

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

Revised as of [Day, Month], 2016

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These updated procedures supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article IV, Section 4.3² of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after [insert effective date of the Bylaws].

¹ CONTEXTUAL NOTE: These Supplemental Procedures are intended to supplement 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.

² Formatting has been updated to conform with the Bylaws approved by the ICANN Board of Directors on 27 May 2016 (hereafter the May 2016 ICANN Bylaws).

1. Definitions

In these Updated Supplementary Procedures:

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute.³ 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.

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.⁴

DISPUTES⁵ 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) 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

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

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

⁵ ~~Sidley Drafting Note: Consideration should be given to whether the definitions of COVERED ACTIONS and DISPUTES are coterminous and/or circular.~~

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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.⁶

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief⁷ 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 Assigned Numbers Authority.

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

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

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.⁸

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.⁹

⁶ May 2016 ICANN Bylaws, Article IV, Section 4.3 (b)(iii).

⁷ May 2016 ICANN Bylaws, Article IV, Section 4.3 (p).

⁸ May 2016 ICANN Bylaws, Article IV, Section 4.3 (d).

⁹ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i)

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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.¹⁰

ICDR RULES refers to the ICDR’s rules in effect at the time the relevant request for independent review is submitted.¹¹

PROCEDURES 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 panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for interim relief.

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.¹²

2. Scope

The ICDR¹³ will apply these Updated Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article IV, Section 4.3 of the ICANN Bylaws after the date these Updated Supplementary Procedures go into effect. In the event there is any inconsistency between these Updated Supplementary Procedures and the ICDR 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 commenced.

¹⁰ Change recommended for consistency with May 2016 ICANN Bylaws, which refer to an “IRP PANEL decision” rather than a “declaration” (although the same Bylaws state that an IRP PANEL will “declare” certain findings). *See* May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v) & Section 4.3(o)(iii).

¹¹ Inclusion recommended 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.

¹² May 2016 ICANN Bylaws, Article IV, Section 4.3 (j)(i).

¹³ May 2016 ICANN Bylaws, Article IV, Section 4.3 (m).

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IRPs commenced prior to the adoption of these Updated Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

In the event that any of these Updated Supplementary Procedures are further subsequently amended to provide for modified procedural rules, such procedural amendments will not apply to any IRPs pending at the time of such amendments; take effect unless a party successfully demonstrates that application of the former Supplementary Procedures would be unjust and impracticable, and would not affect any party's substantive rights. Any party to a then-pending IRP may oppose the request for application of the amended Supplementary Procedures ~~challenge the application of an amendment to these Updated Supplementary Procedures if that party contends that the amendment would affect the party's substantive rights in the IRP~~. Such challenges requests are to be resolved by the IRP PANEL in the exercise of its discretion.¹⁴

Commented [AS1]: ICANN COMMENT: As previously noted by ICANN, this proposed language will undoubtedly result in substantial motion practice on the issues of procedure vs. substance, none of which has any bearing on the conduct being challenged. The expedient approach is to adopt a bright line rule that the rules in effect at the time an IRP is commenced will govern.

3. Composition of Independent Review Panel

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.¹⁵ 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. 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. 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 commitments ~~or the requisite diversity of skill~~

¹⁴ ~~Consider the impact of this language with respect to how amendments to substantive and procedural rules are applied to then-pending IRPs.~~

¹⁵ ~~May 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. The following language is provided for the IOT's consideration: "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."~~¹⁵ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i).

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~~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.¹⁶ 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 [3] of these Updated Supplementary Procedures.

4. Time for Filing

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than [45]¹⁷ days after a CLAIMANT becomes aware or reasonably should have been aware of the action or inaction giving rise to the DISPUTE. In order for an IRP to be deemed to have been timely filed, 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.¹⁸

Commented [AS2]: ICANN COMMENT – This does not seem to be needed here or appropriate because a matter is commenced when the ICDR tells us it has commenced. And, the concept of filing a written dispute is already captured.

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct live telephonic or video conferences.

The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, which are limited to circumstances where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-

¹⁶ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(ii).

¹⁷ Note that the Current ICANN Bylaws (as amended 11 February 2016), Art. IV § 3 ¶ 3, provide for a 30-day period in which to file a request for independent review.

¹⁸ Currently there are no rules on the timely payment of fees. Inclusion of this language is designed to provide firmer guidance and to ensure that a Claimant is committed to the process.

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~~person hearing has demonstrated, with clear and convincing evidence, that: An in-person hearing shall be allowed only in extraordinary circumstances where, upon motion by a Party, the IRP PANEL determines 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.¹⁹ In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

All hearings shall be limited to argument only; all evidence, including witness statements, must be submitted in writing [X] days in advance of any hearing.²⁰

~~The~~ With due regard to Bylaw Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding.²¹ Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Updated Supplementary Procedures.²²

¹⁹ This topic is being held for the next discussion. ICANN Legal to suggest examples of when in-person hearing might be necessary for inclusion in the Updated Supplementary Procedures. [ICANN NOTE: THE CIRCUMSTANCES IN WHICH AN IN-PERSON HEARING MAY BE "NECESSARY" ARE NOT SUBJECT TO ANY BRIGHT LINE RULE, AS THE CIRCUMSTANCES WILL DEPEND GREATLY ON THE SPECIFIC FACTS IN A GIVEN PROCEEDING. AS A RESULT, WE HAVE PROPOSED A STANDARD THAT WE BELIEVE ACCURATELY REPRESENTS THE "HIGH BAR" THAT MUST BE MET BEFORE AN IN-PERSON HEARING IS PERMITTED, AS DISCUSSED WITHIN THE IOT.]

²⁰ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change. The following language is provided for the IOT's consideration: "Cross-examination of live witnesses shall be allowed only in extraordinary circumstances where, upon motion by a Party, the IRP PANEL determines that: (1) it is necessary for a fair resolution of the claim; (2) it 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 such a measure." **ICANN NOTE: This additional language raises the same types of concerns as noted for the hearing. How many witnesses are expected to be present for cross examination? What is the scope of that cross examination? How long would parties have to conduct the cross for each witness? How would the parties make the required showing? This topic is being held for consideration on the next call.**

²¹ May 2016 ICANN Bylaws, Section 4.3(o)(vi).

²² This is an issue for future consideration within the IOT. This provision maintains the status quo until there is an agreed -recommendation to change.

6. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font.²³ All necessary and available evidence in support of the Claimant’s Claim(s) should be part of the initial written submission.²⁴ 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.²⁵ The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.²⁶

7. Consolidation, Intervention, and Joinder²⁷

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 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 CLAIMANT’S~~ written statement of a DISPUTE; shall include all claims that give rise to a particular DISPUTE, but such

²³ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²⁴ Language modified to reflect broadened scope of IRPs. See May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

²⁵ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²⁶ May 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(ii).

²⁷ There is no existing Supplemental Rule. The CCWG Final Proposal and May 2016 ICANN Bylaws recommend that these issue be considered by IOT. See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B); CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, 23 February 2016, Annex 07 – Recommendation #7, at § 20.

claims may be asserted as independent or alternative claims, as many claims as it has that give rise to a DISPUTE.²⁸

Commented [AS3]: ICANN NOTE – While we agree the prior sentence was not clear, as revised this does not seem to involve joinder or intervention. Perhaps simply delete this sentence as unnecessary.

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.

8. Discovery Methods²⁹

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of discovery requests.

On the motion of either Party and upon finding by the IRP PANEL that such discovery is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party's possession, custody, or control that are the Panel determines are reasonably likely to be relevant and material³⁰ to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law. In the extraordinary circumstances where such discovery method(s) are allowed,³¹ all Parties shall be granted the equivalent discovery rights.

A motion for document discovery shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

²⁸ [Sentence doesn't quite work. Is a word missing?]²⁸ See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).

²⁹ There is no existing Supplemental Rule. The [CCWG Final Proposal and] May 2016 ICANN Bylaws recommend that discovery methods be considered by IOT. See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

³⁰ ICANN NOTE: Materiality requirement aligns with the ICDR Rules.

³¹ Email from David McAuley recommended deleting the highlighted text and adding a statement, relative to document inspection, rights, that a party providing documents for review may seek protection from public disclosure via a protective order in appropriate cases. This edit was not discussed on this call. [ICANN NOTE: NO NEED TO REMOVE HIGHLIGHTED SECTION BUT WE AGREE WITH THE PROPOSAL THAT A PARTY MAY MOVE FOR A PROTECTIVE ORDER, OR SEEK THE OTHER PARTY'S AGREEMENT, TO KEEP CONFIDENTIAL ITS INFORMATION.]

Depositions, interrogatories, and requests for admission will not be permitted.³²

Commented [AS4]: ICANN COMMENT – WE RECOMMEND DELETION OF THIS FOOTNOTE AS UNNECESSARY.

³² ICANN NOTE: The “extraordinary circumstances” test is a new, untested standard that does not provide enough guidance to a Panel. There are a host of other considerations when designing discovery, particularly when we consider the short nature of the IRP. ICANN identifies some of the questions below. With the need for additional consideration, this item does not seem ready for inclusion in this version of the procedures. Some of the questions ICANN notes that would need to be addressed as we are considering what discovery in an IRP would look like:

- How many depositions will be permitted? The presumption under the Federal Rules of Civil Procedure is 10, but 10 is A LOT in the context of an IRP aimed at reducing costs and ensuring an accessible process.
- How much time will a party have at deposition? The presumption under the Federal Rules of Civil Procedure is 7 hours on the record.
- What evidentiary rules will govern a deposition? For example, will objections be permitted? If so, on what grounds? In what manner will a transcript be permitted to be used in subsequent litigation (should it occur) or in future IRPs?
- Will there be limitations as to who may be deposed? For example, if a Supporting Organization/Advisory Committee/Empowered Community is the Claimant, who is ICANN allowed to depose to understand the bases for a Claim? Who/which entity is that testimony binding against in connection with the pending IRP or future IRPs or litigation? Are depositions of corporate designees contemplated (i.e., akin to Rule 30(b)(6) depositions under the Federal Rules of Civil Procedure)? For ICANN staff, could claimants require the deposition of all staff they wished to question? What if the questions are not limited to the specific claim at issue?
- Are third party depositions permitted? If so, note that under the Federal Rules of Civil Procedure, the ability to subpoena a third party witness for deposition is limited based on geography. Are any similar limitations contemplated here? What about former ICANN employees/board members?
- Given that depositions, if permitted, would take place after the filing of the Claimant's claim, what supplemental briefing is contemplated based on any testimony obtained at deposition?

Interrogatories & Requests for Admission

- How may interrogatories/requests for admission will each party be permitted to serve? The presumption under the Federal Rules of Civil Procedure is 25, but 25 is A LOT in the context of an IRP aimed at reducing costs and ensuring an accessible process.
- How much time will each side have to respond? The presumption under the Federal Rules of Civil Procedure is 30 days, plus 3 for mail service.
- Do responses have to be verified?
- What objections would be permitted?
- Given that interrogatories and requests for admission, if permitted, would take place after the filing of the Claimant's claim, what supplemental briefing is contemplated based on any discovery responses?

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.^{33]}

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant³⁴ has not demonstrated that it 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 causally connected to the alleged violation.³⁵

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.³⁶

10. Interim Measures of Protection

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 or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article IV, Section 4.3(o)(iv).³⁷

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 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:

³³ Pursuant to the May 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 future consideration within the IOT. May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

³⁴ May 2016 ICANN Bylaws, Article IV, Section 4.3(b)(i). Note that the term “requestor” has been replaced with “Claimant” for consistency with IRP terminology.

³⁵ May 2016 ICANN Bylaws, Article IV, Section 4.3(o)(i).

³⁶ May 2016 ICANN Bylaws, Article IV, Section 4.3(o)(i).

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

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- (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.³⁸

Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible. The EMERGENCY PANELIST may modify or terminate the interim relief if the EMERGENCY PANELIST deems it appropriate to do so in light of such further arguments.

Commented [AS5]: ICANN COMMENT – This language seems to presume that ex parte means without notice as opposed to typical 24 hour notice period, such as is common in court proceedings in the U.S. We do not object to ex parte per se, but believe that a minimum of 24 hours notice, should be required.

11. Standard of Review

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.
- 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 ~~ICANN'S~~ obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.

Commented [AS6]: ICANN COMMENT – Added back in as this is what the Bylaws say.

³⁸ May 2016 ICANN Bylaws, Article IV, Section 4.3(p).

- 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.³⁹

12. IRP PANEL Decisions⁴⁰

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL⁴¹. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.⁴²

13. Form and Effect of an IRP PANEL DECISION

- a. 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.⁴³
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.⁴⁴
- 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.

³⁹ May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

⁴⁰ The May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v), refer to an “IRP PANEL decision” (although they also state that an IRP PANEL will “declare” certain findings in Article IV, Section 4.3(o)(iii)).

⁴¹ May 2016 ICANN Bylaws, Article IV, Section 4.3(k)(v).

⁴² This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

⁴³ May 2016 ICANN Bylaws, Article IV, Sections (s), (t). The May 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.” While the current language maintains the status quo, consideration should be given to whether maintaining the status quo is sufficient given the clear directive in, and the need to comply with, the May 2016 ICANN Bylaws.

⁴⁴ May 2016 ICANN Bylaws, Article IV, Section 4.3 (t).

14. Appeal of IRP PANEL Decisions⁴⁵

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).~~⁴⁶ 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.

15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION.⁴⁷ 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 associated with a Community IRP, as defined in Article IV, Section 4.3(d) of ICANN's Bylaws, including the costs 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 in the event it identifies the losing party's Claim or defense as frivolous or abusive.⁴⁸

⁴⁵ There is no existing Supplemental Rule. The proposed text is based upon the CCWG Final Proposal, Annex 7, ¶ 16, which provides for en banc appeal "based on a clear error of judgment or the application of an incorrect legal standard."

⁴⁶ To discuss with ICDR.

⁴⁷ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

⁴⁸ May 2016 Bylaws, Article IV, Section 4.3(r).