

## DRAFT

### Report of the IRP-IOT Following Public Comments on the Updated Supplementary Procedures for the ICANN Independent Review Process

#### Introduction:

This report presents conclusions reached by the ICANN Independent Review Process (IRP) Implementation Oversight Team (IRP-IOT) on public comments submitted regarding draft Updated Supplementary Procedures (USP) for the IRP.

These are known as “supplementary” procedures because they supplement (and take priority in instances of conflict) the international arbitration rules of the International Centre for Dispute Resolution - the current provider of administrative support for IRPs.

The ICANN Board [adopted](#) revised Bylaws, effective October 1, 2016, in which the IRP is addressed at Bylaw Article 4, Section 4.3.

For background information regarding the IRP and the USP please see the announcement seeking public comment on the draft USP [here](#).

In that announcement, the [draft USP](#) were presented for public comment between November 28, 2016, and February 1, 2017, and the staff [report](#) on the comments was published on August 2, 2017. The public comments forum can be accessed [here](#).

The IRP-IOT utilized its dedicated email list and held over 20 teleconference calls (in 2017 and thus far in 2018) to consider and discuss the public comments relating to draft USP. A listing of the members of the IRP-IOT, records of the teleconference calls, and a link to the IRP-IOT archived email list can all be accessed [here](#) along with other relevant documents.

The IRP-IOT has agreed on certain revisions, presented below, to the draft USP prompted by those comments. The IRP-IOT believes that the set of revisions presented below will enhance the supplementary rules of procedure for IRP and will thus enhance ICANN’s overall accountability in accordance with the purposes of the IRP as set forth in Bylaw Section 4.3(a).

With respect to USP, the IRP-IOT plans (1) to use the specific descriptions below to instruct the Sidley-Austin law firm (outside legal advisors to CCWG Accountability and the IRP-IOT) to amend the draft USP by incorporating these revisions in appropriate language (thus explaining directions below in the nature of “we request”), (2) to review the Sidley-drafted amended language for accuracy in reflecting these conclusions, and then (3) to submit the amended draft USP to the ICANN Board for approval in accordance with Bylaw Section 4.3(n)(ii). **[Do we need actual revisions drafted by Sidley for this report or can we proceed in this manner?]**

There were some public comments that addressed issues not directly related to actual application of supplementary procedures in an IRP proceeding, for instance comments about ongoing monitoring of the USP to ensure continued improvement (ALAC [comment](#)), or the [comment](#) from the Centre for Communication Governance at National Law University, Delhi, seeking that ICANN enact rules in the USP to enable better access to the IRP to developing country claimants. With respect to the former comment

and others not so directly related, the IRP-IOT anticipates addressing these in a separate document. With respect to the latter comment, the IRP-IOT believes that ICANN has the initial duty to seek to establish means of meaningful participation in IRP under Bylaw Section 4.3(y). The IRP-IOT would be happy to assist in any such efforts.

Comment [MD1]: Discussion item - Is this a viable way to proceed or does it open a can of worms ?

The IRP-IOT expresses its gratitude to all those who submitted comments in this process.

### Conclusions of IRP-IOT:

Explanatory Note on the bottom of page 1 of the USP:

We request Sidley to amend the last sentence of the explanatory note at the bottom of page 1 of the draft USP.

That sentence currently reads:

*These procedures apply to all independent review process proceedings filed after [insert effective date of the Bylaws].*

We request Sidley to amend that sentence to make reference to the effective date of the approved USP rather than the effective date of the bylaws and to further note that such application is subject to the changes we request in USP.2 Scope below.

USP 1. Definitions:

No change recommended.

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USP 2. Scope:

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... [1]

In this section, the IRP-IOT addresses comments regarding retroactivity.

Some commenters requested that the new IRP standard/scope apply retroactively, to IRPs in process as of October 1<sup>st</sup>, 2016. While such requests are beyond the remit of the IRP-IOT, the issue is moot, there are no pending IRPs filed prior to that date.

Some commenters requested that the USP be applicable retroactively to cases filed prior to Oct. 1<sup>st</sup>, 2016. This comment could also apply to IRPs that may be filed post-Oct 1, 2016, but prior to these USP coming into effect.

The IRP-IOT requests Sidley to amend the USP.2 Scope section (and others if required for appropriate coverage of this specific issue) to provide that a party may request the panel hearing the case to allow this as a matter of discretion. We also request that Sidley add a standard for the panel in reviewing such requests, specifically that unless all parties consent it shall not allow new rules to apply to pending cases if that action would work a substantial unfairness or increase in costs to any party or otherwise be unreasonable in the circumstances.

USP 3. Composition of Independent Review Panel:

In this section, with respect to the two sentences noting, respectively, a Notice of Standing Panel Appointment and a Notice of IRP Panel Appointment, the IRP-IOT requests that these sentences remain as they are but also that the section be enlarged to state that each Notice document must contain, at the least, a requirement that Standing Panel members must be independent of ICANN and its Supporting Organizations and Advisory Committees; and continuing on to state that, therefore, upon consideration for the Standing Panel and on an ongoing basis, Panelists shall have an affirmative obligation to disclose any material relationship with ICANN, a Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding.

In addition, this section should also add a provision that a Notice of IRP Panel Appointment shall go on to provide that each panelist shall be impartial and independent of the parties and amici at the time of accepting an appointment to serve and shall remain so until the final decision has been rendered or the proceedings have otherwise finally terminated.

#### USP 4. Time for Filing:

In process

Deleted: with respect to two aspects of timing – Malcolm

In addition, with respect to Notice, the IRP-IOT requests Sidley to amend the USP.4 Time for Filing section (or other section as deemed appropriate) to add that Notice under the USP and ICDR rules shall also be given to the ICANN Supporting Organization(s) that developed the consensus policy involved when an IRP Dispute challenges a material provision(s) of an existing Consensus Policy in whole or in part.

#### USP 5. Conduct of the Independent Review:

The IRP-IOT requests that the next-to-last paragraph in USP.5 be clarified by stating the missing number of days in the provision. The provision should now read: “All evidence, including witness statements, must be submitted in writing fifteen [15] days in advance of any hearing.”

Comment [MD2]: Note – Malcolm sent an [email](#) on this issue on Jan. 3<sup>rd</sup> and Liz spoke about the issue on our Adobe [call](#) of Jan. 11 – see pages 6 to 9 of the call transcript PDF.

The IRP-IOT requests that additional provisions be inserted into Section USP.5 addressing translation services.

With respect to such services, we first request a sentence reiterating ICANN Bylaw section 4.3(I): “All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for Claimants if needed.”

As noted, translation services must be based on need, which shall not include cases where the claimant speaks/understands English even though claimant’s primary language is other than English. Put simply, these services would truly be a function of need, not convenience, factoring in the languages in which the requester has reasonable competency.

In addition, where a claimant speaks more than one language (but not English), and one of the languages that claimant speaks is an official UN language (Arabic, Chinese, English, French, Russian and Spanish), then that official UN language would be the translation service provided.

In addition, if the claimant includes more than one person (for instance claimant is a corporation), then if a responsible member of such persons (e.g. an officer of the company) speaks English that would suffice for using English in the IRP.

In addition, when considering the translation of documents, the IRP Panel or Emergency Panelist (see Bylaw 4.3(p)), as the case may be, shall endeavor to strike a fair balance between the materiality of the document versus the costs/delay to translate – all in the context of ICDR Article 18 on Translation, ICANN Bylaw 4.3(n) on ensuring fundamental fairness and due process, and ICANN Bylaw 4.3(s) on expeditious proceedings.

Implementation of these translation services provisions shall be up to the discretion of the IRP Panel or Emergency Panelist, as the case may be, in accordance with these provisions. In unusual cases where a hearing is held, these provisions shall be similarly applied to translations services in the form of interpretation services (with such costs being a factor to weigh as a financial expense of an in-person hearing, along with others, as to the appropriateness of holding a hearing).

In addition, the use of the term “claimant” in this translation services section includes others in the IRP who are joined as parties.

#### USP 6. Written Statements:

The IRP-IOT requests that the following language be added at the end of this section:

“In addition, the IRP Panel may grant a request for additional written submissions from any person or entity admitted as a party or as an amicus upon the showing of a compelling basis for such request. In the event the IRP Panel grants a request for additional written submissions, any such additional written submission shall not exceed 15 pages.”

#### USP 7. Consolidation, Intervention, and Joinder:

In this section, we make no request with respect to the current USP language regarding Consolidation.

With respect to intervention/joinder, we request that the necessary changes be made to have the rule provide as follows:

1. If a person, group, or entity participated in an underlying proceeding (a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)), (s)he/it/they receive notice.
  - 1.A. If a person, group, or entity satisfies (1.), above, then (s)he/it/they have a right to intervene in the IRP as a party or as an amicus, as per the following:
    - 1.A.i. (S)he/it/they may only intervene as a party if they satisfy the standing requirement set forth in the Bylaws.
    - 1.A.ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an amicus.

**Comment [MD3]:** Note – I think Malcolm and Liz ended up in agreement with minor tweak on the call of Jan. 11 but need to confirm this or tweak language as we can agree.

2. For any person, group, or entity that did not participate in the underlying proceeding, (s)he/it/they may intervene as a party if they satisfy the standing requirement set forth in the Bylaws.

2.A. If the standing requirement is not satisfied, the persons described in (2.), above, may intervene as an amicus if the Procedures Officer determines, in her/his discretion, that the entity has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue in the Dispute.

3. In addition, the Supporting Organization(s) which developed the consensus policy involved when an IRP Dispute challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a party to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

USP 8. Discovery Methods:

See recommendations regarding written submissions in USP 6. Written Statements above.

USP 9. Summary Dismissal:

No change recommended.

USP 10. Interim Measures of Protection:

No change recommended.

USP 11. Standard of Review:

No change recommended.

USP 12. IRP PANEL Decisions:

No change recommended.

**Comment [MD4]:** For further discussion: In the restriction on Written Statements language in the third paragraph of the section 7 of the USP – which says: “In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.” Do we agree on “collective” restriction considering changes on joinder? Seems a bit much and also probably hard to manage, may just create requests to panel.

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USP 13. Form and Effect of an IRP PANEL DECISION:

No change recommended.

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USP 14. Appeal of IRP PANEL Decisions:

No change recommended at this time – the IRP-IOT may enhance the rule on appeals following issuance of the USP.

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USP 15. Default Procedures:

Request that Sidley remove this numbered entry ('15 Default Procedures ....Error! Bookmark not defined.') from the Table of Contents on page 1 of the USP. And renumber '16. Costs' in the Table of Contents to '15. Costs.' The IRP-IOT will in a subsequent document recommend that Default Procedures (see Bylaw 4.3(n)(iv)(F)) be issued to conform to Bylaw 4.3(g).

Deleted: In process – note that Table of Contents lists this as #15 but actual written sections do not have Default Procedures but instead have Costs as #15 – note also that may be because we have work to do on separate procedures for this eventuality (perhaps) see Bylaw 4.3(n)(iv)(F) but also note that that Bylaw 4.3(g) also addresses this circumstance

USP 15. Costs:

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**Next Steps:**

Shall there be further public comment? – limited to revisions only?

Submit to Board for approval (Bylaw 4.3(n)(ii))

Admin matters:

- Note to Sidley to provide both a redline and clean copy of new USP
- Clean up footnote references to May 2016 bylaws – make them Oct 2016
- On substantive retroactivity, determine how many, if any, IRPs remain in pending status – quick check its looks like moot issue as most cases have final declaration, were withdrawn, etc – check w/ICANN legal
- Consider a final IRP-IOT panel report where we make suggestions for further rules/bylaws changes. For instance, would we want to recommend that in cases where IRP panelists come from outside the Standing Panel (see Bylaw 4.3(k)(ii)) then the IRP Panel decision would not create precedent (see Bylaw 4.3(a)(vi))?

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