE.~~

- a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN’S Articles or Bylaws.
- b. All DISPUTES shall be decided in compliance with ICANN’S Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

³¹ 2016 ICANN Bylaws, Article IV, Section 4.3(p).

- c. For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP PANEL shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.
- d. With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN’s obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article IV, Section 4.3(a)(iv) of ICANN’s Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.³²

12. IRP Panel Decisions³³

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL members³⁴. If any IRP PANEL member fails to sign the ~~DECLARATION~~, it shall be accompanied by a IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.³⁵

12.13. 10. Form and Effect of an IRP ~~Declaration~~ PANEL DECISION

- a. ~~DECLARATIONS~~ IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.³⁶
- b. The ~~DECLARATION~~ IRP PANEL DECISION shall specifically designate the prevailing party- as to each Claim.³⁷

³² 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

³³ The 2016 ICANN Bylaws refer to an “IRP Panel decision” rather than a “declaration” (although, to be sure, the 2016 ICANN Bylaws state that an IRP Panel will “declare” certain findings.) See 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v) & 2016 ICANN Bylaws, Article IV, Section 4.3(o)(iii).

³⁴ 2016 ICANN Bylaws, Article IV, Section 4.3(k)(v).

³⁵ This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

³⁶ 2016 ICANN Bylaws, Article IV, Sections (s), (t). The 2016 ICANN Bylaws require the IRP Panel to “issu[e] an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure.” This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon regarding timing.

- a. ~~A DECLARATION may be made public only with the consent of all parties or as required by law. Subject to the redaction of Confidential information, or unforeseen circumstances, ICANN will consent to publication of a DECLARATION if the other party so request.~~
- a. ~~Copies of the DECLARATION shall be communicated to the parties by the ICDR.~~
- c. Subject to Article IV, Section 4.3 of ICANN’s Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

14. Appeal of IRP Panel Decisions³⁸

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision (excluding those members issuing the IRP PANEL DECISION). The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention or joinder.

13.15. Costs

The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing IRP PANEL DECISION.³⁹ Except as otherwise provided in Article IV, Section 4.3(e)(ii) of ICANN’s Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the associated with a Community IRP, as defined in Article IV, Section

³⁷ 2016 ICANN Bylaws, Article IV, Section 4.3 (t).

³⁸ There is no existing Supplemental Rule. The following proposed text is for consideration by IoT. The proposed text was drafted based upon the CCWG’s Final Proposal, which provided that an en banc appeal be based on subparts (i) and (ii), below. Suggest using actual text from Annex 7, ¶ 16.

³⁹ This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

4.3(d) of ICANN’s Bylaws, including the costs to of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.

In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRPPANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

14.12. Emergency Measures of Protection

Article 37 of the RULES will not apply.

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in the event it identifies the losing party’s Claim or defense as frivolous or abusive.⁴⁰

⁴⁰ 2016 Bylaws, Article IV, Section 4.3(r).