

SUMMARY OF CURRENT ICANN IRP PROCEDURES

Description / Requirements	Relevant Source	Comments
I. Cooperative Engagement Process (CEP)		
<ul style="list-style-type: none"> • CEP is intended to resolve or narrow issues for which independent review may be sought. • CEP is voluntary; it is intended to occur between the requesting party (the “Requestor”) and ICANN. • Requestors are urged to engage in CEP with ICANN before filing Notice of Independent Review. • Failure to participate in CEP in good faith results in mandatory award of reasonable costs and fees to ICANN, including legal fees, if Requestor does not prevail in IRP. • If a requesting party elects to proceed to CEP, it must initiate CEP within 15 days of when ICANN Board posts minutes and briefing materials related to Board action that Requestor contends show a violation of ICANN’s Bylaws or Articles of Incorporation. • CEP tolls the 30-day period for commencing IRP (<i>see</i> Part II.A). • CEP is requested by submitting written notice to ICANN via email at: independentreview.ICANN.org • The request for CEP must: <ul style="list-style-type: none"> • Identify the Board action(s) at issue; • Identify which portion(s) of the ICANN Bylaws or Articles of Incorporation were allegedly violated; • Designate Requestor’s contact person for resolution of the issue (outside counsel is not typically involved in CEP, but there is no prohibition against participation of counsel in CEP) • ICANN Legal reviews the request for CEP and designates an ICANN executive to discuss the issues raised in the request with Requestor. • ICANN contacts the Requestor to schedule an initial telephonic 	<p>ICANN, Cooperative Engagement Process – Requests for Independent Review, 11 April 2013.</p> <p>ICANN, Cooperative Engagement and Independent Review Processes Status Update – 17 June 2016, at 1, https://www.icann.org/en/system/files/files/irp-cep-status-17jun16-en.pdf.</p> <p>ICANN, Supplementary Procedures for ICANN Independent Review Process (“Supplementary Procedures”) § 11.</p> <p>ICANN Bylaws Art. IV § 3 ¶¶ 14, 16-17 (as amended 11 February 2016).</p> <p>Call with ICANN Legal.</p>	<p>ICANN’s Cooperative Engagement Process document (dated 11 April 2013) sets forth a timeline for the various stages of the CEP process (e.g., the time within which ICANN must designate an executive; the number of days within which the parties “shall confer by telephone or in person” for their initial CEP conference; and the requirement that a second, in-person conference be held “within 7 (seven) calendar days after such initial conference”). However, the document does not explain what happens if the Parties are unable to meet this schedule and have not otherwise agreed to modify the timeline in writing. Nor does the document specify what happens if a Requestor is located abroad and cannot attend an in-person CEP conference. According to ICANN Legal, unless CEP can reasonably be held around ICANN public meetings, and the party that initiated the CEP can attend, in-person meetings are generally not required. A requirement that Requestors who elect to participate in CEP must attend in-person conferences with ICANN may present significant costs and is inconsistent with the general goal of keeping IRP costs low.</p>

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<p>conference.</p> <ul style="list-style-type: none"> Initial CEP conference must occur within 2 days of when ICANN contacts Requestor. There are no restrictions on what can be discussed during CEP, although it is intended to be a Party-to-Party process to seek resolution or narrowing of issues (“Party” refers to ICANN and/or a Requestor). Requestors will frequently provide a letter or other documentation prior to the initial conference to help ICANN evaluate the issues. Such documentation is not required for purposes of CEP, however. If initial conference unsuccessful, second CEP conference must occur in person within 7 days of initial conference. The time schedule and process may be modified as agreed to by both ICANN and the Requestor, in writing. All matters discussed in CEP are confidential; CEP discussions are not admissible in the IRP. 		<p>According to ICANN Legal, the in person requirement is often waived. According to ICANN Legal, unless CEP conference can reasonably be held around ICANN Public meeting we do not require folks to meet in person as that can be a burden.</p>
<p>II. Commencing the IRP</p>		
<p>A. Notice and Request</p>		
<ul style="list-style-type: none"> The International Centre for Dispute Resolution (“ICDR”) is the current “IRP provider” appointed by ICANN to administer IRP proceedings. (See ICANN, Reconsideration and Independent Review) <u>Timing for commencement of IRP:</u> <ul style="list-style-type: none"> Notice and Request must be filed within 30 days of when ICANN Board posts minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that Requestor contends show a violation of ICANN’s Bylaws or Articles of Incorporation. Tolling for CEP: The 30-day commencement period is tolled when Requestors pursue CEP. IRP must be commenced within 15 days from date on which CEP is completed. (In other words, after CEP is completed, the tolling ends and 15 days remain for commencing IRP.) 	<p>ICANN Bylaws, Art. IV § 3 ¶¶ 2-3, 5 (as amended 11 February 2016).</p> <p>Supplementary Procedures §§ 5, 6.</p> <p>ICDR Rules Art. 2, 10.</p> <p>ICDR International Expedited Procedures Article E-2.</p> <p>ICANN, Reconsideration and Independent Review, <i>available at</i> https://www.icann.org/resources/pages/reconsideration-and-independent-review-icann-bylaws-article-iv-accountability-</p>	<p>It is unclear from the documents whether the Request must be filed together with the Notice. ICANN procedures do not specify that they be filed simultaneously, but this appears to be the common practice based on the sample IRP documents at cited link. The ICDR Rules and Supplementary Procedures also do not specify whether the Requestor must also transmit the Request to ICANN simultaneously with the Notice. According to ICANN Legal, the intent is that the Request and Notice be filed together within 30 days of the triggering event. According to ICANN Legal, ICANN will often grant extensions to the time for filing an IRP after CEP is</p>

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<ul style="list-style-type: none"> • IRP is initiated by submitting 2 copies of Notice of Independent Review (“Notice”) (available on ICANN website) with ICDR’s initial filing fee of \$2,000 to \$3250 applicable to non-monetary claims, together with Written Request for Independent Review (“Request”) (similar to a legal brief) to ICDR at address provided on Notice. • Notice must be sent simultaneously to ICANN. • Request must present detailed submission on the facts and claims, together with all of the evidence then available on which the Requestor intends to rely. • Request must show that standing requirements outlined in ICANN Bylaws, Art. IV § 3 ¶ 2 (as amended 11 February 2016) are satisfied to avoid summary dismissal. • Request cannot exceed 25 pages, must be double-spaced, and in 12-point font. • Exhibits and expert evidence are excluded from page limit. • Notice may also contain any proposals for procedures to which the Parties have previously agreed. 	<p>and-review (last visited June 17, 2016).</p> <p>For sample Request documents, see ICANN, Independent Review Process Documents, available at: https://www.icann.org/resources/pages/accountability/irp-en (last visited June 9, 2016).</p> <p>Call with ICANN Legal.</p>	<p>completed.</p> <p>It is unclear from documents to what extent the Parties may customize the procedures for the IRP, as would normally be the case in an ICDR arbitration under ICDR Rule Art. 2 §3(g) and Art. 4 § 4. Those provisions presume that parties to an arbitration may have a prior agreement, which is unlikely in an IRP.</p> <p>Although § 6 of the Supplementary Procedures provides that an IRP Panel may summarily dismiss any request for Independent Review under certain circumstances (e.g., lack of standing), ICANN Legal clarified that as of June 2016, there is no designated person to make summary determinations on a given Request before a full IRP Panel is put in place.</p> <p>III. It is unclear how a Requestor can present all of its proof in the Request before it has had the opportunity to obtain discovery from ICANN.</p> <p>According to ICANN Legal:</p> <ul style="list-style-type: none"> • Because of the limited nature of the IRPs and public availability of much information, it is not always the case that discovery would be needed. • The Request is the opportunity to lay out all issues for the Panel.

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		<ul style="list-style-type: none"> • At present, there is no guarantee that further briefing will be had, so not submitting supporting documents at this point could be an issue. • In practice, every party that has asked for a second opportunity to present papers, has been granted that opportunity by the panel. <p>It is not clear whether the ICDR International Expedited Procedures (“Expedited Procedures”) apply to IRPs. Although the Supplementary Procedures specify that IRPs are governed by the ICDR’s International Arbitration Rules in combination with the Supplementary Procedures (discussed in Part V.B. below), Article 1 § 4 of the ICDR Rules provides that the Parties “may also agree to use the International Expedited Procedures.” (See ICDR Rules Art. 1 § 4.)</p>
A. Answer to the Request		
<ul style="list-style-type: none"> • The date on which the IRP is commenced is communicated to ICANN by letter from the ICDR. ICANN must file its Answer within 30 days of the date set forth in the letter. • ICANN must submit its Answer to Requestor, ICDR, and any other Parties absent extension by the IRP panel. • Answer must present detailed submission on the facts and defenses, together with all of the evidence then available on 	<p>ICDR Rules Art. 3.</p> <p>ICDR International Expedited Procedures Article E-2.</p> <p>Supplementary Procedures § 5.</p>	<p>Counterclaim and setoff provisions of the ICDR Rules do not appear relevant to IRPs.</p> <p>According to ICANN Legal:</p> <ul style="list-style-type: none"> • At this point the panel is not yet in place so this is either by mutual agreement between the parties, or the IRP provider. • ICANN is permitted to raise any issue

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<p>which ICANN intends to rely.</p> <ul style="list-style-type: none"> • Answer cannot exceed 25 pages, must be double-spaced, and in 12-point font. • Exhibits and expert evidence are excluded from page limit. • Answer must include any response to Requestor’s proposed procedures, if any, to which ICANN has not agreed, or any proposed procedures consistent with a prior agreement of the Parties. 	<p>Call with ICANN Legal.</p>	<p>in its Answer, and commonly addresses threshold questions, such as: (1) is the Requestor a harmed party; (2) whether the Requestor was actually harmed by Board action rather than the actions of staff or a third party and/or (3) whether the Board’s action violated the ICANN Articles of Incorporation or Bylaws.</p> <p>To the extent that ICANN would require discovery from a Requestor in order to present its defenses, it is unclear how ICANN could be required to present all of the evidence on which it intends to rely when filing its Answer prior to obtaining discovery.</p> <p>According to ICANN Legal, in practice, there have been opportunities for additional briefings to the Panel</p>
<p>B. Amendment or Supplement of Request or Answer</p>		
<ul style="list-style-type: none"> • Any Party may amend or supplement its Request, Answer, or defense unless the IRP Panel finds such amendment or supplement inappropriate because of the Party’s delay, prejudice to the other Party, or other circumstances. • Amendments cannot exceed the scope of matters to be adjudicated in the IRP. • The IRP may permit an amendment or supplement subject to an award of costs and/or the payment of filing fees as determined by the ICDR Administrator (the “Administrator”). • After the IRP Panel is appointed, no new or different claim may be submitted except with the IRP Panel’s consent. 	<p>ICDR Rules Art. 9.</p> <p>ICDR International Expedited Procedures Art. E-5.</p>	
<p>IV. Conciliation Process</p>		
<ul style="list-style-type: none"> • Conciliation is intended to narrow the issues for which IRP is 	<p>ICANN Bylaws Art. IV § 3 ¶¶ 15-17 (as amended 11 February 2016).</p>	<p>It is unclear to what extent the ICDR’s International Mediation Rules would also</p>

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<p>sought.</p> <ul style="list-style-type: none"> The process is conducted by a conciliator appointed from ICDR’s Omnibus Standing Panel (described in Part V.B below). The conciliator cannot serve as a member of the IRP Panel. All discussions are confidential and are not admissible in the IRP. Conciliation is not mandatory, but failure to participate in the conciliation process in good faith results in mandatory award of reasonable costs and fees to ICANN, including legal fees, if Requestor does not prevail in IRP. 	<p>Supplementary Procedures § 11.</p>	<p>govern the conciliation process.</p>
<p>V. Multiple Parties and Consolidation of Proceedings</p>		
<ul style="list-style-type: none"> IRP consolidation is available. When consolidating a Request with other Parties, Requestor must show that the same circumstances caused each Requestor’s harm and that the Parties have expressly agreed to consolidation. At the request of a Party, the Administrator may appoint a “consolidation arbitrator,” who will have the power to consolidate two or more IRPs pending under the ICDR Rules where certain requirements are met. Following notice from the Administrator stating its intention to appoint a “consolidation arbitrator,” the Parties are given an opportunity to agree on a process for appointing a consolidation arbitrator who will decide whether to consolidate Requests. If the Parties cannot agree on a process for appointing the consolidation arbitrator within 15 days of receiving the Administrator’s notice, the Administrator shall appoint the consolidation arbitrator, who shall not already be serving on any pending IRP subject to consolidation in Requestor’s case. The provisions governing impartiality and independence, challenges and replacement set forth in ICDR Rules Articles 13-15 also apply to the appointment of a consolidation arbitrator. Where IRPs are consolidated, they shall be consolidated into the IRP that commenced first, unless the Parties agree otherwise or the consolidation arbitrator finds otherwise. 	<p>See ICANN Bylaws, Art. IV § 3 ¶ 3 (as amended 11 February 2016).</p> <p>ICDR Rules Art. 8.</p>	<p>Procedures for consolidation are somewhat vague and would appear to make consolidation fully consensual. It is not clear whether ICANN can request consolidation or whether ICANN must agree to consolidation (Article 8 of the ICDR Rules suggests that a consolidation arbitrator may decide consolidation over a Party’s objection). In addition, the Supplementary Procedures appear to contemplate a 2-party IRP process (e.g., § 3 refers to “either party” and other provisions refer to a singular “requestor”), suggesting that the ICDR procedures for joinder of additional Parties set forth in ICDR Rules Art. 7 would not apply.</p> <p>According to ICANN Legal, in practice, some IRPs have had more than one complainant, but they were represented by the same counsel. According to ICANN Legal, to date, the only consolidation has occurred, so there has been no need for the “consolidation arbitrator” referenced in Art. 8 § 2 of the ICDR Rules.</p>

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VI. The IRP Panel		
A. Number of Panelists		
<ul style="list-style-type: none"> An IRP Panel consists of either one or three members appointed from an Omnibus Standing Panel or comprised in accordance with the ICDR Rules (as described in Part V.B below). Either Party may elect that the request for Independent Review be considered by a three-member panel. Requestors may indicate their request for a three-member panel on the Notice. Pursuant to the ICANN Bylaws, “the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.” (ICANN Bylaws Art. IV § 3 ¶ 9 (as amended 11 February 2016)) 	<p>Supplementary Procedures § 3.</p> <p>ICANN Bylaws Art. IV § 3 ¶ 9 (as amended 11 February 2016).</p>	<p>Although the current Bylaws call for an Omnibus Standing Panel, there is currently no Omnibus Standing Panel. As there is currently no Omnibus Standing Panel, there is no Chair of the Panel and it is unclear who makes the final determination on panel size.</p>
B. Composition of the IRP Panel		
<ul style="list-style-type: none"> The IRP Panel is selected from an Omnibus Standing Panel of between six and nine members who have a variety of expertise, “including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN’s mission and work.” (ICANN Bylaws Art. IV § 3 ¶ 6 (as amended 11 February 2016)) Pursuant to the ICANN Bylaws, “[t]he membership of the standing panel shall be coordinated by the IRP Provider [here, ICDR] subject to approval by ICANN.” (ICANN Bylaws Art. IV § 3 ¶ 7 (as amended 11 February 2016)) The IRP Panelists are “identified in coordination with the ICDR.” (Supplementary Procedures) If the Omnibus Standing Panel is not in place when an IRP Panel must be convened, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the ICDR Rules (<i>see</i> ICDR Rules Art. 12). If the Omnibus Standing Panel is in place but lacks the diversity of skill and experience needed for a particular proceeding, ICDR shall identify one or more Panelists, as required, from outside the 	<p>ICANN Bylaws Art. IV § 3 ¶¶ 6-7 (as amended 11 February 2016).</p> <p>Supplementary Procedures, definition of “IRP PANEL.”</p> <p>Call with ICANN Legal.</p>	<p>The current Bylaws state that the IRP Provider, here ICDR, is responsible for “coordinating” the membership of the Omnibus Standing Panel. However, it is not clear whether the IRP Provider is also responsible for maintaining the Omnibus Standing Panel. And as noted above, there currently is no Standing Omnibus Panel.</p> <p>ICANN Legal confirmed that as of June 2016, there is no Omnibus Standing Panel from which IRP Panelists are selected. The Bylaws did not originally contemplate a Standing Panel, but an expert report, issued in 2012, recommended the use of a standing panel. ICANN Legal advised that ICANN has had difficulty finding people to serve on the Omnibus Standing Panel.</p>

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<p>Omnibus Standing Panel to augment the Panelists for that IRP.</p>		<p>We understand from ICANN Legal that the Parties are typically involved in selecting the IRP Panel members, and that there is no set process for how the President of the IRP Panel is selected. Often the two party-selected panelists will agree on a President. If they cannot agree, the ICDR often selects someone.</p>
<p>C. Impartiality of Panel</p>		
<ul style="list-style-type: none"> • ICDR Rules require that the IRP Panelists “shall be impartial and independent,” and each Panelist “shall disclose any circumstances that may give rise to justifiable doubts as to the [Panelist’s] impartiality or independence and any other relevant facts the [Panelist] wishes to bring to the attention of the parties.” • Individuals with an official position or office within ICANN are not eligible to serve on the Standing Panel. • The Panelists and Parties have a continuing obligation to disclose information of circumstances that may give rise to justifiable doubts as to the Panelists’ impartiality or independence. 	<p>ICDR Rules Art. 13§§ 1-3.</p>	<p>It is unclear whether former ICANN Board Members or office holders are also ineligible from serving on the Omnibus Standing Panel.</p>
<p>D. Challenges to the Panel’s Impartiality or Independence</p>		
<ul style="list-style-type: none"> • A Party may challenge an IRP Panelist “whenever circumstances exist that give rise to justifiable doubts as to the [Panelist’s] impartiality or independence.” • The Party making such challenge must send written notice of the challenge to the Administrator within 15 days after being notified of the appointment of the Panelist, or within 15 days after the circumstances giving rise to the challenge become known to that Party. • The notice must state the reasons for the challenge and shall not be sent to any member of the IRP Panel. • If the other Party agrees to the challenge, the IRP Panelist shall withdraw. • Absent agreement on the challenge by the other Party, the Administrator has discretion to make the decision on the challenge. 	<p>ICDR Rules Art. 13-14.</p>	

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<ul style="list-style-type: none"> The Administrator may also remove an IRP Panelist on its own initiative for failing to perform his or her duties. 		
E. Replacement of an IRP Panelist		
<ul style="list-style-type: none"> If an IRP Panelist resigns, is incapable of performing his or her duties, or is removed for any reason, a substitute Panelist shall be appointed. If a substitute Panelist is appointed, unless the Parties otherwise agree the IRP Panel shall determine at its sole discretion whether all or part of the case shall be repeated. 	ICDR Rules Art. 15.	The ICDR Rules provide for appointment of a substitute arbitrator “pursuant to the provisions of Article 12.” There are no clear procedures for who will appoint a replacement Panelist from the remaining members of the Omnibus Standing Panel (Article 12 would otherwise allow the Parties to agree on a procedure for doing so). In practice, the party that selected the panelist has been asked to select the replacement when their chosen panelist passed away. As noted in Part V.B, above, ICANN Legal confirmed that the Omnibus Standing Panel does not exist as of June 2016.
F. Exclusion of Liability		
<ul style="list-style-type: none"> The IRP Panelists, any emergency arbitrator, consolidation arbitrator, and the Administrator shall not be liable to any Party for any act or omission in connection with any IRP Proceeding under the ICDR Rules, except to the extent that such a limitation of liability is prohibited by applicable law. No IRP Panelist, emergency arbitrator, consolidation arbitrator, nor the Administrator shall be under any obligation to make any statement about the arbitration and no Party shall seek to make any of these persons a Party or witness in any judicial or other proceedings relating to the IRP. 	ICDR Rules Art. 38.	
VII. The IRP Proceedings		
A. Rules Governing the IRP		
<ul style="list-style-type: none"> The Supplementary Procedures establish a hierarchy of rules that govern IRPs “in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws.” (Supplementary Procedures § 2) 	Supplementary Procedures §2. ICANN Bylaws Art. IV § 3 ¶ 8 (as amended 11 February 2016).	As discussed in Part II.A., it is unclear to what extent the Expedited Procedures apply in IRPs.

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<ul style="list-style-type: none"> • Under that rubric, the ICDR must apply the Supplementary Procedures, in addition to the International Arbitration Rules of the ICDR (“ICDR Rules”). • In the event of any inconsistency between the Supplementary Procedures and ICDR Rules, the Supplementary Procedures govern. • The ICANN Bylaws also provide for Board approval of the procedures governing IRPs. The Bylaws state that, “[s]ubject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with” Article IV Section 3 of the Bylaws. (ICANN Bylaws Art. IV § 3 ¶ 8 (as amended 11 February 2016)) • The ICDR Rules are supplemented by the ICDR International Expedited Procedures, to the extent those Expedited Procedures apply in IRPs. • If an objection to the applicability of the Expedited Procedures is submitted before the IRP Panel is appointed, the Administrator may initially determine the applicability of the Expedited Procedures, subject to the IRP Panel’s final determination. • The IRP Panel, any emergency arbitrator and consolidation arbitrator shall interpret and apply the ICDR Rules insofar as they relate to their powers and duties. The Administrator shall interpret and apply all other rules. • 	<p>ICDR Rules Art. 1, 39.</p> <p>ICDR International Expedited Procedures, Art. E-1, E-4.</p>	
B. Place of the IRP		
<ul style="list-style-type: none"> • Proceedings are to be conducted by electronic means “to the extent feasible.” • In-person hearings are reserved for the “extraordinary” case. • The Panel presiding over the IRP, “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,” determine whether an in-person hearing is necessary. (Supplementary Procedures § 4) • The Administrator may initially determine where an in-person hearing will take place, with the final determination reserved to 	<p>Supplementary Procedures § 4.</p> <p>ICDR Rules Art. 17 §1.</p>	

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the IRP Panel.		
C. Applicable Laws		
<ul style="list-style-type: none"> • The IRP Panel shall apply the substantive law(s) or rules of law applicable to the dispute. • Failing such agreement by the Parties, the IRP Panel shall apply such law(s) or rules of law as it determines to be appropriate. 	<p>ICANN Bylaws and Articles of Incorporation.</p>	<p>Although Article 31 of the ICDR Rules provides that “an arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the Parties as applicable to the dispute,” we assume that this provision does not apply because IRP disputes are restricted to claims that the Board did not abide by ICANN’s Articles of Incorporation or Bylaws. <i>See</i> ICANN Bylaws Art. IV § 3 ¶¶ 1-2 (as amended 11 February 2016). Pursuant to the corporate internal affairs doctrine, ICANN’s Articles of Incorporation and Bylaws are interpreted under the law of the state of incorporation, here California.</p>
D. Standard of Review		
<ul style="list-style-type: none"> • The IRP is subject to the following standard of review: <ul style="list-style-type: none"> ○ Did the ICANN Board act without conflict of interest in taking its decision? ○ Did the ICANN Board exercise due diligence and care in having sufficient facts in front of them?; and ○ Did the ICANN Board exercise independent judgment in taking the decision, believed to be in the best interests of the company? • The Supplementary Procedures provide: “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.” (Supplemental Procedures § 8) 	<p>Supplementary Procedures § 8.</p> <p>ICANN Bylaws Art. IV § 3 ¶ 4 (as amended 11 February 2016).</p>	

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<ul style="list-style-type: none"> Under the current IRP process, only Board action may be challenged. , If a Requestor demonstrates that the ICANN Board did not meet this standard, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review. ICANN Legal has clarified that the IRP Panel may address the standing and merits requirements in any order of preference, and that the Panel will frequently determine whether the Requestor has alleged Board conduct at the outset. 		
E. Language of the IRP		
<ul style="list-style-type: none"> The IRP Panel determines the language in which the IRP is conducted. 	ICDR Rules Art. 18.	The Supplementary Procedures are silent on the language of the IRP. Article 18 of the ICDR Rules governs language in the arbitration context and provides that “the language(s) of the arbitration shall be the language(s) of the documents containing the arbitration agreement, subject to the power of the arbitral tribunal to determine otherwise.” To date, all IRPs have been conducted in English.
F. Notices and Communication		
<ul style="list-style-type: none"> Unless otherwise agreed by the Parties or ordered by the IRP Panel, all notices and written communications may be transmitted by any means of communication that allows for a record of its transmission, including mail, courier, fax, or other written forms of electronic communication addressed to the Party or its representative at its last-known address, or by personal service. Unless instructed otherwise by the Administrator, after the IRP Panel has been established, the Parties may communicate in writing directly with the Panel with simultaneous copies to the other Party and, unless instructed otherwise, to the Administrator. <i>Ex parte</i> communications (whether made by a Party or its representative) relating to the case with an IRP Panelist are prohibited. 	ICDR Rules Art. 10 § 1. ICDR Rules Art. 13 § 6. ICDR Rules Art.16.	Need to include rules on use of fax. These are unclear at this point.

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G. Party Representation		
<ul style="list-style-type: none"> Parties may be represented in the IRP. Names, addresses, and contact information for the Parties' representatives must be communicated in writing to the other Party and to the Administrator. 	ICDR Rules Art. 16.	
H. Calculation of Time		
<ul style="list-style-type: none"> To calculate a period of time under the ICDR Rules, such period begins to run on the day following the day when a notice is made. If the last day of such a period is an official holiday at the place where notice is received, the period is extended until the first business day that follows. Official holidays occurring during the running of the period of time are included in calculating the period. 	ICDR Rules Art. 10 § 2.	
I. Procedural Order and Timetable / Case Management Conference		
<ul style="list-style-type: none"> The IRP Panel is responsible for determining the timetable for the IRP proceeding. Any violation of the Panel's timetable may result in the assessment of costs pursuant to Section 10 of the Supplementary Procedures. At the beginning of the IRP Proceedings, the IRP Panel may conduct a preparatory conference with the Parties for the purpose of organizing, scheduling, and agreeing to procedures, including the setting of deadlines for any submissions by the Parties. 	Supplementary Procedures § 4. ICDR Rules Art. 20.	Article E-7 of the Expedited Procedures provides guidance on expedited timetables for proceedings before the ICDR. The Expedited Procedures also provide that the Administrator may conduct an administrative conference with the Parties and their representatives to discuss procedures, mediating the dispute, and administrative matters. <i>See</i> ICDR International Expedited Procedures Art. E-3.
J. Conduct of the IRP		
<ul style="list-style-type: none"> Subject to the ICDR Rules and Supplementary Procedures, the IRP Panel may conduct the IRP "in whatever manner it considers appropriate, provided that the Parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." The IRP Panel may order the Parties to produce documents, exhibits, or other evidence it deems necessary or appropriate. 	ICDR Rules Art. 20. Supplementary Procedures § 4.	It is unclear how the ICDR can compel its panelists to complete IRPs within a certain amount of time. Although the ICDR Rules require that the IRP Panel "shall conduct the proceedings with a view to expediting the resolution of the dispute" (ICDR Rules Art. 20), and that a Panel "shall make every effort

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<ul style="list-style-type: none"> • The IRP Panel may decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or relevant testimony or other evidence, and direct the Parties to focus their presentations on issues whose resolution could dispose of all or part of the case. • The IRP Panel should conduct the proceedings by electronic means to the extent feasible. • Telephone conferences are permissible where necessary, but are limited to argument only with all evidence (including witness statements) submitted in writing in advance. 		<p>to deliberate and prepare the [declaration] as quickly as possible after the hearing,” but “no later than 60 days from the date of the closing of the hearing” (ICDR Rules Art. 30), there is no mechanism to ensure that IRPs be completed by a given deadline.</p> <p>According to ICANN Legal, no Panel has issued its Declaration within the 60 day time frame.</p> <p>Similarly, no panel has issued its declaration in accordance with Section 4.3(18) which provides that : “The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review.”</p>
K. Written Submissions / Hearings		
<ul style="list-style-type: none"> • The dispute shall be resolved by written submissions only unless the IRP Panel determines that an oral hearing is necessary. • Where expedited proceedings are based on written submissions, all submissions are due within 60 days of the date of the procedural order, unless the IRP Panel determines otherwise. • In-person hearings are disfavored and reserved for “the extraordinary” case. • If the IRP Panel and Chair of the standing panel deem it necessary to hold an in-person hearing (or the ICDR if the standing panel is not yet convened), the in-person hearing shall be limited to argument only with all evidence (including witness statements) submitted in writing in advance. • Cross-examination is not permitted. • If an oral hearing is held in an expedited proceeding, the IRP Panel shall set the date, time, and location of the hearing. The oral hearing shall take place within 60 days of the date of the procedural order unless the IRP Panel deems it necessary to expand the period. Parties desiring a stenographic record may arrange for one if desired. The hearing shall not exceed one day unless the Panel determines otherwise. 	<p>Supplementary Procedures § 4.</p> <p>ICDR Rules Art. 1 § 4.</p> <p>ICDR International Expedited Procedures Arts. E-8, E-9.</p>	<p>As noted there is no Omnibus Standing Panel and no Chair of such Panel although the current Bylaws contemplate a Panel and a Chair.</p>

Description / Requirements	Relevant Source	Comments
L. Panel-Appointed Expert		
<ul style="list-style-type: none"> The IRP Panel, after consultation with the Parties, may appoint one or more independent experts to report to it, in writing, on issues designated by the Panel and communicated to the Parties. The Parties shall provide such an expert with any relevant information, documents, or goods that the expert may require. 	ICDR Rules Art. 25.	The right of Parties to question the expert may be abrogated by Supplementary Procedures § 4, which does not contemplate examination of witnesses and limits hearings (in person or telephonic) to argument only.
M. Discovery and Discovery Disputes		
<ul style="list-style-type: none"> The Parties may modify the ICDR Rules governing discovery only by written agreement and in consultation with the IRP Panel. Unless the Parties agree in writing, the IRP Panel shall conduct discovery in accordance with Article 21 of the ICDR Rules. The IRP Panel shall manage the exchange of information between the Parties with a view to maintaining efficiency and economy, and fairness between the Parties. The Parties may provide the Panel with their views on the appropriate level of discovery for each IRP, but the IRP Panel retains final authority. The Parties must exchange all documents upon which each intends to rely on a schedule set by the IRP Panel. The IRP Panel may, upon application, require a Party to make available to another Party documents in that Party’s possession that are not otherwise available to the Party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. The Panel may put in place appropriate measures to protect confidentiality of materials. Discovery procedures applicable in U.S. court proceedings (depositions, interrogatories, requests for admission) generally do not apply in an IRP. In resolving any dispute about pre-hearing exchanges of information, the IRP Panel shall require a requesting Party to justify the time and expense that its request may involve and may condition granting such a request on the payment of part or all of the cost by the Party seeking the information. 	ICDR Rules Art. 20-21.	Neither the Bylaws nor the Supplementary Procedures contain any provisions addressing discovery in IRPs. It is unclear what standards the IRP Panel would apply when resolving disputes concerning discovery.

Description / Requirements	Relevant Source	Comments
<ul style="list-style-type: none"> If a Party fails to comply with a discovery order, the IRP Panel may draw adverse inferences and may take such failure into account in allocating costs. 		
N. Privilege		
<ul style="list-style-type: none"> The IRP Panel must take into account “applicable principles of privilege” (e.g., attorney-client). (<i>See</i> ICDR Rules Art. 22) Where Parties, their counsel, or their documents would be subject under applicable law to different rules, the IRP Panel should, to the extent possible, apply the same rule to all Parties, giving preference to the rule that provides the highest level of protection. 	ICDR Rules Art. 22.	It is unclear what substantive law the IRP Panel would apply when resolving privilege questions.
O. Waiver		
<ul style="list-style-type: none"> Any objections based on a Party’s non-compliance with any provision or requirement of the ICDR Rules must be stated in writing or they are considered waived. 	ICDR Rules Art. 28.	
P. Default		
<ul style="list-style-type: none"> If ICANN fails to submit an Answer in accordance with Article 3, the IRP Panel may proceed with the IRP. The IRP may proceed if a Party, duly notified under the ICDR Rules, fails to appear at a hearing without sufficient cause. If a Party duly invited to produce evidence or take other steps in the IRP fails to do so within the time set by the Panel without sufficient cause, the Panel may issue its declaration on the evidence before it. 	ICDR Rules Art. 26.	
VIII. Preliminary Relief		
A. Interim and Emergency Measures of Protection		
<ul style="list-style-type: none"> Before constitution of IRP Panel: <ul style="list-style-type: none"> Requestor may apply for emergency relief by submitting written notice to the Administrator and all other Parties stating why such relief is required and why Requestor is entitled to emergency relief. Written notice must be submitted concurrent with the Notice of Independent Review and may be submitted to ICDR by email with certification that all Parties have been notified. 	Supplementary Procedures § 7. ICDR Rules Art. 6 §1. ICDR Rules Art. 24.	Section 7 of the Supplementary Procedures sets forth a process for interim relief and states that an IRP Panel “may recommend that the Board stay an action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration.” This language suggests that ICANN has abrogated the provisions set forth in Article 6 of the ICDR Rules (which allow

Description / Requirements	Relevant Source	Comments
<ul style="list-style-type: none"> Chair of standing panel may provide a recommendation on the stay of any ICANN Board action or decision. After constitution of IRP Panel: <ul style="list-style-type: none"> Panel may recommend that the ICANN Board stay any action or decision, or that the Board take any interim action, until the Board has reviewed and acted upon the IRP declaration. The confidentiality provisions set forth in Article 37 of the ICDR Rules do not apply pursuant to § 12 of the ICANN Supplementary Procedures. 		arbitrators “to order or award any interim or conservancy measures that the emergency arbitrator deems necessary, including injunctive relief”), and that, like the Final Declaration, the IRP Panel’s interim measures are non-binding on the Board. According to ICANN Legal, in practice ICANN has abided by any interim measures ordered.
IX. Closing of the Proceedings		
<ul style="list-style-type: none"> The IRP Panel may request additional submissions from the parties as the Panel deems appropriate. The IRP Panel may re-open the hearing at its discretion or upon application of a Party at any time before the Panel issues its declaration. 	ICDR Rules Art. 27.	
X. IRP Declaration		
A. Time Limit for Issuing Declaration		
<ul style="list-style-type: none"> Declarations shall be issued “promptly” by the IRP Panel. Unless otherwise agreed by the Parties, specified by law, or determined by the Administrator, the declaration shall be made no later than 60 days from the date of the closing of the hearing. If an expedited proceeding, unless otherwise agreed by the Parties, specified by law, or determined by the Administrator, the declaration shall be made not later than 30 days from the date of the closing of the hearing or from the time established for final written submissions. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. 	Supplementary Procedures § 10. ICDR Rules Art. 30. ICDR International Expedited Procedures Art. E-10. Bylaws Section 4.3(18)	According to ICANN Legal, no panel has met the 60-day/6 month timeline.
B. Form and Effect of Declaration		
<ul style="list-style-type: none"> Declarations shall be made in writing by the IRP Panel, based on the documentation, supporting materials, and arguments submitted by the Parties. 	Supplementary Procedures § 10. ICDR Rules Art. 30.	According to ICANN Legal, in practice, declarations are posted as a matter of course, absent a request from the parties otherwise,

Description / Requirements	Relevant Source	Comments
<ul style="list-style-type: none"> The declaration shall specifically designate the prevailing Party. The IRP Panel shall state the reasons upon which a declaration is based, unless the Parties have agreed that no reasons be given. 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 requests such consent. 		with a limited amount of redactions.
C. Making of the Declaration		
<ul style="list-style-type: none"> If a three-member IRP Panel, any declaration of the Panel shall be made by a majority of its members. The declaration must be signed by the Panel. If any IRP Panelist fails to sign the declaration, it shall be accompanied by a statement of reasons for the absence of such signature. 	Supplementary Procedures § 9. ICDR Rules Art. 30.	
D. Waiver of Court Review		
<ul style="list-style-type: none"> Absent agreement otherwise, the Parties shall waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can be validly made. 	ICDR Rules Art. 30.	
E. Notification to Parties and Deposit with ICDR		
<ul style="list-style-type: none"> Copies of the declaration shall be communicated to the Parties by the ICDR. 	Supplementary Procedures § 10.	
F. Non-Binding Nature of Declaration		
<ul style="list-style-type: none"> The declaration of the IRP Panel, together with the ICANN Board's subsequent action on the declaration, shall be final and have precedential value. However, the declaration is not binding on the Board, as the Bylaws require only that "[w]here feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting." 	ICANN Bylaws Art. IV § 3 ¶ 21 (as amended 11 February 2016).	There is a tension between the IRP Panel's power to grant emergency injunctive relief pursuant to ICDR Rules Art. VI, which can prevent the Board from taking action, versus the final declaration of the IRP, which is not binding on the Board. In any event, ICANN has complied with declarations.
G. Consent Declaration		
<ul style="list-style-type: none"> If the Parties settle the dispute before the IRP Panel issues its declaration, the Panel shall terminate the IRP and, if requested 	ICDR Rules Art. 32.	It is not clear whether this Rule applies, as § 10 of the Supplementary Procedures requires

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<p>by all Parties, may record the settlement in the form of a consent declaration on agreed terms. The IRP Panel is not obliged to give reasons for such a declaration.</p>		<p>that the declaration “shall specifically designate the prevailing party.” In a settlement context, there is no clear “prevailing party.”</p>
<p>H. Correction of Declaration</p>		
<ul style="list-style-type: none"> • Within 30 days after the receipt of the declaration, any Party, with notice to the other Party, may request the IRP Panel to interpret the declaration or correct any clerical, typographical, or computational errors. • If the IRP Panel considers such a request justified after considering the contentions of the Parties, it shall comply with such a request within 30 days after receipt of the Parties’ last submissions requesting interpretation or correction of the declaration. • Any interpretation, correction, or additional declaration made by the IRP Panel shall contain reasoning and shall form part of the declaration. • The IRP Panel on its own initiative may, within 30 days of the date of the declaration, correct any clerical, typographical, or computational errors or make an additional declaration as to claims presented but omitted from the declaration. 	<p>ICDR Rules Art. 33.</p>	<p>Because the IRP Panel has no jurisdiction to award monetary relief, I have not included those portions of Art. 33 of the ICDR Rules that touch on counterclaims and setoffs.</p>
<p>XI. Costs</p>		
<p>A. Relevant Costs</p>		
<ul style="list-style-type: none"> • Costs may include: <ul style="list-style-type: none"> ○ The fees and expenses of the IRP Panel ○ The costs of assistance required by the Panel, including its experts; ○ The fees and expenses of the Administrator; ○ Any costs incurred in connection with a notice for interim or emergency relief pursuant to Articles 6 or 24 of the ICDR Rules. • Under the Bylaws, Article IV, § 3.18, each party shall be responsible for its own legal and other expenses. “The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel 	<p>ICDR Rules Art. 34.</p>	<p>No provisions seem to be in place to support injured parties who lack financial means to litigate.</p>

Description / Requirements	Relevant Source	Comments
<p>may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest.</p>		
<p>B. Provisional Advance of Costs</p>		
<ul style="list-style-type: none"> • The Administrator may request that the Parties deposit appropriate amounts as an advance for the costs referred to in Article 34 of the ICDR Rules (listed above). • During the course of the IRP, the Administrator may request supplementary deposits from the Parties. • Failure of a Party asserting a claim or counterclaim to pay the required deposits shall be deemed a withdrawal of the claim or counterclaim. • After the declaration has been made, the Administrator shall render an accounting to the Parties of the deposits received and return any unexpended balance to the Parties. 	<p>ICDR Rules Art. 36.</p>	
<p>C. Allocation of Costs</p>		
<ul style="list-style-type: none"> • The IRP Panel shall fix costs in its declaration. • The Party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP Panel may allocate up to half of the costs to 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 IRP, the IRP Panel must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees. • Each Party to the IRP shall bear its own expenses. 	<p>Supplementary Procedures § 11. ICANN Bylaws Art. IV § 3 ¶¶ 16-18 (as amended 11 February 2016).</p>	
<p>D. Fees of Panel</p>		
<ul style="list-style-type: none"> • The fees and expenses of the IRP Panelists shall be reasonable in amount, taking into account the time spent by the Panelists, 	<p>ICDR Rules Art. 35.</p>	

Description / Requirements	Relevant Source	Comments
<p>the size and complexity of the case, and any other relevant circumstances.</p> <ul style="list-style-type: none"> • As soon as practicable after the commencement of the IRP, the Administrator shall designate an appropriate daily or hourly rate of compensation in consultation with the Parties and all IRP Panelists, taking into account the Panelists' stated rate of compensation and the size and complexity of the case. • Any dispute regarding the fees and expenses of the IRP Panelists shall be determined by the Administrator. 		