

Draft IRP Updated Supplementary Procedures: Report of the IRP IOT

The IRP Implementation Oversight Team (IOT) has been tasked with drafting detailed rules of procedure for the Independent Review Process (IRP) enhancements described in the CCWG-Accountability Supplemental Final Proposal Work Stream 1 Recommendations (the WS-1 Recommendations).

As a first step in this process, and to ensure that the Bylaws changes adopted by the ICANN Board on 27 May 2016 can be given full effect on the date of transition, the IOT has developed a set of Updated Supplementary Procedures for ICANN's IRP.

Background

The International Centre for Dispute Resolution (ICDR) currently administers ICANN's Independent Review Processes. ICANN IRPs are governed by the ICDR's [International Dispute Resolution Procedures](#) as modified by [Supplementary Procedures for ICANN's IRP](#). In the event of any inconsistency between the ICDR Procedures and the Supplementary Procedures, the ICANN-specific Supplementary Procedures take precedence.

Full implementation of the WS-1 Recommendations requires:

- Initiation of tender process for selecting an organization to provide administrative support for the IRP;
- Selection of a standing Panel; and
- Development of detailed rules of procedure.

To ensure that the WS-1 Recommendations are implemented while these steps are being carried out, it is necessary to revise the Supplementary Procedures to reflect the substantive and procedural changes to the IRP as reflected in the new Bylaws.

Major Issues

[Discussion of the outstanding/controversial issues; explanation of the IOT's conclusions and minority views if any]

Summary of Changes

1. Definitions.

The Updated Supplemental Rules contain several new defined terms. Most of these definitions reflect procedural enhancements, such as the definition of an "Emergency Panelist" to adjudicate requests for interim relief and a Procedures Officer to adjudicate requests for consolidation, invention, and joinder.

More substantively, a “Dispute” is defined to cover: (a) actions or inactions by ICANN (including the Board, Directors, Officers, or Staff members) that violate ICANN’s Articles of Incorporation or Bylaws; (b) claims that ICANN has not enforced its contractual rights under the IANA Naming Function Contract; or (c) complaints by direct customers of the IANA naming function that are not resolved by mediation.

2. Scope.

The Updated Supplementary Procedures (USP) specify that the new rules apply to cases filed on or after their effective date. The section also provides that in the event of further changes (Amended USP), which are to be expected in this transition period, a party to an IRP subject to the USP may seek to apply the Amended USP.

3. IRP Panel Composition.

The USP provides mechanism for: (a) selecting members of a decisional panel (each party selects one panelist, and those panelists select the third); (b) confirmation of the independence and impartiality of those panelists; and (c) substitution of panelists in the event of vacancy or removal.

4. Time for Filing.

This section describes commencement of an IRP and establishes that a Claimant shall file a written statement of a DISPUTE no more than 45 days after he becomes aware of the material affect of the action or inaction ; provided, however, that a statement of a Dispute may not be filed more than twelve (12) months from the date of such action or inaction.

5. Conduct of Independent Review.

This section confirms that the goal of the IRP is to resolve disputes expeditiously and cost effectively while ensuring fundamental fairness and due process. To this end, the USP calls for independent review to proceed by electronic means where possible, but permits face to face hearings in “extraordinary circumstances” where the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the purposes of the IRP; *and* (3) considerations of fairness and furtherance of the purposes of the IRP outweigh the time and financial expense of an in-person hearing and cross-examination.

6. Written Statements

This section is unchanged from existing Supplementary Procedures

7. Consolidation, Intervention, and Joinder.

This section was added to address the WS-1 Recommendation, as reflected in Article IV, Section 4.3(o) (ii) of the May 2016 ICANN Bylaws.

8. Discovery Methods.

This section was added to address the WS-1 Recommendation, as reflected in Article IV, Section 4.3(n) (iv) (D) of the May 2016 ICANN Bylaws. It provides for discovery of documents or other information likely to be relevant and material to resolution of the Dispute. The section provides that depositions, interrogatories, and requests for admission will not be permitted.

9. Summary Dismissal

This section provides for summary dismissal of a request for Independent Review where the Claimant does not meet the standing requirements (materially affected) or where the request lacks substance, is frivolous, or is vexatious.

10. Interim Measures of Protection

This section has been changed to implement WS-1 Recommendations reflected in Article IV, Section 4.3(p) of the May 2016 Bylaws regarding the circumstances in which interim relief is available.

11. Standard of Review

This section replaces the current IRP standard of review, which purports to limit the Panel to an examination of three questions:

- (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?*

In its place, the USP provides for an objective, de novo examination of the Dispute and permits the Panel to consider prior relevant IRP decisions. It prevents (as required by law) the Panel from replacing the Board's reasonable business judgment with respect to the Board's exercise of its fiduciary duties. Finally, it establishes the standard of review for claims related to the IANA Naming Functions Contract.

12. IRP Panel Decision

This replaces Section 9 of the existing procedures (Declarations) consistent with Article IV, Section 4.3(k)(v) of the May 2016 Bylaws.

13. Form and Effect of an IRP Panel Decision

This section has been revised to reflect the requirement for a written decision, specifically designating the prevailing party, and setting out a well-reasoned application of how the Dispute was resolved in light of prior IRP Decisions, the Articles and Bylaws and norms of applicable law.

14. Appeal

This is a new section reflecting the WS-1 Recommendation that an IRP Panel Decision may be appealed to the full Standing Panel in specified circumstances.

15. Costs

This section provides that except in the case of a community IRP, each party shall bear its own legal expenses. Except in the case of a community IRP, it permits the panel to pay administrative costs and/or fees of the prevailing party if it determines that the losing party's claims or defense were frivolous or abusive.