

# **EXHIBIT A**

**Updated Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process<sup>1</sup>**

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 4.3<sup>2</sup> of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after [insert effective date of the Bylaws].

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

DISPUTES are defined as:

(A) Claims that COVERED ACTIONS 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
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

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<sup>3</sup> May 2016 ICANN Bylaws Article IV, Section 4.3(b)(i).

<sup>4</sup> May 2016 ICANN Bylaws Article IV, Section 4.3 (b)(ii).

(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.<sup>5</sup>

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief<sup>6</sup> 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.<sup>7</sup>

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.<sup>8</sup>

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.<sup>9</sup>

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<sup>5</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3 (b)(iii).

<sup>6</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3 (p).

<sup>7</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3 (d).

<sup>8</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i)

<sup>9</sup> 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).

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

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.<sup>10</sup>

## **2. Scope**

The ICDR<sup>11</sup> 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.

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 subsequently amended, such amendments will not apply to any IRPs pending at the time such

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<sup>10</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3 (j)(i).

<sup>11</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3 (m).

amendments come into force unless a party successfully demonstrates that application of the former Supplementary Procedures would be unjust and impracticable to the requesting party and application of the amendments would not materially disadvantage any other party's substantive rights. Any party to a then-pending IRP may oppose the request for application of the amended Supplementary Procedures. Requests to apply updated amended supplementary procedures will be resolved by the IRP PANEL in the exercise of its discretion.

### **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.<sup>12</sup> 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, 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.<sup>13</sup> 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.

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<sup>12</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i).

<sup>13</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(ii).

#### **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 days after a CLAIMANT<sup>14</sup>

becomes aware of the material affect of the action or inaction giving rise to the DISPUTE; 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.

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.<sup>15</sup>

#### **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,<sup>16</sup> 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, where, upon motion by a Party, 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

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<sup>14</sup> This issue remains under discussion within the IOT

<sup>15</sup> 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.

<sup>16</sup> Some members of the IOT would prefer to remove the phrase, “where necessary.”

time and financial expense of an in-person hearing.<sup>17</sup> 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 unless the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) 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 witness testimony and cross examination.

All evidence, including witness statements, must be submitted in writing [X] days in advance of any hearing.

With due regard to Bylaw Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding.<sup>18</sup> Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Updated Supplementary Procedures.<sup>19</sup>

## **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.<sup>20</sup> All necessary and available evidence in support of the Claimant's Claim(s) should be part of the initial written submission.<sup>21</sup> 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.<sup>22</sup> The IRP

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<sup>17</sup> ICANN continues to have serious concerns about the impact of in-person hearings on cost and time to resolution, and prefers to specify that the requisite demonstration must be made by clear and convincing evidence.

<sup>18</sup> May 2016 ICANN Bylaws, Section 4.3(o)(vi).

<sup>19</sup> This is an issue for future consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change.

<sup>20</sup> 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.

<sup>21</sup> Language modified to reflect broadened scope of IRPs. *See* May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

<sup>22</sup> 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.



PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.<sup>23</sup>

## **7. Consolidation, Intervention, and Joinder<sup>24</sup>**

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. CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.<sup>25</sup>

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 Methods<sup>26</sup>**

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.

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<sup>23</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(ii).

<sup>24</sup> There is no existing Supplemental Rule. The CCWG Final Proposal and May 2016 ICANN Bylaws recommend that these issues 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.

<sup>25</sup> *See* May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).

<sup>26</sup> 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).

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 the Panel determines are reasonably likely to be relevant and material<sup>27</sup> 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. Where such discovery method(s) are allowed,<sup>28</sup> 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.

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

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.<sup>29</sup>

## **9. Summary Dismissal**

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant<sup>30</sup> 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.<sup>31</sup>

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<sup>27</sup> ICANN NOTE: Materiality requirement aligns with the ICDR Rules.

<sup>28</sup> ICANN prefers to retain "in the extraordinary circumstances."

<sup>29</sup> 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).

<sup>30</sup> 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.

<sup>31</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3(o)(i).

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.<sup>32</sup>

## **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).<sup>33</sup>

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:

- (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.<sup>34</sup>

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.

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<sup>32</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3(o)(i).

<sup>33</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3(p).

<sup>34</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3(p).

## **11. Standard of Review<sup>35</sup>**

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 obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article IV, Section 4.3(a)(iv) of ICANN’S Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.<sup>36</sup>

## **12. IRP PANEL Decisions<sup>37</sup>**

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL<sup>38</sup>. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL

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<sup>35</sup> The standard of review is dictated by ICANN’S Bylaws and cannot be modified or updated without a corresponding Bylaws amendment.

<sup>36</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

<sup>37</sup> 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)).

<sup>38</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3(k)(v).

member shall endeavor to provide a written statement of the reason for the absence of such signature.<sup>39</sup>

### **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.<sup>40</sup>
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.<sup>41</sup>
- c. Subject to Article IV, Section 4.3 of ICANN’s Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

### **14. Appeal of IRP PANEL Decisions<sup>42</sup>**

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

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<sup>39</sup> 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.

<sup>40</sup> 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.

<sup>41</sup> May 2016 ICANN Bylaws, Article IV, Section 4.3 (t).

<sup>42</sup> 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.”

## **15. Costs**

The IRP PANEL shall fix costs in its IRP PANEL DECISION.<sup>43</sup> 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.<sup>44</sup>

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<sup>43</sup> 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.

<sup>44</sup> May 2016 Bylaws, Article IV, Section 4.3(r).

# **EXHIBIT B**



## **Comments of the Intellectual Property Constituency Comments on the Draft Independent Review Process Updated Supplementary Procedures**

**February 1, 2017**

The Intellectual Property Constituency (IPC) of the GNSO appreciates this opportunity to comment on the draft Updated Supplementary Procedures for the ICANN Independent Review Process (IRP Supplementary Procedures) developed per the requirements contained in the final report of the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability, Work Stream 1) (see <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>).

We commend the IRP Implementation Oversight Team (IOT) for its efforts in drafting updated procedural rules for the IRP to reflect the enhancements provided for in the revised ICANN Bylaws of 1 October 2016. We also appreciate the helpful explanatory Report of the IRP IOT, and note that there were three issues in particular on which the IOT was unable to reach full consensus. We provide our comments on these three issues: application of the updated rules to existing but unresolved IRPs, time limits for filing, and in-person hearings and cross examination. We also provide our comments on the following additional points, which the IPC considers to be of importance: consolidation, intervention and joinder, appeals to the Standing Panel, and costs.

### **Summary**

For the reasons set out more fully in the sections below, the IPC makes the following recommendations for changes to the Draft IRP Updated Supplemental Procedures:

#### Existing but Unresolved IRPs:

1. Amendments governed by the Bylaws should apply to all IRPs arising from events which post-date the adoption of the revised Bylaws, save to the extent that an issue has already been dealt with under the existing rules.
2. Amendments on which the IOT has discretion should apply to any IRP arising from events post-dating the adoption of the IRP Supplementary Procedures, but not to IRPs which are already underway at adoption.

#### Timing of the Claim:

1. The adoption of a constructive knowledge element as required under the Bylaws.
2. The 45-day time limit be amended to allow an initial filing window of 90 days from actual or constructive knowledge.
3. Alternatively, whilst not our preferred option, the 45-day deadline could remain in place with the caveat that only a *de minimis* IRP complaint would need to be filed within that window in order to merely provide notice to ICANN and the broader



community, with the ability to file a substantive complaint in a longer period (such as an additional 45 days from the original filing).

4. The 12-month time limit be dispensed with for all Claims, since this is inconsistent with the constructive knowledge element. If not removed for all Claims, this should in any event be removed for Claims of “facial” invalidity, as advised by Sidley and addressed in their revised text.
5. The interplay between the IRP and various other community accountability mechanisms be identified and addressed, and specifically that timing ambiguity and inconsistency be rectified.
6. Payment of the IRP fees should be by reference to the receipt of the invoice from ICDR, rather than on filing the IRP.

#### Consolidation, Intervention and Joinder:

1. Any third party directly involved in the underlying action which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s).
2. Multiple Claimants should not be limited collectively to the 25-page limit for Written Statements but shall be entitled to their own individual page limits. Unnecessary and unreasonable costs generated as a result can be addressed by the Panel when making costs awards.
3. Requests should be determined by the IRP Panel and not by a Procedures Officer.

#### Appeals:

1. Appeals be made to an Appeals Panel, being a subset of the Standing Panel, between 5 and 7 members, who did not hear the original IRP and who have no other conflict of interest. The Standing Panel should number sufficient members to allow for this.
2. Costs of the appeal should be in the discretion of the Appeals Panel, but there should be a presumption that a losing appellant will bear the other party’s reasonable costs of the appeal.

#### Costs:

1. Include language within § 15 to the effect that “Nothing in these IRP Supplementary Procedures is intended to supersede ICDR Rules, Article 20(7) and Article 21(8), including the right to request an interim order allocating costs arising from a party's failure to avoid unnecessary delay and expense in the arbitration”.

### **Application of the updated rules to existing but unresolved IRPs**

The Report of the IRP IOT explains that the IOT was unable to reach full consensus on the applicability of the updated rules to existing but unresolved IRPs. This issue was therefore referred to the full CCWG-Accountability, which decided not to provide for such retroactivity due to concerns as to unintended consequences, including increased complexity and potential Bylaws violations resulting from doing so.

In considering this issue in particular, and the draft IRP Supplementary Procedures in general, it is important to bear in mind the intended purpose behind developing an amended IRP, namely to enhance ICANN's accountability to those impacted by its actions and inactions and specifically "to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws" (see Para 174 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations) and that ICANN should be "held to a substantive standard of behaviour rather than just an evaluation of whether or not its action was taken in good faith"( Para 175 *ibid.*). Consequently, the CCWG-Accountability proposed several enhancements to the IRP "to ensure that the process is:

- Transparent, efficient and accessible (both financially and from a standing perspective).
- Designed to produce consistent and coherent results that will serve as a guide for future actions." (Para 176 *ibid.*).

It is the IPC's view, therefore, that in considering the question of whether the amended rules should have retroactive effect we ought to bear these aims in mind and deliver this increased accountability where possible, without re-opening matters which have already been dealt with. In doing so, the IPC considers that it is necessary to take account of the nature of the amendment, and specifically to consider whether the amendment is one which is governed by the Bylaws, or whether the Bylaws merely grant discretion to the IOT to determine the relevant standards and rules.

#### Amendments governed by the Bylaws

In the former case – for example the amendment to the standard of review – the relevant provisions were adopted in October 2016 with the amended Bylaws. The implementing rules contained within the IRP Supplementary Procedures should therefore apply to any IRP arising from events which post-date the adoption of the revised Bylaws since that is the point at which all parties became bound. We understand that this is the intention, since the IRP Supplementary Procedures state that "These procedures apply to all independent review process proceedings filed after [insert effective date] of the Bylaws." To the extent, however, that matters have already been dealt with under the old rules in an ongoing IRP we would suggest that they should not be reopened, unless it would be unjust and unreasonable to one of the parties not to do so.

#### Amendments for which the IOT had discretion

For matters covered by the IRP Supplementary Procedures which were left in the revised Bylaws to the discretion of the IOT, including matters relating to the timing to make a claim, conduct of hearings, and the availability of appeals, these new rules should apply to any IRP arising from events post-dating the adoption of the IRP Supplementary Procedures, but not to IRPs which are already underway at adoption. To provide otherwise could lead to unfairness, since the parties to an IRP could be expected to have taken the existing rules into account when reaching their decision whether or not to proceed, and would not have had the opportunity to consider rules which were not then in existence.

## Time limits for filing

### Time to bring Claims is too short and has no constructive knowledge element

Although the IPC appreciates the need for finality and closure with respect to the community's ability to bring IRP proceedings, the IPC is concerned by the brevity of the proposed deadlines for filing IRPs – within 45 days of when the complainant becomes aware of the harm and no more than 12 months from the ICANN action or inaction causing the harm. See Draft IRP Updated Supplementary Procedures at 6.

First, this standard limits the filing period based on a potential claimant's actual knowledge of the harm, and does not include a constructive knowledge element, as envisaged in the ICANN Bylaws. See ICANN, Bylaws Section 4.3(n)(iv)(A) ("The time within which a Claim must be filed after a Claimant becomes aware **or reasonably should have become aware** of the action or inaction giving rise to the Dispute.") (emphasis added). Although this formulation is likely an intentional omission by the IOT, imposing too short a time frame based on actual knowledge of a harm caused by ICANN action or inaction could be unduly prohibitive for potential claimants, and could invite "gaming" to extend the limitations period.

Indeed, while certain harms might be readily apparent within 45 days, others, and particularly those that might impact only discrete portions of the community, might reasonably take longer, even potentially longer than the 12-month final limitation on bringing claims following the ICANN action or inaction.

In this regard, we note and agree with the advice of Sidley Austin LLP in their Memorandum dated 4 January 2017. Sidley comments that the 12-month cut off for commencing a claim may have been selected by the IOT as designating the maximum time limit within which the claimant "reasonably should have become aware," and that if so "such a determination would be subject to criticism and it could result in claims being foreclosed before an injury, and hence any knowledge of any injury, had even arisen". Sidley advises that "Applying a strict 12-month limit to any IRP claim that commences at the time of the ICANN action or inaction and without regard to when the invalidity and material impact became known to the Claimant, is inconsistent with the Bylaws (and is inconsistent with the terms of Annex 7 of the CCWG Report)".

Further, even where a harm may become apparent with these windows, it may be very difficult for Claimants to prepare and file an IRP complaint within 45 days of actual notice of the actionable event, particularly in the cases where multiple stakeholders are involved. If a situation arose where the IPC was considering filing an IRP, for example, this is not a decision which could be made by the Constituency's leadership without obtaining the approval of its membership which could, potentially, even require a vote. Since the IPC's membership itself includes a number of organisational members this process of consultation and approval must, inevitably, take a little time. We imagine that other Constituencies and Stakeholder Groups may be in a similar position, as would the full GNSO. A 45-day time limit risks denying ICANN's constituent member groups access to the IRP.

Without prejudice to the further comments made below, therefore, the IPC recommends that:

- 1) The adoption of a constructive knowledge element as required under the Bylaws;

- 2) The 45-day time limit be amended to allow an initial filing window of 90 days from actual or constructive knowledge;
- 3) Alternatively, whilst not our preferred option, the 45-day deadline could remain in place with the caveat that only a *de minimis* IRP complaint would need to be filed within that window in order to merely provide notice to ICANN and the broader community, with the ability to file a substantive complaint in a longer period (such as an additional 45 days from the original filing);
- 4) The 12-month time limit be dispensed with for all Claims, since this is inconsistent with the constructive knowledge element. If not removed for all Claims, this should in any event be removed for Claims of “facial” invalidity, as advised by Sidley and addressed in their revised text.

#### Interplay with other accountability mechanisms is unclear

##### 1. Cooperative Engagement Process

Prior to the filing of a Claim, parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process (CEP). It is not clear how long a CEP would take, but would likely run up against the 45-day filing period (even if revised). Based on information contained in the schedule of pending CEPs and IRPs published by ICANN, some CEPs take months or even years to complete. Thus, both the 45 day and any 12-month time limit are potentially impossible to meet if there is a CEP. This is an unsatisfactory ambiguity which ought to be directly addressed, either by the CEP stopping the clock, or by the IRP being formally commenced and then stayed pending the CEP. The latter option is not entirely satisfactory, however, since the work in preparing the IRP Claim would need to be done, and the fees paid to ICDR which may prove to have been wasted if the CEP resolves matters. Therefore, the IPC recommends that any CEP that precedes the filing of an IRP Claim toll any filing limitations period associated with the matter.

##### 2. Request for Reconsideration

Similarly, in many cases community members would first file a Request for Reconsideration (RFR) before resorting to the IRP. For reasons similar to those referred to above in relation to the CEP, the filing of a RFR on the issue should also toll the deadline, and the IPC recommends that the IRP Supplementary Procedures should specifically identify and address this interplay between the RFR and the IRP. As with the CEP, the RFR could resolve the matter before the need to file an IRP, but in the event it does not, the deadline for filing the IRP should remain intact.

##### 3. Community Engagement and Escalation

Further, the CCWG-ACCT Report for Work Stream 1 states that “All of these community powers can only be exercised after extensive community discussions and debates through processes of engagement and escalation. The process of escalation provides many opportunities for the resolution of disagreements between parties before formal action is required.” Such “community powers” must presumably include the Community IRP. This escalation and engagement process could not possibly be completed and still allow the 45-day limit to be met (or possibly even a 12-month limitation), thereby potentially denying access to the Community IRP altogether.

The IPC recommends that the interplay between the Community Engagement and Escalation process and any subsequent Community IRP be identified and addressed, and that the deadline for commencement of the Community IRP be tolled.

The IPC believes that it is necessary to amend the filing limitations periods in these ways in order to best serve the underlying goal of providing adequate due process and properly effectuate the enhanced accountability mechanisms. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (discussing discretion of States in erecting reasonable procedural requirements for triggering or foreclosing the right to an adjudication).

#### Time for Payment of Fees

The requirement to pay the filing fee within 3 business days of filing the request may be impractical. Many entities and organisations require an invoice in order to make such a payment and experience of some IPC members is that ICDR does not issue invoices within such a short timeframe. A more practical solution would be to require payment within a set time of receipt of the invoice from ICDR, and we would suggest that 5 business days is the minimum appropriate time.

#### **In-person hearings and cross-examination**

The IPC supports the proposed language which seeks to limit the holding of in-person hearings and calling of live witnesses to only those exceptional circumstances where the requesting party can demonstrate that this is necessary for the fair resolution of the Claim and the furtherance of the purposes of the IRP, and where appropriate balancing consideration has been given to the additional time and costs which would be incurred by all parties. See IRP Supplementary Procedures § 5.

#### **Consolidation, intervention and joinder**

Under the existing IRP Supplementary Procedures, the only way for a third party to “intervene” in an IRP proceeding would be for that party to submit a statement at the request of the IRP Panel. See IRP Supplementary Procedures § 5 (“The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, **or from other parties.**”) (emphasis added). The draft Updated Supplementary Rules do not fully resolve IPC concerns about the ability of interested third parties being able to intervene or join an IRP proceeding. First, the draft merely permits **an existing party** to request the appointment of a Procedures Officer to determine whether other parties should be permitted to intervene or join the proceeding. The draft then states that any person or entity qualified to be a Claimant may intervene in an IRP with the permission of the Procedures Officer, but it is not clear what would happen if a party does not request the appointment of a Procedures Officer in the first place. In our view it is not appropriate for such important decisions to be made a Procedures Officer or by the Dispute Resolution Provider; decisions on whether to allow consolidation, joinder or intervention should always be made by the IRP Panel.

In addition, although the IPC understands that IRPs are directed against ICANN, there may be third parties who wish to intervene in support of ICANN's position or to safeguard their own position. This possibility does not appear to be accounted for in the draft which states

only that “Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER”. In particular, where the IRP is being brought effectively to challenge the decision of an ICANN-appointed panel, such as in the case of a Legal Rights Objection (LRO), the IRP would be brought by the losing party. The LRO itself, however, would have been an action between two or more parties and the winning party or parties have a direct interest in the outcome of the IRP and it is inequitable to deny them the opportunity to request permission to intervene.

To rectify these concerns, the IPC suggests that any third party directly involved in the underlying action which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s). Otherwise, the IRP may not afford appropriate due process for all interested parties (not just those who may be aligned with the claimant or claimants on the issue(s) under review).

We see no reason for restricting all Claimants collectively to the 25-page limit for Written Statements. Even where a third party is participating as an additional Claimant it is not inconceivable that the multiple Claimants will have slightly different arguments and positions they wish to advance. It would appear to be a denial of access to justice to impose this limit collectively. We consider that to the extent that there is some increased cost as a result of the parties submitting their own Written Statements, this can be addressed in any costs award made by the Panel as necessary and appropriate.

Again, these rights of intervention and joinder are necessary to serve the due process goals of the enhanced IRP. *Cf., e.g., Martin v. Wilks*, 490 U.S. 755 (1989) (discussing a four-part test for determining whether a lawsuit can proceed in satisfaction of due process in the absence of a necessary party, including (1) whether “a judgment rendered in the person’s absence might be prejudicial to him or those already parties”; (2) whether the court can reduce or eliminate prejudice by “the shaping of relief or other measures”; (3) whether the judgment rendered without the outsider will be “adequate”; and (4) the costs on the plaintiff of a dismissal for non-joinder.).

## **Appeals to the Standing Panel (Section 14)**

### Composition of the Appeals Panel

The Standing Panel is defined as an “omnibus standing panel of at least seven members”. It is thus envisaged that the Standing Panel may consist of more than seven members, even, theoretically, an unlimited number. It may not be practical, therefore, to have the entire Standing Panel hear an appeal *en banc* for the following reasons:

- 1) the number of members may make such a panel unnecessarily unwieldy;
- 2) a Standing Panel which consisted of an even number of members could result in no majority decision being reached (i.e., a tied decision);
- 3) some members of the Standing Panel may be subject to a conflict of interest;
- 4) three members of the Standing Panel will have been the original deciding panellists. This might itself be considered a conflict of interest since it must be extremely difficult for one of the deciding panellists to impartially determine that they made a “clear error of judgment” or applied “an incorrect legal standard”. Certainly there would be

a risk of the appearance or perception of bias which would undermine the appeal process. We also contend that it is contrary to principles of natural justice that those who reached the original decision should participate in the determination of the appeal.

If there is to be an appeal process, the IPC recommends that the appeal be to an Appeals Panel consisting of:

- 1) an odd number of Standing Panel members, being a minimum of 5 and a maximum of 7 members to be selected at random;
- 2) such 5 members to exclude any Standing Panel member who participated in the original decision and any panellists who have a conflict of interest;
- 3) to the extent that the number of available Standing Panellists is fewer than 5, additional Standing Panellists shall be appointed.

Such a solution would not be inconsistent with the Bylaws, which state that “Subject to any limitations established through the Rules of Procedure, an IRP Panel decision may be appealed to the full Standing Panel sitting en banc...” (ICANN Bylaws Section 4.3 (w)).

#### Costs of Appeal

Although matters of costs should be left to the ultimate discretion of the Appeals Panel, it seems reasonable, in the interests of justice, that there should be a presumption that an unsuccessful appellant will bear their opponents reasonable costs of the appeal. Such a provision ought to discourage frivolous appeals with little or no prospects of success.

#### **Costs (Section 15)**

It is common in such proceedings to seek to ensure the good conduct of parties by means of the threat of costs and other sanctions. The ICDR Rules do so at Article 20(7) and Article 21(8). Since the IRP Supplementary Procedures state that in case of conflict between the two sets of rules, the IRP Supplementary Procedures will apply (See IRP Supplementary Procedures § 2), and since the IRP Supplementary Procedures § 15 includes language regarding the treatment of the costs of the IRP, as provided for under ICANN Bylaws Section 4.3(r), the IPC believes it would be beneficial to clarify that no conflict exists in this regard. The addition of language within § 15 to the effect that “Nothing in these IRP Supplementary Procedures is intended to supersede ICDR Rules, Article 20(7) and Article 21(8), including the right to request an interim order allocating costs arising from a party's failure to avoid unnecessary delay and expense in the arbitration” would be beneficial in removing any possible doubt.

Respectfully Submitted,

Intellectual Property Constituency

# **EXHIBIT C**



**Comments of the Noncommercial Stakeholders Group (NCSG)  
on the  
Updated Supplementary Procedures for Independent Review Process (IRP)**

January 24, 2017

The NCSG appreciates the opportunity to comment on the [proposed supplementary rules](#) that have been released by the Implementation Oversight Team.

The IRP is a very important part of ICANN's accountability arrangements. As NCSG, one of our main concerns is that IRP challenges can be used to prevent ICANN from taking actions that exceed its mission. In particular, we want strong protections against ICANN moving into content regulation and other more extensive forms of regulating Internet users and uses that are not required to coordinate the domain name system.

With that in mind, we have several major objections to the proposed rules: statute of limitations, notice, rights of intervention and remedies.

1. Statute of Limitations. The current Supplementary Procedures for IRP provides a very limited time for a user to challenge an ICANN policy as violating the mission. The challenge must be made within 45 days of the time the person becomes aware of the harm caused but — far more important — after one year from its passage, a decision or policy becomes *completely exempt* from any IRP challenge. The proposed supplementary rules time-limit IRP challenges to a maximum of one year after ICANN's action, thereby immunizing it from any subsequent challenges. This is an extraordinary loophole.

It could easily take 2-3 years after a policy is adopted for it to be actually implemented by ICANN and cause harm. Under these proposed supplementary rules, no one could challenge the rule if the harms were caused a year after it was passed.

Making matters worse, these problems were pointed out on the email list of the working group during the ICANN CCWG process. Indeed, there was general agreement that the time limit was a problem and should be changed. But through a series of unfortunate coincidences and bad decisions, those objections were ignored and the Implementation Oversight Team (IOT) pressed ahead with the originally proposed text.

Time limits make sense when one is dealing with commercial contractual disputes, such as disputes between ICANN and a new top level domain applicant or a registrar. Those disputes pertain to specific decisions of ICANN, not to its overall mission and not to consensus policies that might violate the mission or core commitments. Clearly, we don't want commercial actors to be able to hold ICANN in a state of perpetual uncertainty regarding decisions or actions in the

narrow domain that it regulates. But the time limits make no sense at all when applied to disputes over consensus policies that are alleged to transgress mission limitations. The mission limitations are meant to protect fundamental individual rights, and to permanently constrain ICANN's mission. They are not matters of expediency and are not time-dependent. If a policy allows ICANN to expand its mission beyond its intended remit, the actions it takes under that policy should be subject to challenge at any time.

In attempt to downplay the significance of this problem, some have argued that after a policy becomes immune to IRP challenge, if ICANN takes an action *implementing* an ICANN policy that is itself a violation of the mission limitations or bylaws, that is a separate event. Hence the clock would start again, and we would have another year to challenge the implementing action.

There are many flaws in this interpretation. One obvious one is that such an IRP challenge would not be against the *policy itself*, it would only challenge the implementing action. This means that a successful challenge would not prevent any future implementations of the policy that might transgress mission limitations. Furthermore, the immunity of the policy itself from challenge would stack the deck against challengers.

But there is an ever more serious problem with relying on implementation actions to challenge policies. Only ICANN actions can be challenged under the IRP. So if the implementing action is by a Registry, it cannot be challenged under the IRP. This takes us back to the pre-transition position where only Registries are protected by the IRP, and any other "materially affected parties" are not. Registries, who are acted on by ICANN, would always be able to challenge an implementing action by ICANN. But Registrants, who are acted on indirectly through Registries and Registrars, would quickly run out of time to challenge the policy behind the Registry action and cannot challenge the Registry's implementation. As representatives of registrants (non-contracted parties), NCSG finds this unacceptable. Thus, we respectfully but firmly submit that the 12-month hard time limit on IRP challenges to Board policy decisions must be removed from Section 4.

Our second part of this objection is the brevity of the arbitrary 45-day time limit within which a claimant must act after having become aware of a material harm. Here our objection is not philosophical in nature -- we readily acknowledge that some time limit on action is appropriate, as claimants should not be permitted to "sleep on their rights" once aware of their injury. However, from a practical standpoint 45 days is simply too short a time period for claimants. This is particularly true if the potential claimant is a collective body (like the NCSG) where significant public actions need to be coordinated with numerous members and other stakeholders. Add to this the necessity of finding and retaining counsel (not to mention the mechanics of funding the endeavor) and our view is that 45 days is far too short a time frame within which to reasonably expect action. To be candid we would think that 180 days is an appropriate time frame -- after all most judicial systems world-wide have limitations periods that

are measured in years, rather than days or months. In the spirit of constructive compromise, however, we would be satisfied if the limitations period were increased to 90 days.

The NCSG notes that the legal team from Sidley and Austin that is working with the IOT essentially agrees with the criticism of the IRP supplementary rules we have advanced here. The implementation team had an “agreement in principle” that “An action/inaction by ICANN that is facially invalid (i.e. it could not be implemented in a way that did not violate the Articles or Bylaws) could be challenged anytime.” The Sidley-Austin analysis concludes,

As currently drafted, Section 4 of the Draft Supplemental Rules does not capture the Agreement in Principle described above. ...[A]s currently drafted, a facially invalid action or inaction could not be challenged by a claimant if the material impact to the claimant (harm or injury) arose at a time such that the claim could not be filed within 12 months from the ICANN decision that created the facial invalidity.

The Sidley-Austin report goes on to state that:

It may be that the IRP Subgroup has determined that 12 months is the period in which a claimant reasonably should have known of the action or inaction giving rise to the Dispute in all circumstances (or in all circumstances other than where the challenge is on facial invalidity grounds); however, we think such a determination would be subject to criticism and it could result in claims being foreclosed before an injury, and hence knowledge of any injury, had ever arisen.

We believe that the legal advice provided confirms our concerns; moreover, the legal experts concluded that “Exempting facial challenges from the 12-month rule would not create limitless jurisdiction.”

## 2. Notice

In the real-world, an Appellant seeking to overturn a decision he/she/it lost or a regulation he/she/it does not like must provide notice to the Appellee. It’s a fundamental part of due process to allow everyone directly-involved in an underlying proceeding to come together to participate in its appeal.

But those who lose arbitration decisions, e.g., Community Objections at the International Chamber of Commerce (created as part of the New gTLD procedures) have no such obligation. The losers of such Objections can (and do) file CEP and IRP actions without ever telling the winners that these actions have been filed. Further, it may be weeks before ICANN published the notice telling the world that such challenges have been filed.

It made be further weeks before the filings and pleadings of the IRP proceeding are published by ICANN on its webpage, and such a website is quite obscure and followed by only a handful of parties to begin with. It is likely to be well into the process before Communities (and other directly-impacted parties) have any idea that filings against their claims, winning decisions and interests have even been filed.

The same injustice will arise when a Consensus Policy is challenged (which it may be under the ICANN Bylaws). There is currently no requirement that the Claimant filing an IRP must give notice to the Supporting Organization which created and passed the Consensus Policy. Such lack of notice is a violation of due process - the Supporting Organization and its Stakeholder Groups the right to know that a challenge has been raised -- they have the right to timely and "actual notice."

As discussed above, in a commercial arbitration there are traditionally only two parties, so notice is not an issue. But with the expansion of access to the IRP proceeding - for a range of new types of disputes- actual notice now not only makes sense, it is critical to protection of the fundamental rights of all the parties.

It makes no sense when there are directly-involved additional parties -- such as noncommercial Communities who have fought the high barriers of a Community Objection and prevailed - to be left out of a challenge to their decision when the losing party (the applicant in this case) files an IRP proceeding with ICANN.

It further makes no sense when the IRP is acting as a "Constitutional Court" to review a Consensus Policy that the whole of the Supporting Organization that negotiated that Consensus Policy is left out. ICANN Counsel is outstanding, but it is the Supporting Organization and the ICANN Community that negotiated, wrote and passed the Consensus Policy and they, too, must know when a challenge to that policy is filed.

Actual notice - requiring the Claimant to file copies of its Request for an IRP together with all pleadings, exhibits, appendices, etc, is a standard part of due process in litigation and dispute forums around the world - and as easy as adding appropriate "cc's" to the email filing the claim with ICANN.

### 3. Right of Intervention

Currently, the IRP *Updated Supplementary Procedures* only have the disgruntled party and ICANN as the parties to the proceedings. All others have to apply to accepted -- and the first argument the Claimant's Counsel makes is "No!" That's not the procedure in any other litigation forum which practices due process. Everywhere else, all parties to the underlying proceeding have the ***right to intervene -- the right to be heard in the challenge to their proceeding.***

Here too, such a Right of Intervention (a material change to Section 7 of these Procedures) must be added.

It only makes sense as ICANN was not a party to the underlying proceeding and does not know the arguments made. Working with ICANN, a winning party or Community must have the right to represent its own interests.

Should the winning party not have the time and resources to fully engage in the IRP, they should at least be able to file proceedings analogous to *Amicus Briefs* to inform the IRP Panel of information that is materially-relevant to the proceeding and of which the winning party may be in sole possession.

Similarly, for a challenge to a Consensus Policy, the Supporting Organization and its Stakeholder Group must be in a position to defend their work. The negotiation of the PDP in a Working Group takes months and even years. The research done, the negotiations made, the public comment received, and the compromises sought are all part of the record which the Stakeholder Groups will know. No single party, perhaps a company upset with the compromise, should be allowed to unilaterally challenge or seek to renegotiate a Consensus Policy without all other equally-engaged parties being allowed on an equal basis into the “IRP Room.”

### 3. Emergency Panels and Interim Measures of Protection Must be Openly Heard with All Relevant Parties Present

It is very easy to believe something is an emergency when you only hear one side. IRP Panels and Emergency IRP Panelists are being asked to make major decisions without hearing from all sides who are directly-impacted by a decision.

So an IRP Panel may hear that a Winning Party is seeking to stop the implementation of a Consensus Policy (pending an IRP Proceeding that may take months or longer). What would be the impact of such a delayed implementation -- or implementation actually stopped after having commenced?! ***Clearly, all of those directly impacted by delay of a Consensus Policy (including registries, registrars, and registrants) must be allowed to comment on the impact of that delay. If the Emergency Request impacts contracts already passed, EU Privacy Shields already in place, etc., it is the party directly impacted by the delay or cessation of the policy that will be in the best position to comment on the directly harm of its even temporary cessation.***

The IRP Panel or Emergency Panelist has the right and obligation to hear about the harms from all sides or it cannot properly evaluate “[t]he balance of hardships” as required by the *IRP Supplementary Procedures* in Section 10.

#### **4. Returning a Consensus Policy to the ICANN Board and the Supporting Organization Which Wrote It to be Rewritten**

After many months or even years of work, Supporting Organizations produce Consensus Policies. If on review through this new IRP “Constitutional Court” proceeding, the IRP Panel finds that some portion of the Consensus Policy does not comply with ICANN Bylaws or process and needs to be rewritten, who should do that?

In the real world, appellate courts remand such laws and regulations back to the experts who created them -- back to the legislators and regulators. Then, those groups review those portions of the rules that need to be reviewed and rewritten and do so pursuant to their rules -- and with full notice to their Communities.

We’ve stepped into the IRP as a Constitutional Court without adequate consideration of the limitation of their powers. Like appellate courts in countries, the IRP should only be judging what and what is not consistent with ICANN Bylaws. The hard work of rewriting those sections of the Consensus Policy that were invalidated below to the communities that created the rules in the first place.

Accordingly, the IRP Panels should send invalidated portions of Consensus Policies back to the ICANN Board which should send it back to the Supporting Organization that created them. Such must be the rules written into the *IRP Supplementary Procedures* “Standard of Review” (Section 11).

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In summary, NCSG expects the supplementary rules to be modified to meet the following criteria:

- The IRP has to protect registrants, not just contracted parties.
- There should be no fixed time limit on the rights of Internet users to challenge a policy that is alleged to take ICANN beyond its mission or otherwise violate the fundamental bylaws.
- IRP challenges need to be able to challenge policies, not just implementations, otherwise registrants are unprotected against registries and registrars.
- While it is reasonable to set a limit on the period in which a registrant is harmed by a policy and files an IRP challenge to the policy, 45 days is too short. Three months is more appropriate given the need for ordinary registrants to consult with lawyers and assess the damage caused by a policy.

We further look forward to the supplementary rules being evaluated and wisely updated to resolve critical due process issues pointed out above and ensure to directly-impacted, materially-affected parties:

- Actual notice,
- Rights of intervention,
- Rights to be heard in emergency proceedings evaluating “interim measures of protection” and “balance of hardships,” and especially
- Remedies of the IRP Panel when a portion of a Consensus Policy is set aside. Clearly the Community must be called upon to rewrite this Consensus Policy together and through its well-established procedures.

We greatly appreciate your upcoming work in these areas.

# **EXHIBIT D**



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RECORDED VOICE: This meeting is now being recorded.

DAVID MCAULEY: Thank you. Welcome all, this is David McAuley speaking, and we have a small group so far, but in the past, a number of people have come in several minutes late, which is fine, so I would like to press on. We're close to the five person rule, but I think we're in shape that we can roll on right now. What I'd like to first do is ask if there is anybody on the audio bridge who is not in the Adobe room to please identify themselves.

Hearing none, then I ask if there is anybody on the call so far that has any changes to announce to their statements of interest. [AUDIO BREAK] Hearing none, I will assume that is the case. I just heard someone come in on the call, if that's someone that is on the audio bridge only, could they please identify themselves?

REG LEVY: This is Reg Levy.

DAVID MCAULEY: Hi Reg, David McAuley here, thank you. That leads in to my introduction of Reg. Reg is acting in the capacity of a chairing skills coach to me, and she participated in the last call, and she will participate in this call in background, not as a participant in the group. And so I appreciate everybody's understanding in that respect. So,

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*Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.*

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we've covered the administrative matters, and I'd like to get into the agenda.

Again, we're a small group, but we have enough to press on and I would like to make a record and press on and get to some of these issues. So I hope that you have seen the agenda that I sent out earlier in the week. Once we get past the administrative stuff, we move next to the work timeline and the impact on the staff report, and hope you've had a chance to look at that. I'd like to discuss it now.

The current timeline looks for us to have a staff report done on the public comments to the draft rule by March 29th. Obviously, that is no longer going to work. And so we need to set a new date and we need to do it in this meeting, in order to have sufficient time that the changed date can be announced prior to the 29th, and that takes a little bit time to do that. In my memo, I suggested that we move it to May 29th. I'm sorry did someone want to say something? I might've hear something.

BERNARD TURCOTTE:

No, it was just me, David, I was just saying correct.

DAVID MCAULEY:

Okay, thanks, Bernie. What has to happen between here and the new day, whatever date we choose – let me just stop for a second and ask if the person that just joined us on audio only, would they please identify themselves?

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LIZ LE: Hi, this is Liz Le from ICANN.

DAVID MCAULEY: Thank you. We're just talking about a new date for the staff report. The things that have to happen between here and that staff report are we need to complete our work, that is, come to consensus on how we're going to handle public comments, and as you okay, there are a number of comments, some of them complex and very good, thoughtful comments that we need to work through. In addition, we need to pass our thoughts past Sibley, I believe, at least in my opinion we do, to make sure that we get a reality check, so that what we're doing, what we're suggesting passes legal muster.

We then need to then hand it over to Staff, so that they can write it up with some direction from us as to what we intend, and have all that done by May 29th. If we choose that date, which I'm suggesting, there's still a lot of work to do between here and there, and there is no rule against us beating that date.

So I'm now going to open the floor to anybody that would like to have any comments on setting a new date, and that being the date of May 29th. If anybody that would like to say anything, please feel free. I'm not seeing any hands, so I'm wondering if I could see green ticks or expressions of "aye," if that means that people are agreeing to the new date of May 29th.

Okay, is there anybody that wants to put a red tick up and object to that date? You can clear the green ticks now. I see no objections, and so I'm going to assume, the, that we have just the date of May 29th. And so

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I'll mention to Bernie and Brenda to please act on that as the new date and do what you need in that respect. I see Kavouss' notes in the chat asking me to slow down, and I'll do my best to do that. Thank you Kavouss.

Next on the agenda is a brief report by me to this group about some comments I made during ICANN58 in Copenhagen. And it's something that we've expressed in our letters to SOs and ACs, as well. And that is we have notified SOs and ACs that under the bylaws, specifically 4.3J, they have a role coming up now in the near future, to consider people who apply to become members of the standing panel and the SOs and ACs have the lone role of nominating people to the standing panel, at least seven, and the bylaws are perfunctory in this respect. It really just sort of indicates that they will do it.

What it says in 4.3J is, "The supporting organizations and advisory committee shall nominate a slate of proposed panel members from the well qualified candidates identified for the process." And so they're going to need help, and I have said that the IOT would be willing to act in a helpful capacity, and it's something I think we've discussed before. But I just wanted to make sure it's on our radar screen.

We can discuss it soon, I might instigate a discussion on the list, thoughts on how we might do this. We might create a small team to do it, that would be helpful, we might do it as a group. If anybody has any thoughts on this topic, I would open the floor to them now to sort of help us move this particular bit forward.

Okay, I may then instigate a discussion on the list, but if this group, the SOs and ACs are going to need help organizing themselves, our role would be administrative, not inserting ourselves in their role of nominating, but helping them with our understanding of the bylaws, et cetera.

Next we move on to public comments review. Before we move to the timing issue and Malcolm, let me again mention that I need volunteers. Before I do that, I want to note that Kavouss' hand is up. Kavouss, please take the floor.

KAVOUSS ARASTEH:

Yes, on SOs and ACs to nominate candidates to the panel, the qualifications of those people are those which are referred to in the bylaws, is that so?

DAVID MCAULEY:

Yes, that's correct, Kavouss. The 4.3J and 4.3Q I think are the sections in the bylaws that describe the qualifications that someone would have to have to become a member of the standing panel. And so as I understand it, ICANN will release an expression of interest, and I'm going to ask Sam to comment on that in just a minute, an expression of interest document inviting people to apply to become members, and from the bucket or the pool of people that do apply, ICANN or the SOs and ACs will parse through those applications to sort of put them in two separate piles, those who are very well qualified, and those who may be qualified, but don't fit into the well-qualified bucket.

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And then from the well-qualified candidates, the SOs and ACs will nominate members to the standing panel. That nomination, by the way, is subject to board approval, not to be unreasonably withheld. Does that answer your question, Kavouss?

KAVOUSS ARASTEH:

Yes, it answered my question, but something you have not covered during the Work stream 1 in the bylaw of all the qualifications, and I don't want to change anything, to add anything, but something that needs to be understood, that the first among the qualifications, must or should have been involved in the issue of the IRC during the first work stream. I have heard some people, there have never been any discussions and so on, so forth, and they line up other people to support them, so the quality person is not only something that people should judge, but it comes from the background and experience in the preparation in the discussions, knowing all of these things.

So I don't know how ICANN will take that into account. I hope that they will into account in the first meet, which I call it a short meet or I call them the [inaudible] for participants to be designated by the SOs and ACs. So I'm just referring to ICANN to be quite sure that the people have all qualifications required, because this is a very, very sensitive and very important issue, members of the panel. Thank you.

DAVID MCAULEY:

Thank you, Kavouss. Sam, you have your hand raised, so I will invite you to take the floor.

SAMANTHA EISNER:

Thanks, David. So just on a bit of an admin, on the administrative side, where our internal team is working on finalizing a document that will be previewing with this group before we would post on ICANN's website. We think that it's appropriate to get the view of the IOT on the document, to check that we're meeting the spirit of the bylaws and the qualifications that we're putting up and the things that we're including in there.

And then, to Kavouss' point, we're drafting to the specifications that are in the bylaws, and again, the IOT will have a chance to look at it, and then as David was noting, there is a vetting process, so we go through and we check out what is well-qualified, and then work with SOs and ACs to then make our appointments.

So if there are other qualifications that aren't necessarily listed in the documents, but that the SOs and ACs do apply against that list of other well-qualified applicants, that's something that certainly the committee could discuss, how they wanted to do that work, to take into account the typed of experience we're bringing in. But from our side, we're drafting it to the bylaws and some general standards, and aren't trying to insert any additional requirements that weren't vetted earlier.

DAVID MCAULEY:

Thank you, Sam. Do you have any estimate on timing that you'll give us the document to take a look at?

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SAMANTHA EISNER: Yeah, we're just doing a final pass through it, and we're – I had hoped that we had something out last week during Copenhagen, but we weren't able to do that, but we're hoping that we can get something out to you guys next week.

DAVID MCAULEY: Thank you, Sam. Okay. So, moving on, I'm going to ask Malcolm to take the floor in just a minute. And the goal here is to follow up on Malcolm's discussion last week addressing the issue of the time for filing claims, which was the subject of a number of comments, not least Malcolm's own.

I will ask you, Malcolm, as you go through this, to please keep an eye on time, and we're going to hope to move along, I would like very much to get into the next issue during this call. And so, Malcolm, I will pay attention to the queue, but I may also put my hand up, because if I have comments, I'll be commenting as a participant and not as the lead, and so I'll be watching the queue for you, but if it's okay, I'll hand you the floor now.

MALCOLM HUTTY: Thank you, David. I apologize to anyone on the call that finds it hard understand me, I'm afraid I'm suffering from a bit of a cold at the moment. I hope you can hear me clearly. Okay, so to run through this quickly, firstly, the last meeting we had which was slightly sparsely attended, wasn't really decision making meeting, it was one where we provided the analysis of the public comments received and as



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preparation I had a breakdown of that, which was presented at the meeting and we had a discussion, but no decisions were taken.

In short, though, to summarize very briefly, there were a number of comments who objected to the way the timing rule had been presented, on the grounds that it was either A, too short, or that the basis from which the calculation was done was wrong in their opinion, and that it needed to be based on when the harm was done or when the harm was known to the claimant, rather than on a fixed date as the date of the action, that might prevent the claimant from making a claim at all.

So there was a discussion about that, but no conclusions were reached. I did suggest that there was point out in the public comments that was the first threshold question that would need to be reached before we went to any further issues, which was the proposal from the business constituency, that there should simply be a moratorium on the timing issue.

Nobody on that call said that there was any support for that, but if there was not support for that, then we need to look at options for moving forward, and the structure of the rest of the session that I've got on this slide, that shows basically the main focus on that main point of contention, as to how the time is calculated, and also how it should be.

And then a small number of relatively minor and relatively un-contentious points have also been raised, that should be given consideration, but are not likely to be as substantial points of discussion as that main issue. So first off, is there anyone on this call that would

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now wish to step in and speak in favor of just simply a moratorium and just dropping this topic? If there are none, and I see David.

DAVID MCAULEY:

Malcolm, I did want to say I paid very close attention to the list and other than in the comment, I haven't seen support for a moratorium, and I personally as a participant would argue against a moratorium. I think we need to move on and get the rules in place. Thank you.

MALCOLM HUTTY:

Okay, thank you. I was thinking personally, I would have been content with that outcome, but I see no support for it, and so speaking in a sort of subdivision chair role, I think we can now say that there is just simply no support for this as a proposal, and we can now discard it.

So if we can now move to the next slide, as to how time is calculated. This raises what I think is the main issue that has been raised, and in particular, on this next slide we see the proposal that David brought up on the last call, and he and I have worked together for formulating into more clear words, the attempt to resolve the main issue that was raised by most of the respondents to the public comments.

And that proposal is this; to say that the rule on timing should be that the claimant must file their claim no later than the later of the two following dates, that's so many days after the date of harm, or if later, so many days after the date that the claimant became aware of the harm, or reasonably to have been aware of it.

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So the effect of that would be, if we pick for example six months, that would say that six months after you've been harmed, that's the time that you have got for filing, you've got to do it within six months after you've been harmed, unless for some reason you weren't aware that you had been harmed, and if that were the case, then it would be six months after when you aware that you had been harmed, or if it's a shorter time than that, when you reasonably had been aware of it.

And to clarify the second bullet point here, that does mean when you ought to have been aware of it, or when you were actually aware of it, if you should have been aware of it beforehand, then that's the date that counts. But in practicality, it's likely to mean so many days after the harm, unless there is some reason that you don't know, and then when it is that you do know, or should have known.

So that's the proposal that was brought up in the last meeting, and with no disagreement in the last meeting, but it was sparsely attended, we worked on it together. We both believe that this would address the main of the objections that were raised by the public commenters, so I put it to the group. I see David's hand and Kavouss' hand. David are you first, or is that an old hand?

DAVID MCAULEY:

No, that's a new hand, and thank you Malcolm. I think you alluded to it, but the one thing that I wanted to mention about this slide is I agree with you that if we can come up with whatever the number of days is, 45, 90, 180, whatever goes in as XX, if we can agree on that, then I'm fine with this, except to say, just to be a little bit more clear about it, I

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think you said this, but to be a little bit more clear, the subparagraph 2, where it says, "X days after the date claimant became aware of the harm, or ought reasonably to have been aware of it," to me, that would be best qualified by saying whichever of those two dates is earlier.

And so I agree that it would be the later of the two dates, but with respect to this subparagraph alone, I think there are two potential dates there, when someone became aware of the harm, or should have been aware of the harm, the operative date there in that subparagraph is whichever of those two is earlier. That's my comment. Thank you.

MALCOLM HUTTY:

Okay. So if we then add the word, "earlier" just on the end of that second subclause, so it reads, "X days after the date claimant became aware of the harm, or ought reasonably to have been aware of it, -- if earlier – would that satisfy?

DAVID MCAULEY:

Yes, I think so. Thank you.

MALCOLM HUTTY:

Yes, Kavouss? We can't hear you. I believe Kavouss has been disconnected, and we are attempting to recontact him at this point.

DAVID MCAULEY:

While we're waiting for Kavouss, I'm just wondering if anyone has thoughts on what should be the XX? What's the number of days? It

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sounds like 45 was not well received, and there have been some other suggestions. Did you want to address that now, Malcolm?

KAVOUSS ARASTEH: Yes I am on the call. What we're doing is later than the latest, this is very awkward, not later than the latest...

MALCOLM HUTTY: Perhaps it would be more elegant to say before the latest following date.

KAVOUSS ARASTEH: The wording, but not later than the latest, is not understandable for many people, like me. Maybe for you it's good, but for me it doesn't have any sense. Thank you.

MALCOLM HUTTY: Okay, I see people in the chat, Kavouss that they find it hard to hear you, but if I may repeat what I understood you to say, you found the phrase, "Not later than the latest," to be difficult to understand, and it could be rephrased in a way that was easier to be understood, which I'm sure can be done. I think at this stage we're looking for the principle here, and I'm sure the lawyers will find a way of phrasing it that works best, but we're looking for the principle. So maybe if "They must file before the later of the following two dates" or something like that. Any other phrasing that means the same thing, I'm sure would be acceptable.

DAVID MCAULEY: Malcolm, you have a hand up from Sam.

MALCOLM HUTTY: Sam, please go ahead.

SAMANTHA EISNER: Hi Malcolm, thanks. I just wanted to find out if with this phrasing the IOT is considering removing a suggestion that there is any outside time limit on an IRP, and it's solely based on when someone would find out about harm, is that what I should understand?

MALCOLM HUTTY: It's not only based on when someone finds out about harm, it is based on firstly the date that the harm occurs, or later, if they find out about this, or ought to have found out about this. So we'd expect that in most cases it would be based on the date that the harm occurs, although there is a possibility that if the claimant wasn't aware of the harm at that time, it could be extended, but no more later than when they reasonably ought to have been aware of it.

Sam, if you are alluding to the change from a fixed date, that there is no reference to the date of harm, I would refer you in part to the legal advice we received from our independent counsel, which said we needed to move away from a fixed date to one based on the date of knowledge. And we are in some respects responsive to that.

SAMANTHA EISNER: Right, I understand the need based on the timing of a date from when harm occurs, that's not what I'm asking about, but for the subsection 2, how long after an act could someone bring a claim? Whether we put in 180 days in there, or whatever, is it something that a claimant could bring five years after? Is that a reasonable reading of this? That's what I'm trying to get to.

MALCOLM HUTTY: I think it would be really most unlikely that anyone would say that it took five years for them to become aware that they had been harmed by it, and to sustain that was reasonable for them not to have been aware of it for that long. So what we are really looking at in that subparagraph is yes, if it's based from the date of the harm, and if you weren't aware of it immediately, then you can have longer, but only so long as is reasonable, such that you ought reasonably to have been aware of it.

DAVID MCAULEY: And while Sam is considering your response, Malcolm, I just wanted to note that you have two hands following Sam. Kavouss is next, and then after Kavouss is Greg Shatan.

MALCOLM HUTTY: And I think while Sam is considering that, we'll move to Kavouss.

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KAVOUSS ARASTEH: I don't understand the difference between one and two. Let me explain. A harm occurred. Someone [inaudible] identify that harm. Then what you are saying in one and what you are saying in two, why are there two different? The harm, and as well as the harm? What is the difference? What are we going to say here? It's not very clear. Can you kindly explain what you mean by one and two? Either of them is understandable, but both of them, I don't understand. Thank you.

MALCOLM HUTTY: Kavouss, I think it is possible it may well be that the second paragraph includes the first, but we would expect in most cases that the claimant was aware of the harm at the instant that it occurred, and it would only be in exceptional cases when the claimant was not aware of it. So that's why it has been described in this fashion. But I think that we should try to get away from the precise wording of this. What we're looking for is an agreement on principle here. Do we agree on this basic principle, and if we do, then we can leave it to the lawyers to find some way of phrasing it more elegantly than I have been able. Does that satisfy, Kavouss?

KAVOUSS ARASTEH: Yes, if we are talking about principle, from the time both the principle one and two would there, right? So both of them you want to keep, and then later on at the end, we go with one of them, but not both, right?



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MALCOLM HUTTY: I think, if I understand what you're saying correctly, yes.

KAVOUSS ARASTEH: Okay, no problem. Thank you.

MALCOLM HUTTY: Greg Shatan, you have the floor.

GREG SHATAN: We do need both one and two, and they are not the same, and I don't know whether two will be an exceptional case or not. One covers the date on which some harm actually occurred, and two covers the date that the claimant found out that the harm occurred, or should have found out the harm occurred, if they had been acting reasonably. Now there are a number of different ways, I don't know if we need to go through hypotheticals on these.

An example that has no relevance to ICANN, but it's an easy one, if you have a house in the woods, very far from the nearest neighbors, and it burns down on July 1, you don't go there until August 1. July 1st is the date from which one counts from, and August 1st would be the date of two. And if there is some unreasonable amount of time to spend away from one's summer home, even if you never go to the summer home and never actually find out about it, it should be assumed that you would have somebody reasonably looking in on your house at least a couple times a year, then that you reasonably ought to have been aware of it would be, say, six months after it happened.

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Now you could argue about the exact point, but the point is that these are three different points in time and all of them need to be considered as potential end date. If you go only after the date of the harm, then you're basically creating a rule based on the date of occurrence, that has nothing to do with particularly circumstances of the plaintiff, and that could be very unfair to a plaintiff who does not become aware of things.

Again, we could run through a number of hypotheticals, I'm sure we could think of some, where awareness would not become immediate. The harm may take a while to occur, the harm may take a while to be seen, the harm may take a while to reasonably have been seen.

Finally, I would say that this kind of two-prong construction here is absolutely the standard for these kinds of result end dates, quibble about the language here or here, I'm sure that there is some canned language we could find that is maybe a little better, but conceptually this is spot on, and I don't think we need to do anything to change this. There is the point that Sam raised, which is the point of repose, whether it will be some date after which the activity occurred, as opposed to a harm based date, and that's a question.

I guess a lot of that is base, so I'm not sure why you have difficulty following the logic. Your house burns down on July 1, you don't know about it. August 1st you go and see that your house burned down, and you know about it. You never go to your house, at some point you should have gone to your house, you should have been aware of it. Those are three dates are all different. And all those should be taken into account.

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Finally, if we're talking about changes to the bylaws, I'm not sure that there should ever be repose in challenging a harm that results from a change to the bylaws, so I think we need to talk about what activity we're talking about, before we make any blanket rules. Thanks.

MALCOLM HUTTY: Thank you, Greg. Sam, you have the floor.

SAMANTHA EISNER: I think we're converging, the issue of whether one and two make sense, I think they do, and we can refine the language a bit, but I think the concepts in there, timing it from that, are important. I do think, as Greg was phrasing it, that the issue of ultimate repose, I think we still have an obligation to look at the purposes of the IRP, if the purposes of the IRP and accountability are to reach some point of certainty of action, and that things will stand that were done, that maybe it does make sense to have some sort of external time limit on it.

The repose, if something didn't cause harm, if you didn't find out it didn't cause harm within five years, why would we entertain it and upset everything that has been relying upon that issue for five years? Because someone decided that they were harmed by it earlier. That's an issue to be handled in a different way. Maybe circumstances have changed, so the policy really needs to be changed instead of being challenged against the bylaws. There could be multiple things that need to happen.

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So I think we still need to keep in mind the ultimate purpose of the IRP in considering whether or not there is an outside limit on the issue of repose while we still maintain the timeframe being from when you found out when the harm happened, or when you should have known about the harm. I think that the issues here aren't necessarily problematic, it's the question of could you always bring a harm, even if it happened 5, 10 years later, that's the issue I think we're concerned about.

MALCOLM HUTTY:

Thank you, Sam. Okay, I think I can summarize then. At this point there appears to be a consensus of support for this approach, although it can be handed over to the lawyers to refine the wording of it. Sam is still raising the question of repose, but on the other hand it is noted that all the public comments that spoke to this issue, spoke against the principle of repose and our independent legal counsel had advised us that the potential for repose was not consistent with the bylaws as they stand today. So I would recommend to the group that we agree that further repose beyond this is not something that we can do, it's not within our power to recommend to do.

I see Kavouss saying that you oppose such a complicated and complex concept. Kavouss, we are saying that we will refine and clarify how this is put, the principle here is that you must file no later than the date of harm, or if it's later than that, the date that you should reasonably have become aware of the harm, or actually did become aware of it.

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And if you should reasonably have become aware of it before you became aware of it, then it's when you should reasonably become aware of it that matters. And I don't know how to put it more clearly than that, but I'm sure the lawyers will help. I don't know if I can move forward or if we should continue this topic. David, please.

DAVID MCAULEY:

Thank you, I wanted to do two things. One is, as the leader of the call, let me just ask, I heard a phone entry, so I wanted to ask if there is someone that is now participating who is on audio only and has not identified themselves before, and if so, would they please identify themselves?

REG LEVY:

David, this is Reg again, I got disconnected.

DAVID MCAULEY:

Thanks, Reg. And then Malcolm, I just wanted to comment too. I think Sam and Greg get to the difficulty here, and I agree that you and I worked up what is on the screen, I have no problem with that, and I certainly agree with that, but the question has been raised, should there be in addition to this, a third paragraph that says in any event there is a date of repose.

And what we're trying to do is balance equities between claimants and ICANN, and there is equity on both sides, I think, to be served. The one thing I wanted to note as I was listening to Sam is that in the IRP process, it's not the only remedy that someone has. There's always

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litigation. Someone can go to a court somewhere if they have true grievance.

MALCOLM HUTTY: David, I'm not sure that's correct. In many cases, contracted parties I believe give up the right to go to a court and submit to the IRP as their only form of possible arbitration. Is that not correct?

DAVID MCAULEY: Okay, that's a fair point. Thank you. But I guess what I'm getting at, too, is the equities on both sides. So I can see the reasonableness of this. I do want to ask you to move on. I think you can move on, but my hope, and I think the hope of others, is that we can close this issue today.

We might give Sam a chance to come back. She asked where did this comment come from, to maybe look at this a little bit more closely and specifically, so I think we're making great progress, I don't have any quarrel with that. But we might have to do some work on list following it up. I would encourage you to move on, if you can.

MALCOLM HUTTY: Okay, in that case, I'll move on. We'll note that this is still a topic that Sam is raising an objection to. I would like to read into the record a comment Greg makes in chat, to change "no later than" to "on or before," which achieves the same effect while avoiding the double use of the word "later," which Kavouss, in particular, was objecting to. But before we move on, I'd like to read that into the record.

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Now if we can move to the next slide, please. Regardless of how the time is calculated, we have the question of how long is allowed, based on when it is calculated.

DAVID MCAULEY: Malcolm, you have one remaining hand from Kavouss.

MALCOLM HUTTY: Oh, I do? Kavouss, I beg your pardon, please go ahead.

KAVOUSS ARASTEH: I would say that we need some sort of preamble for one and two. If one before talking of the date, which will say harm has occurred and claimant is aware of the harm on the date of its occurrence, then you introduce one. Two, harm has occurred and the claimant is not aware of the harm until later date, then we have to distinguish between the two before going to any dates. Two different cases. So it will be defined to quite clearly mention what are the two cases. Thank you.

MALCOLM HUTTY: Thank you, Kavouss. Moving to the next issue, we [inaudible] what we decide on the previous issue, we have the question of how would the XX be filled out? We had previously said 45 days to file and most public commenters responded, in fact, I think every public commenter that spoke to this issue, said that 45 days was too short. The most popular suggestion was 180 days, or six months, and the second most popular

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suggestion was 90 days, or three months. I simply turn to the group and ask for your views on what would be an appropriate balance to strike?

DAVID MCAULEY:

Malcolm, hi, it's David, and I've raised my hand as a participant. Let me do two things. Let me just read Sam's comment, which is a wrap up on the issue we just discussed, and is a prelude, I think, to what she will say on the list. Sam's comment is, "From what we can find on Sibley's advice, they noted that a one year bar on claims could stand and they provided other advice on the facial invalidity issue that we are no longer discussing."

Now, turning to the number of days, it seems that the most popular was 180, and the second most popular was 90. Maybe we could come to something in the middle, like 120; 180 seems long to me, but that's just my personal view. I recognize that 45 days may be too quick within which to react, but I could go for 90 or 120, I would be supporting something like that. Thank you.

MALCOLM HUTTY:

Okay, I note that links did not actually recommend a particular time, but said that the test that we should ask ourselves is how long is so long that it would undermine the ability of the IRP to reach a fair decision. So perhaps I could ask the group, how long do you think would be too long, such that memories would fade, evidence would disappear, and then the IRP can reach a fair decision. Opinions please. Once your hand is raised, go ahead.



KAVOUSS ARASTEH: Yes, my hand is raised because we have discussed at the beginning about the 45 days and we proposed that, but the way I understand it is most popular, or less popular, I think is based on a few comments, I think we should request logical and not propose a longer time, so I'm in favor a maximum of 90 days, but not more than that. Thank you.

MALCOLM HUTTY: Okay, Kavouss in favor of maximum 90. I read Greg in the chat saying, "120 days, we need to look at the timing of the empowered community and give it time to work."

Okay, so have the most popular suggestions are 180, then 90. Kavouss also saying no more than 90. And then a compromise being offered and seconded at 120. Is it possible for us to compromise on 120? It will be very useful if we could get this cleared up, if we could agree and compromise this now, we will have achieved something. Do I hear anyone objecting us agreeing to compromise on 120? Okay, David?

DAVID MCAULEY: Well, I was going to say, I could support Kavouss, too. I was either 90 or 120. If there is a hard feeling that more than 90 is too much, I could easily support 90, or I could support a compromise. I just want to go beyond 45, I think that's fair, and if we can stay under 180, I think that is excessive, myself, it's a personal view, that's all.

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MALCOLM HUTTY: My personal view, actually, is that we are asking ourselves the wrong question as to how long is necessary and instead we should be asking how long impairs the operation of the IRP. I don't think that 180 days impairs the operation of the IRP, so I would go for whatever the longest compromise we could raise, so I'll add myself to the voices in a personal context, for 120. But David, you seem to be content with either 90 or 120?

DAVID MCAULEY: I am, and I would simply ask if there is anyone in the group that would object to 120? I know Kavouss has mentioned a hard cap of 90 days. Is there anyone else that would object to 120? Kavouss, your hand is up again?

KAVOUSS ARASTEH: Yes, if everybody agrees with 120, I don't want to be only one objecting to 120, I'll go with the others.

MALCOLM HUTTY: Kavouss, your spirit of compromise is greatly appreciated, and I'm delighted that we can close out one of the issues on this difficult topic on this call. Thank you. Please let the record reflect that the group has agreed on 120 days.

Bernie notes that there are 10 minutes left in the call. Now there are some other issues that were raised. The issue that we have just dealt with is the most complex and difficult topic. The remaining slides I have show what those issues are, and we will have to come to them at some

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time, but I turn to David to ask, would you like me to proceed through those issues, or would you like to the other non-timing related issues in this call?

DAVID MCAULEY:

Thank you, Malcolm. I would like to pursue the timing issues henceforth on the list. If it's okay, I would like to initiate a discussion about the joint issue. But saying that, we've recognized Sam has some comments to make on list, and there are some additional issues as you point out. I think we've made great progress, and I thank you Malcolm for taking the lead on this. But let me move to the next issue, if no one has any concern with that. So, Brenda, if you could put the other slides up, the ones that I sent. The slides, by the way, are really just talking points.

What I've put up on the first slide, is as we consider issues revolving jointer, let's remember two fundamental bylaw provisions that are sort of the backdrop for this discussion and all discussions, and one is that the IRP is intended to secure just resolution of disputes and that the rules of procedures of the IRP are meant to ensure fundamental fairness and due process. And so in that context, I wanted to note that a number of commenters talked at jointer.

We have jointer issues raised in the context of parties that were involved in other panel decisions below. For instance, we're talking here about expert panel decisions, which are now subject to IRP review. These are things likes string confusion and legal rights objections, those kinds of things. And so there is a request of people who effectively won

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their cases below, are not ignored, if a claimant is unsatisfied with that panel's decision, goes to IRP, and could have a right to join. That's one of the issues about jointer.

The second bullet says that there is an issue over should a procedures officer from the panel decide questions of jointer, or should the panel decide questions of jointer. And then I think it was the IPC who said there should be a an express indication that there isn't a page limitation for other parties, so if we can scroll down to the next slide.

I mentioned two parties that commented. One is a law firm Fletcher, Hale, and Hildreth, I think Robert Baldwin was the author. But there is another author here who is the prime mover in this particular case, and that's Cathy Kleiman, who many of us know as a participant in the GNSO.

And then the GNSO's IPC also commented, and I should note that the non-commercial stakeholder group, and I failed to put them on a slide, that was my inadvertence, the non-commercial stakeholder group has made points that largely are similar to those made by the law firm Fletcher, Hale, and Hildreth. Cathy, in Robert Baldwin's note, asked for a couple of things to be done in the jointer issue. I see I have 6 minutes left. So I'm basically setting the table for further discussion.

One is, they would like actual notice to go to all the original parties in the expert panel decision that's being challenged. Two, they ask for a mandatory right of intervention, that is for people to be able to join, to people who were parties in the panel. That doesn't mean they have to intervene, that means they have a right to intervene.

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And then three, there would be a right for parties to be heard prior to an IRP panel making an award of some intermediate remedy, like putting an action on hold, intermediate relief. Those are the things that motivated them and they thought that these rules address. The IPC said, and by the way, the non-commercial stakeholder group followed very much along those lines.

The IPC did, as well, using the words, "directly involved" in the action below, it should have a right to intervene, and I believe it was the IPC that said anybody that comes in as a party should have the ability to file equally detailed statements, whatever the limit is, I think it's 25 pages.

So, there are ways that we can approach this. I think it's a fair request that involved below who won at the expert panel, and now see their win being challenged, should be able to be parties, and should have a right to be parties, I can see that. We can also consider whether there are ancillary parties that might have a right to file an amicus brief, a friend of the court kind of brief. But as I set the table, I shouldn't take up all the air time, so let me just open the floor to ask if people want to comment on this subject, I mean, we're going to have to do more work on it, I'll have to address it in our next call, but are there people that would like to make a comment? And I see Sam Eisner's hand is up, so I'm going to ask Sam to comment.

SAMANTHA EISNER:

Thanks David. So, this is not actually about the substance of the recommendations and jointer, and the question of whether or not people are appropriate to be part of it, particularly as if it relates to a

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panel decision that other parties were involved in, et cetera, I think we do need to be careful as we consider these, that we recall what the definition of disputes are, and that we don't write rules that allow people to re-litigate a panel decision through the IRP, but make sure that any one that we would allow jointer, or for this instance, using the example of the expert panel, that it's tethered to whether or not that expert panel decision resulted in a violation of ICANN bylaws or articles, and that we make sure that we tailor any jointer to supporting that discussion within the IRP.

Because we're not granting the IRP the ability to re-litigate things, we're granting the IRP the ability to make a determination on whether or not an action violated ICANN's articles or bylaws. So, I think we just need to be careful, if we intend to include jointer rules, that we make sure that the purpose of them is well described and limited to the purposes of the IRP.

DAVID MCAULEY:

Thanks, Sam. I think that's an excellent comment, and I was basically assuming it, but I think I should have said it. So, I agree. None of the things that we're talking about should enlarge, or can enlarge, in my opinion, enlarge on what the bylaws provide. So, the people that are theoretically joining as parties that would be considered under jointer here, are going to be sort of on ICANN's side of things.

In other words, bending the case against the claimant. And so my expectation is that the claimant is going to bound to make the claim that the panel decision violated the articles or the bylaws, and it's going

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to be a high bar to meet. So, I think you made a very good point. Thank you for that.

I promise to the group to address this further in our next call. By the way, our next call is next week. Is that correct, Bernie?

BERNARD TURCOTTE: Yes, I've posted it in the chat.

DAVID MCAULEY: Okay, thanks Bernie.

KAVOUSS ARASTEH: David, is that 27th? The 27th of March is Monday, Thursday is not the 27th.

DAVID MCAULEY: Oh, I believe the call is on Thursday, a week from today, which would be 30th, thank you Kavouss. But in any event, I have to go through this a little bit further, but I wanted to set the table and start the juices flowing on this issue, because I'm going to be looking for comments next week.

It seems to me that there are some legitimate comments about people having a right to join as a party, and I think that if you take a look at the slides and maybe some of the comments, those three comments, non-commercial stakeholder group, ITC, and the law firm, Fletcher, Hale, and

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Hildreth, you will get a good feel for what the issues are, and I look forward to further discussion.

We have about a minute for any other business, and so I'll ask if anybody else has any other business that they would like to raise, and then I will simply mention in that, I'm going to come out in the list and talk a little bit more about people volunteering, and how we might be able to manage the comments and move them forward.

Anybody want to make any comment? [AUDIO BREAK] Seeing none, I would like to thank everybody for what I think was a productive call and everybody's participation, and look forward to chatting next week and seeing you all on the list. So that will be the end of this call. Thank you.

**[END OF TRANSCRIPTION]**



# **EXHIBIT E**

## 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.

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.

#### USP 2. Scope:

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

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."

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.

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.

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

No change recommended.

### 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.

### 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).

### USP 15. Costs:

#### **Next Steps:**

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

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

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#### 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))?

# **EXHIBIT F**



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Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP)<sup>1</sup>

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Revised as of [Day, Month], 2018

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These interim procedures (Interim Supplementary Procedures) supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article 4, Section 4.3<sup>2</sup> of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after 1 May 2018.

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In drafting these Interim Supplementary Procedures, the IRP Implementation Oversight Team (IOT) applied the following principles: (1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016<sup>3</sup>; (2) to the extent public comments received in response to the

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<sup>1</sup> CONTEXTUAL NOTE: These Interim Supplementary 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.

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<sup>2</sup> Formatting has been updated to conform with the Bylaws approved by the ICANN Board of Directors on 22 July 2017 (hereafter the July 2017 ICANN Bylaws).

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<sup>3</sup> See <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>

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USP reflected clear movement away from either the current Supplementary Procedures or the USP, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration; (3) take no action that would materially expand any part of the Supplementary Procedures that the IOT has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

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## 1. Definitions

In these Interim Supplementary Procedures:

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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.<sup>4</sup> 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.<sup>5</sup>

DISPUTES are defined as:

(A) Claims that COVERED ACTIONS 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

<sup>4</sup> ICANN Bylaws, Article 4, Section 4 3(b)(i)

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<sup>5</sup> ICANN Bylaws, Article 4, Section 4 3(b)(ii)

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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.<sup>6</sup>

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief<sup>7</sup> 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 IRP Provider (IRPP) under Article 4, Section 4.3 of ICANN’s Bylaws.

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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.<sup>8</sup>

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

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.<sup>10</sup>

<sup>6</sup> ICANN Bylaws, Article 4, Section 4 3(b)(iii)

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<sup>7</sup> ICANN Bylaws, Article 4, Section 4 3(p)

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<sup>8</sup> ICANN Bylaws, Article IV, Section 4 3(d)

<sup>9</sup> ICANN Bylaws, Article IV, Section 4 3(k)(i)

<sup>10</sup> Change recommended for consistency with 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 ICANN Bylaws, Article 4, Section 4 3(k)(v) & Section 4 3(p)(v)(G)

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

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 [4](#), Section 4.3(a).

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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.<sup>11</sup>

## 2. Scope<sup>12</sup>

The ICDR<sup>13</sup> will apply these [Interim Supplementary Procedures](#), in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article [4](#), Section 4.3 of the ICANN Bylaws after the date these [Interim Supplementary Procedures](#) go into effect. In the event there is any inconsistency between these [Interim Supplementary Procedures](#) and the ICDR RULES, these [Interim Supplementary Procedures](#) will govern. These [Interim 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. IRPs commenced prior to the adoption of these [Interim Supplementary Procedures](#) shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

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In the event that any of these [Interim Supplementary Procedures](#) are subsequently amended, [the rules surrounding the application of those amendments will be defined therein.](#)

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~~Deleted: such amendments will not apply to any IRPs pending at the time such amendments come into force unless a party successfully demonstrates that application of the former Supplementary Procedures would be unjust and impracticable to the requesting party and application of the amendments would not materially disadvantage any other party’s substantive rights. Any party to a then-pending IRP may oppose the request for application of the amended Supplementary Procedures. Requests to apply interim updated amended supplementary procedures will be resolved by the IRP PANEL in the exercise of its discretion.~~

<sup>11</sup> ICANN Bylaws, [Article 4](#), Section 4.3(i)

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<sup>12</sup> [IOT has engaged in substantial discussion concerning retroactive application of the USP to IRPs in progress when the USPs are enacted. Full changes relating to those discussions are not reflected herein. The full provision on applicability of future rules is expected to be fully set out in the full set of Updated Supplementary Procedures, which will then apply to how those procedures will be considered for application.](#)

<sup>13</sup> ICANN Bylaws, [Article 4](#), Section 4.3(m)

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### 3. Composition of Independent Review Panel<sup>14</sup>

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.<sup>15</sup> 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 pursuant to the ICDR RULES.<sup>16</sup> In addition to disclosing relationships with parties to the DISPUTE, IRP PANEL members must also disclose the existence of any material relationships with ICANN, and/or an ICANN Supporting Organization or Advisory Committee. 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, 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.<sup>17</sup> 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 Interim Supplementary Procedures.

Comment [A1]: Independent” and “Impartial” are terms of art under the ICDR Rules, so we suggest capitalizing them here  
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### 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 120 days after a CLAIMANT<sup>18</sup> becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; 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.

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Comment [A3]: On 30 April 2018 David McAuley proposed to the IRP IOT that the repose issue be put “into a second ‘bucket’-the bucket of rules that are not yet ready for release. This would be a de facto moratorium while the IOT does further work on the notion of repose.”

However, we still need to include some level of guidance to the panel on timing, and so we propose that this be included because it aligns with what was included in the public comment, and it is far easier to move to a less restrictive rule in the full update than it would be to move to a more restrictive rule. As public comment is needed in order to make a substantial change to get to no repose, if the outcome of the further public comment supports no repose, and that is in alignment with the global public interest, the final set of rules will incorporate that standard

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<sup>14</sup> IOT reached tentative agreement as of 8 February 2018 on adding a statement about independence, impartiality, and obligation to disclose material relationship with ICANN, Supporting Organization, Advisory Committee, or any other Participant in an IRP proceeding

<sup>15</sup> ICANN Bylaws, Article 4, Section 4 3(k)(i)

<sup>16</sup> ICDR International Dispute Resolution Procedures, Art 13 “Impartiality and Independence of Arbitrator.” at Pg 21-22, available at [https://www.icdr.org/sites/default/files/document\\_repository/International\\_Dispute\\_Resolution\\_Procedures\\_English.pdf](https://www.icdr.org/sites/default/files/document_repository/International_Dispute_Resolution_Procedures_English.pdf)

<sup>17</sup> ICANN Bylaws, Article 4, Section 4 3(k)(ii)

<sup>18</sup> This issue remains under discussion within the IOT



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.<sup>19</sup>

## 5. Conduct of the Independent Review<sup>20</sup>

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,<sup>21</sup> 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, where, upon motion by a Party, 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.<sup>22</sup> 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 unless the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) 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 witness testimony and cross examination.

<sup>19</sup> 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.

<sup>20</sup> [IOT agreement to set 15 day deadline for written statements as of 8 Feb 2018](#) [IOT has engaged in substantial discussion concerning translation services](#). [Because translation services were not considered in the initial public comment, consideration of how translation services might be incorporated into the Supplemental Procedures is reserved for the full update.](#)

<sup>21</sup> Some members of the IOT would prefer to remove the phrase, “where necessary”

<sup>22</sup> ICANN continues to have serious concerns about the impact of in-person hearings on cost and time to resolution, and prefers to specify that the requisite demonstration must be made by clear and convincing evidence.

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All evidence, including witness statements, must be submitted in writing 15 days in advance of any hearing.

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With due regard to Bylaw Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding.<sup>23</sup> Any violation of the IRP PANEL’s timetable may result in the assessment of costs pursuant to Section 10 of these Interim Supplementary Procedures.<sup>24</sup>

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**6. Written Statements<sup>25</sup>**

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font.<sup>26</sup> All necessary and available evidence in support of the CLAIMANT’S Claim(s) should be part of the initial written submission.<sup>27</sup> 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.<sup>28</sup> The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.<sup>29</sup>

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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, double-spaced and in 12-point font.

<sup>23</sup> ICANN Bylaws, Article 4, Section 4 3(o)(vi)

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<sup>24</sup> This is an issue for future consideration within the IOT This provision maintains the status quo until there is an agreed recommendation to change

<sup>25</sup> IOT tentative agreement as of 8 February 2018

<sup>26</sup> 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

<sup>27</sup> Language modified to reflect broadened scope of IRPs See ICANN Bylaws, Article 4, Section 4 3(i) IOT tentative agreement as of 8 February 2018

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<sup>28</sup> 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

<sup>29</sup> ICANN Bylaws, Article 4, Section 4 3(o)(ii)

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7. Consolidation, Intervention, and Joinder<sup>30</sup>

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. CLAIMANT’S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.<sup>31</sup>

Intervention and Joinder:

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 shall receive notice that the INDEPENDENT REVIEW has commenced. Such a person, group, or entity shall have a right to intervene in the IRP as a CLAIMANT or as an amicus, as per the following:

Comment [A4]: NOTE to IOT: In the process of trying to include this agreed upon concept, we recommend that it is not yet ready for inclusion. There are a few issues: (1) we do not have a definition of a "party" here, and so we need to vet if we mean a claimant (2) for intervention as of right, we need to build in some sort of tethering to the dispute; it's not that anyone can join in, it should be that those with related issues may join. We also need to consider things like filing fees and other practical issues

i. (S)he/it/they may only intervene as a party if they satisfy the standing requirement to be a CLAIMANT as set forth in the Bylaws.

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ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an amicus.

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Any person, group, or entity that did not participate in the underlying proceeding may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. If the standing requirement is not satisfied, such persons may intervene as an amicus if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed amicus has a material interest at

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<sup>30</sup> There is no existing Supplemental Rule. The CCWG Final Proposal and ICANN Bylaws recommend that these issue be considered by IOT. See ICANN Bylaws, Article 4, 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

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<sup>31</sup> See ICANN Bylaws, Article 4, Section 4.3(n)(iv)(B)

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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.

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

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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 Methods<sup>32</sup>

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 the Panel determines are reasonably likely to be relevant and material<sup>33</sup> 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. Where such discovery method(s) are allowed,<sup>34</sup> 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.

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

<sup>32</sup> There is no existing Supplemental Rule. The [CCWG Final Proposal and] ICANN Bylaws recommend that discovery methods be considered by IOT. See ICANN Bylaws, [Article 4](#), Section 4 3(n)(iv)(D).

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<sup>33</sup> ICANN NOTE: Materiality requirement aligns with the ICDR Rules

<sup>34</sup> ICANN prefers to retain "in the extraordinary circumstances "

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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.<sup>35</sup>

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant<sup>36</sup> 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.<sup>37</sup>

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.<sup>38</sup>

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 4, Section 4.3(o)(iv).<sup>39</sup>

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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:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;

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<sup>35</sup> Pursuant to the ICANN Bylaws, Article 4, 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 ICANN Bylaws, Article 4, Section 4 3(n)(iv)(D)

<sup>36</sup> ICANN Bylaws, Article 4, Section 4 3(b)(i)

<sup>37</sup> ICANN Bylaws, Article 4, Section 4 3(o)(i)

<sup>38</sup> ICANN Bylaws, Article 4, Section 4 3(o)(i)

<sup>39</sup> ICANN Bylaws, Article 4, Section 4 3(p)

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(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.<sup>40</sup>

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.

#### 11. Standard of Review<sup>41</sup>

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 obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.

<sup>40</sup> ICANN Bylaws, Article 4, Section 4 3(p)

<sup>41</sup> The standard of review is dictated by ICANN's Bylaws and cannot be modified or updated without a corresponding Bylaws amendment

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- e. IRPs initiated through the mechanism contemplated at Article 4, 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.<sup>42</sup>

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12. IRP PANEL Decisions<sup>43</sup>

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup>
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.<sup>47</sup>
- c. Subject to Article 4, 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.

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<sup>42</sup> ICANN Bylaws, Article 4, Section 4 3(i)

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<sup>43</sup> The ICANN Bylaws, Article 4, 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 4, Section 4 3(o)(iii))

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<sup>44</sup> ICANN Bylaws, Article 4, Section 4 3(k)(v)

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<sup>45</sup> 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

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<sup>46</sup> ICANN Bylaws, Article 4, Sections (s), (t) The 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 ICANN Bylaws

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<sup>47</sup> ICANN Bylaws, Article 4, Section 4 3(t)

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#### 14. Appeal of IRP PANEL Decisions<sup>48</sup>

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

#### 15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION.<sup>49</sup> Except as otherwise provided in Article 4, 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 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

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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.<sup>50</sup>

<sup>48</sup> 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."

<sup>49</sup> 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.

<sup>50</sup> Bylaws, Article 4, Section 4.3(r).

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# **EXHIBIT G**

# [IOT] IRP IOT - taking stock and moving forward

**McAuley, David** Contact Information Redacted

*Mon Sep 24 14:13:26 UTC 2018*

- Previous message: [\[IOT\] IOT - 6 September meeting 1900 UTC - Cancelled](#)
- Next message: [\[IOT\] IRP IOT - taking stock and moving forward](#)
- Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

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Dear members of the IRP IOT:

As you know, we were unable to gather a quorum for a conference call Sept. 6th despite several reminders from Bernie over a period of about a month. This comes on the heel of difficulties gathering quorums for calls over the past year.

While this is a disappointment, I think it fair to say that post-IANA Transition there has been some fatigue in the community. That is understandable - nothing I say here is meant as criticism.

But as IOT lead I must take steps to ensure that we remain viable, especially now that we have significant responsibility for establishing the 'new' IRP as mandated in Bylaw 4.3(n) (i). It is now two years since this bylaw was enacted and we must get on with this work.

Therefore, I want to suggest a plan for us, the members of the IOT, to accomplish what we must with due regard to moving things along.

Here is what I propose:

1. That we take steps, starting at ICANN 63 (with appropriate notices beforehand), to reconstitute the IOT by approaching SOs/ACs with information about such a need. We would administratively organize this through the ICANN Org Policy group. This means adding members to the IOT. No one currently on the IOT who wishes to remain would be barred from staying in the IOT going forward under my plan - but the plan would suggest that those who are no longer interested/participating should please resign, with no adverse inference to be drawn. Those who remain must be willing to participate in work and deliberations. (Bylaw 4.3(n) (i) indicates that the IOT will be established "in consultation with" the SOs/ACs.)

2. In the meantime, I urge us as a group to contribute thoughts on list and to make a quorum for two calls prior to ICANN 63 to address two important issues we are almost finished with:

a. Interim rules of procedure. If we can close on this by Oct. 11th the interim rules could be presented to the Board at its meeting in Barcelona - this would help ensure the new rules are available ASAP; and

b. Repose (Time-for-Filing issue) - analyze public comment and finish this work (interim rules would protect claimants from any impact from the time-for-filing rule pending finalization of that topic).

The two calls would both be in the week of Oct. 8th. They would be Tuesday Oct. 9 at 19:00 UTC and Thursday Oct. 11 at 19:00 UTC.

3. Thus, it is expected we would wind-up work on the interim rules and repose prior to having a reconstituted IOT. If we start a reconstitution effort I estimate we could have a reconstituted IOT by early in the new year - there is plenty of work yet to do. (See Annex A below.)

4. I have been asked to give a summary of IRP developments to a few groups at ICANN 63 and will do so on behalf of the IOT - and will pass slides around to the IOT when I get them done - we could in those presentations mention this plan and we could also encourage SOs/ACs at the same time to get moving with the standing panel. I think it possible that by adding IOT-reconstitution to the SOs/ACs agenda it could help them focus on the standing panel as well.

Best regards,

David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

Contact Information Redacted

Annex A - remaining tasks for IOT:



- a. CEP rules to be developed - see section 4.3(i);
- b. Possibly recommend panel training - see section 4.3(j) (i);
- c. Develop an IRP panelist recall procedure - see section 4.3(j) (iii);
- d. Possibly develop specialized PTI service-complaints rules - see section 4.3(n) (ii);
- e. Develop procedures if ICANN elects not to respond to an IRP (see section 4.3(n) (iv) (F) but note that section 4.3(g) may provide all the procedure we need in this respect);
- f. Develop standards and rules governing appeals (see section 4.3(n) (iv) (G) and see also section 4.3(w)). For example, will we allow appeals where there was no response? Or appeals of non-binding IRPs? (see section 4.3(x) (iv)) Or appeals of interim relief under section 4.3(p))? We may also want to talk about the potential for defaults/dismissals and the allowance, or not, for related appeals;
- g. Will we develop additional independence requirements for IRP panelists - see section 4.3(q) ((i) (B)). This includes consideration of term limits and restrictions on post-term appointments to other ICANN positions - see 4.3(q) (i) (B) and see 4.3(j) (iii); and
- h. Possible review of Annex D, section 4.2 (Community IRPs) so that we can help our respective SOs/ACs in the event of a community IRP.

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<http://mm.icann.org/pipermail/iot/attachments/20180924/a2124857/attachment.html>

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# **EXHIBIT H**

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Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP)<sup>1</sup>

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Revised as of [Day, Month], 2018

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These interim procedures (Interim Supplementary Procedures) supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article 4, Section 4.3 of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after 1 May 2018.

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In drafting these Interim Supplementary Procedures, the IRP Implementation Oversight Team (IOT) applied the following principles: (1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016<sup>3</sup>; (2) to the extent public comments received in response to the

<sup>1</sup> CONTEXTUAL NOTE: These Interim Supplementary 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.

<sup>3</sup> See <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>

USP reflected clear movement away from either the current Supplementary Procedures or the USP, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration; (3) take no action that would materially expand any part of the Supplementary Procedures that the IOT has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

## 1. Definitions

In these Interim 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. ~~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.~~

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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.

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DISPUTES are defined as:

(A) Claims that COVERED ACTIONS 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
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

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(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

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EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief 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 emergency relief (ICDR RULES Article 6).

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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 IRP Provider (IRPP) under Article 4, 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.

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

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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.

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

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and/or participation as an amicus, 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 consolidation (ICDR Rules Article 8).

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PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article 4, Section 4.3(a).

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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.

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## 2. Scope

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The ICDR will apply these Interim Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article 4, Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect. In the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern. These Interim 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. IRPs commenced prior to the adoption of these Interim Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

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In the event that any of these Interim Supplementary Procedures are subsequently amended, the rules surrounding the application of those amendments will be defined therein.

## 3. Composition of Independent Review Panel

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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. 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 pursuant to the ICDR RULES. In addition to disclosing relationships with parties to the DISPUTE, IRP PANEL members must also disclose the existence of any material relationships with ICANN, and/or an ICANN Supporting Organization or Advisory Committee. 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, 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 ICDR RULES shall apply to selection of the third panelist. 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 Interim Supplementary Procedures.

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Comment [A1]: "Independent" and "Impartial" are terms of art under the ICDR Rules, so we suggest capitalizing them here

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#### 4. Time for Filing<sup>18</sup>

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 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; 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.

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Comment [A2]: On 30 April 2018 David McAuley proposed to the IRP IOT that the repose issue be put "into a second 'bucket' -the bucket of rules that are not yet ready for release. This would be a de facto moratorium while the IOT does further work on the notion of repose."

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.

However, we still need to include some level of guidance to the panel on timing, and so we propose that this be included because it aligns with what was included in the public comment, and it is far easier to move to a less restrictive rule in the full update than it would be to move to a more restrictive rule. As public comment is needed in order to make a substantial change to get to no repose, if the outcome of the further public comment supports no repose and that is in alignment with the global public interest, the final set of rules will incorporate that standard.

#### 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.

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In the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief pursuant to the Bylaws, Article 4, Section 4.3(p), the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate.

#### 5A. Nature of IRP Proceedings

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible.

Hearings shall be permitted as set forth in these Interim Supplementary Procedures. Where necessary, the IRP PANEL may conduct hearings via telephone, video conference or similar technologies. The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. For purposes of these Interim Supplementary Procedures, an "in-person hearing" refers to any IRP proceeding held face-to-face, with participants physically present in the same location. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-

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<sup>18</sup> The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.



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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. 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.

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All hearings shall be limited to argument only unless the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) 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 witness testimony and cross examination.

All evidence, including witness statements, must be submitted in writing 15 days in advance of any hearing.

With due regard to ICANN Bylaws, Article 4, Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL’s timetable may result in the assessment of costs pursuant to Section 10 of these Interim Supplementary Procedures.

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#### 5B. Translation

As required by ICANN Bylaws, Article 4, Section 4.3(l), “All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for CLAIMANTS if needed.” Translation may include both translation of written documents/transcripts as well as interpretation of oral proceedings.

The IRP PANEL shall have discretion to determine (i) whether the CLAIMANT has a need for translation services, (ii) what documents and/or hearing that need relates to, and (iii) what language the document, hearing or other matter or event shall be translated into. A CLAIMANT not determined to have a need for translation services must submit all materials in English (with the exception of the request for translation services if the request includes CLAIMANT’s certification to the IRP PANEL that submitting the request in English would be unduly burdensome).

In determining whether a CLAIMANT needs translation, the IRP PANEL shall consider the CLAIMANT’s proficiency in spoken and written English and, to the extent that the CLAIMANT is represented in the proceedings by an attorney or other agent, that representative’s proficiency



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in spoken and written English. The IRP PANEL shall only consider requests for translations from/to English and the other five official languages of the United Nations (i.e., Arabic, Chinese, French, Russian, or Spanish).

In determining whether translation of a document, hearing or other matter or event shall be ordered, the IRP PANEL shall consider the CLAIMANT’s proficiency in English as well as in the requested other language (from among Arabic, Chinese, French, Russian or Spanish). The IRP PANEL shall confirm that all material portions of the record of the proceeding are available in English.

In considering requests for translation, the IRP PANEL shall consider the materiality of the particular document, hearing or other matter or event requested to be translated, as well as the cost and delay incurred by translation, pursuant to ICDR Article 18 on Translation, and the need to ensure fundamental fairness and due process under ICANN Bylaws, Article 4, Section 4.3(n)(iv).

Unless otherwise ordered by the IRP PANEL, costs of need-based translation (as determined by the IRP PANEL) shall be covered by ICANN as administrative costs and shall be coordinated through ICANN’s language services providers. Even with a determination of need-based translation, if ICANN or the CLAIMANT coordinates the translation of any document through its legal representative, such translation shall be considered part of the legal costs and not an administrative cost to be born by ICANN. Additionally, in the event that either the CLAIMANT or ICANN retains a translator for the purpose of translating any document, hearing or other matter or event, and such retention is not pursuant to a determination of need-based translation by the IRP PANEL, the costs of such translation shall not be charged as administrative costs to be covered by ICANN.

## 6. Written Statements

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A CLAIMANT’S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

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

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In addition, the IRP PANEL may grant a request for additional written submissions from any person or entity who is intervening as a CLAIMANT or who is participating 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, double-spaced and in 12-point font.

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For any DISPUTE resulting from a decision of a process-specific expert panel that is claimed to be inconsistent with ICANN’s Articles of Incorporation or Bylaws, as specified at Bylaw Section 4.3(b)(iii)(A)(3), any person, group or entity that was previously identified as within a contention set with the CLAIMANT regarding the issue under consideration within such expert panel proceeding shall receive notice from ICANN that the INDEPENDENT REVIEW PROCESS has commenced. ICANN shall provide notice by electronic message within two business days (calculated at ICANN’s principal place of business) of receiving notification from the ICDR that the IRP has commenced.

7. Consolidation, Intervention, and Participation as an Amicus

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A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an amicus. Requests for consolidation, intervention, and/or participation as an amicus 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 consolidation.

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In the event that requests for consolidation or intervention, 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 consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The

Deleted: Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. CLAIMANT’S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims<sup>22</sup>

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PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

**Intervention**

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

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

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

The IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

**Comment [A3]:** NOTE to IOT: In the process of trying to include this agreed upon concept, we recommend that it is not yet ready for inclusion. There are a few issues: (1) we do not have a definition of a "party" here, and so we need to vet if we mean a claimant (2) for intervention as of right, we need to build in some sort of tethering to the dispute; it's not that anyone can join in, it should be that those with related issues may join. We also need to consider things like filing fees and other practical issues

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**Comment [A4]:** Neither "party" nor "amicus" are defined terms

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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

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Participation as an Amicus Curiae

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an amicus curiae before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an amicus before the IRP PANEL.

All requests to participate as an amicus must contain the same information as the Written Statement (set out at Section 6), specify the interest of the amicus curiae, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed amicus curiae has a material interest relevant to the DISPUTE, he or she shall allow participation by the amicus curiae. Any person participating as an amicus curiae may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an amicus curiae.

8. Exchange of Information

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

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On the motion of either Party and upon finding by the IRP PANEL that such exchange of information 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 the Panel determines are reasonably likely to be relevant and material 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. Where such method(s) for exchange of information are allowed, all Parties shall be granted the equivalent rights for exchange of information.

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A motion for exchange of documents shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute

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along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

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

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.

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#### 9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant 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.

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

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#### 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 4, Section 4.3(o)(iv).

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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 emergency relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

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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.

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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.

#### 11. Standard of Review

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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 obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article 4, 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.

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#### 12. IRP PANEL Decisions

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IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL. 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.

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### 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.
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.
- c. Subject to Article 4, 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.

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### 14. Appeal of IRP PANEL Decisions

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

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### 15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, 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 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

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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.

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- i. (S)he/it/they may only intervene as a party if they satisfy the standing requirement to be a CLAIMANT as set forth in the Bylaws.
- ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an *amicus*.

Any person, group, or entity that did not participate in the underlying proceeding may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. If the standing requirement is not satisfied, such persons may intervene as an *amicus* if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed *amicus* 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.

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.

### **Discovery Methods<sup>1</sup>**

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<sup>1</sup> There is no existing Supplemental Rule. The [CCWG Final Proposal and] ICANN Bylaws recommend that discovery methods be considered by IOT. See ICANN Bylaws, Article 4, Section 4.3(n)(iv)(D).



# **EXHIBIT I**

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**IOS MEETING**

Tuesday, October 9, 2018 – 19:00-20:00

>> BERNARD TURNCOTTE: David, we have 5 formal members. That's enough to go ahead.

You have a are hard stop at the top of the hour. I do as well.

>> DAVID McAULEY: Anyone in the group have changes to the SOIs they want to note? I don't see any hands. I don't hear anything. I think we can proceed on.

If you're not speaking mute the phone as well.

Excuse me.

Welcome to this good group of people many I need a sip of water. I'll be a second.

Thank you, excuse me for that.

But, as you saw from the e-mail I sent yesterday to agenda the hope is to get two thing done interim rules of procedure then turn to repose and get those done in fairly quick order so we can present them to the board.

Then as the group returns to the group look at adding more members to the group. The first part is to try to get to interim rules of procedure. So, you saw the materials that Bernie sent around. And with the exception of rule 4, time for filing, these rules are pretty much where we have arrived after all of our work to date, excuse me. In order to go through the call today, I'd like to mention, and this is going to be an important call of record, as will Thursdays, my plan is to actually read the rules. I'll try to do it reasonably quickly. But also noting that our captioning is really the way that we are going the keep a record here in addition to the audio record.

Is to read the rules but I don't read the definitions. I'll simply list the terms that are defined. And I won't be reading footnotes.

With respect to rule 4, when I read that, I'll read it as it appears now, but I will also state my recollection that we have agreed to a safe harbor of sorts. Which I will describe when we get to rule 4.

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***Note: The following is the output resulting from the RTT (Real-Time Transcription also known as CART) of a teleconference call and/or session conducted into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.***

And when we get to sending language to the list, I will be happy to take on the role of providing that language.

As I read the rules, if anyone has a request of change to any rule, certainly raise your hand and mention it and once the discussion of that is done, I would like to that person to send to the list a sort of written encapsulation of what was agreed showing changes from where we are now on the list or call from Thursday. In that respect, when we get to rules 7 and 8 to joinder and discovery, I myself will have comments which I will be mentioning in my personal capacity, not as leader of the IOT.

So the goal here for the first part of this is to arrive at interim rules we can send to the board. So I plan, in just a few minutes to start reading. I'm going to ask first if anyone has any comments on this approach or anything they want to say as we dive into this.

Also, I want to remind as Bernie put in the chat, this is a 60 minute call there's a hard stop at the top of the hour for a number of us.

And I see, I'm going to go take a look, I don't see any hands. Okay, let's begin and go through the rules many by the way, I'm reading from what is known as the clean copy.

And just I'll take one second.

Number 1 is definitions. Within that group we have definitions for the following terms: A claimant is defined. Covered actions, disputes, emergency panelist is a defined term. Iana. The international center for dispute resolution. The ICDR, ICANN of course.

Independent review process is a defined term. IRP panel. IRP panel decision. ICDR rules. Procedures officer is a defined term. Purposes of the IRP is a defined term. And standing panel.

I don't see any hands. That's just a compilation of what is there.

Number -- compilation of what is there. Number 2, IDCR will apply the interim supplementary procedures in addition to IDCR rules. In all cases submitted to the IDCR in connection with article 4 section 4.3 of ICANN by I laws after the date the up rules go into effect. In the event there's any inconsistency between the interim supplemental procedures and the IRDC rules these limit supplemental rules will govern. The interim of the any amendment of them should apply in the independent review is commenced IRPs commenced prior to the adoption of implementary procedures the effect of the time such IRPs were commenced. In the event any of the subsequently amended the

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rule surrounding the application of those amendments will be defined there in. So, for rule number 2, it's on the floor and open for any comments or concerns.

I'm going go on mutagen just for a second.

Okay, thanks. I don't see any hands.

So we will proceed on.

To rule number 3, composition of independent review panel. The IRP will comprise three panelist selected from the selecting panel unless a standing panel is not in place when the IRP is initiated. The claimant should select one panelist from the standing panel and the two panelists will select a third from the standing panel. The will not take effect unless and until the standing panel signs a notice of standing panel appointment affirming it's able to serve and independent of IRCD rules. In addition to disposing relationships to the parties to the dispute IRP panel members must dispose of material relationships to ICANN or ICANN supporting organization or advisory committee. In event that the relevant IRP is niche rated or in place but does not have capacity due to other IRP commitments the claimant and ICANN should from outside the standing panel and the two panelist should select the thirist panelist in the event the two parties select the panelist cannot agree on the third panelist the IRCD rules should apply to the panelist. In the event the panelist re-sign are incapable of performing the duties of the panelist and it becomes vacant a substitute should be appointed pursuant to section 3 of the interim supplemental procedures. That's now on the floor and open for comment.

I'm looking at Chad. I see Avri will not be hear for the next meeting. I'm sorry to hear that but Avri please comment on list as you wish. And thank you robin for the information about the SOI. I don't see hands.

Yes go ahead Bernie.

>> BERNARD TURCOTTE: I notice you're having trouble with your voice if you want me to read I can.

>> DAVID McaULEY: Let me do number 5 and you take 5 A, etc.

>> BERNARD TURCOTTE: Just doing this to help out, that's fine.

>> DAVID McaULEY: I'm sorry, Bernie I didn't catch all that what was that?

>> BERNARD TURCOTTE: Yes, perfect.

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>> DAVID McAULEY: Okay thanks.

Let me go ahead and read time for filing. Rule number 4 is the next one up. An independent review is commenced with a claimant files a written file of dispute a claimant should file a written statement of dispute no more than 120 days after the claimant becomes materially aware of the effect or in-effect of arise to a dispute. The may not be filed 12 months from the date of such action or inaction in order for an IRP to be deemed to be timely filed all fees should be paid to ICDR within 3 business days as measured by the ICDR in filing with request with ICDR.

I mentioned at the top that I would note that we have discussed and agreed, not the actual words but we agreed to the concept of a safe harbor here and if I'm not mistaken the concept of a safe harbor is while these interim -- while these interim rules are applicable, the second part of this two part timing limitation, that is the 12 month limitation, would note apply so that no ones prejudiced while we are trying to sort out what we call the issue of repose.

And so, that is my understanding of where we are on this rule. And I see Malcolm's hand is up. I'll give the hand to Malcolm and -- so Malcolm please take over.

>> MALCOLM HUTTY: Thank you David. Your handling this meeting in an especially formal manner so I feel it's important I respond accordingly with a formal statement on this point. I'm always on record of having said there's not time for filing is inconsistent with the bylaws we are in dispute about this and decided to adopt the interim procedures in time resolve this dispute without holding what up what ICANN insure us is an urgent need for the bylaws in an interim basis. So I am okay with that. But only on the understanding that I want understood for the record want written into the record that in no way [indiscernible] resolve at all from the disagreement or the dispute as to the compatibility from this clause with the bylaws or it's probe tee. Thank you

>> DAVID McAULEY: Thank you Malcolm. So noted. I'm trying to be formal and I appreciate how you made your statement.

I put my hand up as a participant to note that while I mentioned the one safe harbor we discussed, I would like to ask if we need another safe harbor and I'm particularly interested in the views of other members of this group. And that safe harbor would be that in the public comments. And this would be, I'm speaking now with respect to the 120 day limitation because I believe we will put out an interim rule whether it's a rule that states a 12 month limitation or that would be under a safe harbor. If you go back to 120 day limitation that's not under a safe harbor. I wonder, what do we think in this group about

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public comments that say, in measuring that 120 days we should put in some kind of hold while people are pursuing CEP? So, I'm asking that as a question. And hoping that some people resume have views.

And if not, I can -- I would be happy to float language to list that -- that we can look at.

But I'm interested, I see Sam your hand is up. I'll ask you to take the floor.

>> SAM EISNER: Thanks David. That idea of tolling when a CEP is in process, is already part of our current process, so we can try to find the language, I don't know if it's in the CEP documentation. So we already do have language with that. And I think that we you know from the ICANN side, we support that as well.

That that time period, if 120 days, so long as your CET is commenced in the 120 days that the time period to file the IRP is extended we wouldn't have any issues with that from the ICANN side. And we can try to color out the language that we already have on that.

>> DAVID MCAULEY: Thank you Sam, I need the lower my hand. Thank you Sam, I appreciate that. I don't recall that language and I do recall that we have on our plate, after we get through the rules and repose, we do have a month o amongst other things to come up with CEP rules. So if you can look up the language or put something on list that may mention that I think it would be good the mentions that in the rule.

So, I -- Sam I'm taking that's an old hand or new hand?

>> SAM EISNER: Old hand.

>> DAVID MCAULEY: Thank you. Let's move on, Bernie can you go ahead with rule 5? D.

>> BERNARD TURCOTTE: Sure. Rule 5 conduct of in the independent review.

It is in the best interest of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and that reasonably low cost while ensuring fundamental fairness and due process consistent with the purposes of the IRP. The IRP panel should consider accessibility and fairness and efficiency. Both as to time and cost in its conduct of the IRP.

In the event that an emergency panelist has been designated to add adjudicate a request for interim relief pursuant to the bylaws article 4 section 4.3 [p], the emergency panelist shall comply with the rules applicable to IRP panel. With such modifications as appropriate.

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And I guess I'm going right -- or not?

>> DAVID McAULEY: Before -- are you going to do 5? Before you do that, let's see if there's any comments or concerns with what you read in 5. I don't see hands or hear anyone. So Bernie if you are going to take all of 5, you're welcome to continue. Or if you want to bounce 5 A and B between us let me know. I think I'm okay with 5 A. Nature of IRP proceedings. The IRP panel should conduct its proceedings by electronic means to the extent feasible. The hearings should be permitted as set forth in the terms supplementary procedures. Where necessary, the IRP panel may conduct hearings via telephone or video conference or similar technologies. The IRP panel should conduct its proceedings where the assumption that in-person hearings shall not be permitted. For the purposes of the interim supplementary procedures an in-person hearing is any IRP proceedings held face-to-face with participants physically present in the same location. The presumption against in-person hearings may only be rebutted in varied circumstances. The IRP determines that an in-person hearing has demonstrated that an in-person hearing is necessary for a fair resolution of the claim, 2 that an in-person hearing is necessary to further the purposes of the IRP and 3, considerations of fairness and furtherance of the IRP outweigh the time and financial expense of an in-person hearing. In no circumstances shall in-person agency be permitted for the purpose of producing new arguments or evidence that were not previously presented to the IRP panel. All hearings should be limited to argument only. Unless the IRP panel determines that the party seeking to present witness testimony has demonstrated that such is 1, necessary for fair resolution of the claim, 2, 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 witness testimony and can cross-examination.

All evidence including witness statements must be submitted in writing, 15 days in advance of any hearing.

With due regard to ICANN bylaw article 4 section 4.3 S the IRP panel retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP panel's timetable may result in the assessment of cost pursuant to section 10 of those in terms supplementary procedures. That concludes 5 A David over to you.

>> DAVID McAULEY: Thanks Bernie I put my hand up as a participant here. I have one minor comment in second paragraph in page 5 third line. That sentence reads "hearings should be and, etc. and technologies there's a closed parentheses that we need to eliminate there's no open parentheses. I mention I now but for similar changes, where we are just correcting typos and things like that, I don't

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think we need the mentions them to phone unless anyone thinks we should. I wanted to make that point by pointing out that one small typo. That's my only comment as participant, thank you Bernie.

And so I don't see anyone else's hands or voices. So Bernie go ahead and press on.

>> BERNARD TURCOTTE: Thank you. 5 B translation. As required by ICANN bylaws article 4 section 4.31 or L, I'm uncertainly all IRP proceedings should be administered in English as the primary working language with provision of translation when needed it shall include written documents and transcripts and interpretation of oral proceedings. IRP panel should have direct discretion to determine 1, when the claimant has a need for translation services, 2 what documents and or hearings that need relates to and 3, what language the document hearing or other matter or event shoe shall be translated into.

A claimant not determined to have a need for translation services must submit all materials in English with the exception of the request for translation services if the request includes claimants certification to the IRP panel. That's submitting the request in English would be unduly burdensome some in determining whether a claimant needs translation the IRP should the spoken written and English. And to the extent the claimant is represented in proceeds by an attorney other agent that representatives proficiency in spoken and written English the IRP panel should only consider requests from translation from to English and other 5 official languages of the United Nations. IE French, Russian, or Spanish.

In determining when translation of a document hearing or other matter or event shall be ordered, the IRP panel shall consider the claimants proficiency in English as well as the other requested language from among Arabic, Chinese, French, Russian or Spanish. The IRP panel shall confirm all material proportions of the record of the proceeding are available in English.

In considering requests for translation the IRP panel shall consider the materiality of the particular document hearing or other matter or event requested to be translated as well as the cost and delaying occurred by translation pursuant to ICER article 18 on translation. And the need to insure the medical fairness and translation of ICANN bylaws article 4, 4373 and 4. And otherwise ordered by the IRP panel, cost of need based translation as determined by the IRP panel shall be covered by ICANN as administrative cost and shall be coordinated through ICANN serve could provider. Even with a determination of need based translation if ICANN or the claimant coordinates the translation of any documents to its legal, such legislation of the legal cost and not an administrative cost born by ICANN. And in the event that either the claimant or retains a translator for the hearing or other matter, as such retention is not pursuant to determination need based translation by the IRP panel, the cost of such translation should not be charged as administrative cost to be covered by ICANN. David, over to you.



>> DAVID McAULEY: Thank you Bernie that was quite a lot.

That one is now open and on the floor. So comments? Questions about it are certainly welcome. I see Malcolm hand up please, go ahead.

>> MALCOLM HUTTY: Thank you I had two things. Firstly the authoritative language for the decision. I don't see, this is already new language that the currently not considered I don't see it stated where that the authoritative decisions shall be in English for the purposes of future reference. It says that the English will be the primary working language. But that's not the same as the authoritative text of the decision.

So I think that should be added.

My second is, the final sentence, if ICANN retains translator, even if it hasn't been by the claimant that will be a cost that is not in the administered cost and can be assigned to the claimant, that doesn't seem right.

For example, if ICANN picks a panelist that requires translation, claimants could end up picking up the crux of that. This would be a significant hurdle in the way of per say claimants.

So I would say claimants should only be exposed to the cost of translation if they request it.

>> DAVID McAULEY: Thank you Malcolm. And the third point.

>> MALCOLM HUTTY: Those were my only points.

>> DAVID McAULEY: So with respect to the authoritative decision point, I see -- before I start commenting I see Sam's hand is up. Go ahead Sam.

>> SAM EISNER: This is Sam Eisner for the record. Malcolm if there was a need for translation at the panel level, that would, I think that would be covered by the administrative cost of the hearing. So the cost that we would envision the claimant to be responsible for would be for example, you could say that someone would -- if they wish to control the translation of their briefing document or something because of the way it's translated might be important for the statement of their legal argument. That would be something that the claimant would be responsible for. But other translation for moving the process along would be considered administrative. That's where the administrative cost comes in. Because ICANN there's already a requirement for ICANN to be responsible for administrative costs. So

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my sense is we don't need to add anything to cover that. So you can, if you want the read the rules again with that in mind, let me know. And see if you want the add anything else.

>> MALCOLM HUTTY: Can we just have clarification of what you were thinking of a circumstances in which ICANN would retain a translator at its own request, not at the claimants request, at which that would not be considered an administrative cost?

>> SAMANTHA EISNER: So, there could be a possibility that ICANN, separate from the administrative cost in the proceeding, if ICANN needed to provide a translated version of its briefing papers, that because that is a -- because the statement of it, and the way that claims are presented, might be really essential to how ICANN is stating it's case. That would be something that wouldn't be an administrative cost, that would be a legal cost.

>> MALCOLM HUTTY: I don't understand this point. Could you please give me some examples to why this -- give some example that would give some reason as to why a claimants, the circumstances in which a claimant would be properly exposed to a translation that ICANN is doing for its purpose bus not because the claimant asked for it.

>> SAM EISNER: The claimant is responsible for cost if ICANN made the translation?

>> MALCOLM HUTTY: If these are legal costs rather than administrative costs, then the claimants particularly exposed to having the cost shifted on to them vendor.

>> SAM EISNER: , I imagine if they are choosing -- if the claimant for example chose to control the translation of it, as opposed to using the translation service that would be made universally available, then that would be something that the claimant would then assume as a legal cost.

It doesn't mean they have to use their own translation service to do that. But if they wanted to control how the translation was prepared and presented, within the IRP, then that would be their own legal cost. They don't have to do it that way.

>> DAVID McaULEY: Can I interrupt for a second? Malcolm can I make a at the same time? It's David speaking for the record. Malcolm when you stated your concern about this part of the translation you mentioned it stemed from the last sentence.

And the last sentence owns with the words the cost of such translation shall not be charged as administrative costs to be covered by ICANN. Is it possible if that language was simply to expand it and

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say the cost of such translation would not be charged as administrative costs to be covered by ICANN if the translation was requested by the claimant and if the translation was requested by ICANN it wouldn't apply under here any way. Something like that. Is that what you're getting at.

>> MALCOLM HUTTY: It's broadly what I'm getting at but it's much simpler and more restrained edit that would achieve it. The sentence begins additionally in the event that either the claimant or ICANN retains a translator. If we delete ICANN, yeah.

Okay.

>> DAVID McAULEY: Uh-huh.

>> MALCOLM HUTTY: Then wouldn't that cover it?

>> DAVID McAULEY: Sam what do you think?

>> SAM EISNER: So there is the ability and the reason it makes sense to remove it now, although I think this is something that we should talk about, do we remove part of this if we are having issues moving it forward? So we can get interim set done. Or do we do more revision of it as we are working on the final set. There's the provision for ICANN to gain cost shifting in the event of, I forget the language in the bylaws in the event of some bad faith from the claimant.

So there's benefit in both ICANN and the claimant understanding which parts of the add man strive costs and which parts are the legal costs that are aligned to the proceeding.

And so, just as a claimant would have a legal cost, if it were to choose to move forward, I think we are understanding each other on that part, there's also the possibility that ICANN would absorb cost that are not truly administrative costs in there. You know if ICANN wanted specific control over how a translation was done, it would be the same as a claimant. So I don't think that we should remove ICANN from that, either.

>> MALCOLM HUTTY: Sam I have no problem with what you just said there.

Yeah.

My only concern is that limited to ICANN incurring translation costs other than, for the benefit of the claimants. If ICANN has other purpose why it needs translation done, that should not form part of the legal costs that is essentially exposed to whether the claimants exposed to ICANN's operating costs.

Only things done for the translation done for the to meet the needs of the claimant should be potentially chargeable to the claimants and should be only chargeable with the claimants consent.

If the claimant requests translation, absolutely for that to be something they are potentially exposed to cost of that, that's perfectly reasonable. I have no objection there.

>> SAM EISNER: I think the legal cost shifting itself is kind of a broader conversation because into bylaws it can go either way. So I think that if there's that need, it's not actually ICANN's operating cost, it's the cost of defense just as there's a cost of the claimant bringing that. So I think you know if there's consent, the consent kind of goes all the way around, I would think. I'm not sure we want go to consent place on that.

>> DAVID McaULEY: Well it's David speaking again, what I'd like to -- what I'm hoping to achieve is to get a rule done. So I think from what I hear but I don't know this I think it's possible you Malcolm and you Sam might actually be largely in agreement.

But, that it would take some work to find the expression of that agreement. So I'm wondering if I can ask you two to work on this offline and come back on list? Is that -- and Malcolm's offered, Malcolm mentioned one possible edit is to simply remove the words "or ICANN" maybe the way that could work Sam is you say that wouldn't work for this reason or that reason. Would you two be willing to work on this offline and present it on Thursday?

>> MALCOLM HUTTY: Absolutely David very happy to.

>> SAM EISNER: Me too.

>> DAVID McaULEY: That's an action item for you guys. I think it sounds to me you might be very closely in agreement, but the expression of it is hard.

With that done, let me ask Malcolm the authoritative decision, the language of that should be specified. If I'm not mistaken that was your other comment. If that is the case my suggestion would be that would be in English.

>> MALCOLM HUTTY: Yes.

>> DAVID McaULEY: So that's an action item for Bernie could you make a note of that? That I'll take -- that's something I'll take on. But I'm not able to make notes right now. If you would mention that to me.

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So if there's no other hands, I see Malcolm and Sam you still have hands up. Unless those are new, I'll move on.

Excuse me.

And so it's my turn to read, we will move on to written statements, number 6 we have 23 more minutes remaining. A claimant's, this is written statement section 6, the dispute claims that give rise to a particular dispute but such claims are independent or alternative claims. The initial written submissions of the parliamentary shall not exceed 25 pages double spaced in 12 font in available evidence of the claimants claims or claims should be part of the initial written submission. The evidence is not included when calculating the page limit. The parties may submit expert evidence in writing and that's one right to reply the IRP panel may request additional from the review, the board the supporting or other parties.

In addition, the IRP partner panel may grant a request for additional who is intervening as a claimant or who is participating as an amicus on the compelling bases for a request. In the event the IRP panel such additional written submissions shall not exceed 15 pages, double spaced in 12 point font any dispute from process decision expert panel that is claimed to be articles of incorporation or bylaws as specified bylaw section 4.3 BIII B 3 any person or group entity previously identified in contingent set regarding the issue under consideration within such party panel shall receive notice from ICANN the independent review process has commenced. ICANN shall provide notice by electronic notice within two business days calculated at ICANN's personal place of business in receiving notice from IDCR that commenced that's rule 6.

Comments or questions welcome?

And I see Kate Wallace has her hand up.

>> KATE WALLACE: Thanks David this is Kate Wallace from Jones Day for the record. This is thoughts from an observer from the last sentence of the provision about the notice that ICANN shall provide notice by electronic offer for consideration that we reflect on the fact this is mandatory language and in some instances it might be difficult to comply with. Instead perhaps we can consider I suppose it would be more of a reasonableness standard. Something like did he ever to provide notice or under take reasonable efforts to provide notice. By electronic message. Which would allow for circumstances when perhaps notice couldn't be effect waited for reasons of contact information not being perfect or otherwise.

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>> DAVID McAULEY: Thank you Kate. Let me react to that as a participant and not as the lead. And that is, two things, one is I would carbon you to send language, suggested language to the list on or before the Thursday call to address that. And I take it that the point that you're making is to address instances where the notice cannot be effect waited. And I think that's fair. But when you use a word liken did he ever and again I'm speaking as a participant, I think it should be noted that but for inability to get done, maybe it's a technical glitch, I don't know. That would be my suggestion. That it be to are given where it's simply impossible to achieve. But if you kindly come up with the language and submit it, would you be willing to do that.

>> KATE WALLACE: Sure I'd be happy to do that.

>> DAVID McAULEY: Okay thank you. Any further comments or questions on rule 7?

Seeing none, and hearing none, let's move on Bernie you're back up with rule 7.

>> BERNARD TURCOTTE: All right, rule 7 consolidation intervention and participation as an amicus.

The procedures officer shall be appointed from the standing panel to consider any requests for a consolidation, intervention and or participation as an amicus. Requests for consolidation and intervention and or participation as an amicus are committed to the reasonable discretion of the properties officer. In the event that no standing panel is in place when the procedure officer must be selected, a panelist maybe appointed by the ICDR pursuant to the national arbitration rules related to the appointment of panels for consolidation.

In the event that requests for consolidation or intervention the restrictions on written states set forth in section 6 shall apply to all claimants collectively for 25 pages exclusive of evidence and not individually unless otherwise modified by the IRB panel and it's discretion consistent with the purposes of the IRP.

Consolidation. Consolidation of disputes may be appropriate when the procedures officer concludes that there's a sufficient common nucleus of operative fact among multiple IRPs such that joint resolution of the disputes would foster a more just and efficient resolution of the disputes than addressing each dispute individually. If disputes are consolidated each existing dispute shall no longer be subject to further subject consideration. The procedures officer may in its discretion order briefing to consider the probe tee of the consolidation of the disputes.

Intervention, any person or entity qualified to be a claimant pursuant to standing requirements set forth in bylaws may in IRP with admissions to the policy after p officer as provided below. The person, group

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or entity participated in an you understand lying proceeding an ICANN bylaws section 43 B 3 AI 3 intervention is appropriate to be so the when the perspective participant does not already have pending related dispute and the potential claims of the prospective participants from the common combing louse of operative facts based on such briefing has the procedures officer made order at its discretion. In addition, the supporting organization which developed a consensus policy involved when a dispute challenges a material provision or provisions of an existing consensus policy in hole or in part shall have a right to intervene as a claimant to such challenge. Supporting organizations rights in this respect shall be exercisable through the chair of the supporting objection.

Any person group or entity who intervenes as a claimant pursuant to this sections will become a claimant in the existing process and have all of the rights and responsibilities of the other claimants in that matter and be bound to the outcome to the same extent as any other claimant.

All motions to intervene or for consolidation shall be directed to the IRP panel within 15 days of the initiation of the independent review process. All requests to intervene or for consolidation must contain the same information as the written statement of the dispute and must be companied by the appropriate filing fee.

The IRP panel may accept for review by the procedures officer any motion to intervene or for consolidation after 15 days in cases where it deems that the purposes of the IRP are furthered by accepting such a motion. The IRP panel shall direct that all materials relayed to the dispute be made available to entities that have intervened or had their claims consolidated unless the claimant or ICANN objects that such disclosure will harm such confidentiality, personal data or trade secrets in which case the IRP panel shall rule on objection and provide such information as is consistent with purposes of the IRP and the appropriate preservation of confidentiality as recognized in article 4 of the bylaws.

Participation as an amicus any person or group or entity that has a material interest to the relevant to the dispute but does not satisfy the standing requirements for the claimants set forth in the bylaws may participate as a amicus before the IRP panel. Subject to the limitations set forth below. A person, group or tenant tee that participate paid in an underlying proceeding and process for ICANN bylaws we no that one, shall be deemed to have material interest relevant to the dispute and may participate as an amicus before the IRP panel.

All requests to participate as an amicus must contain the same information as the written statement that out in section 6 specified the interest of the amicus and must be companied by the appropriate filing fee. If the procedures officer determines in his or her discretion that the proposed amicus has a

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material interest relevant to dispute, he or she shall allow participation by the amicus curia. Any person participating as a amicus curia may submit to the IRP panel written briefing on the dispute or on such discrete panel questions as the IRP panel may request briefing in the discretion of the IRP panel and subject to such deadlines and page limits and other procedural rules as the IRP panel may specify in its discretion. The IRP panel shall determine in its discretion what materials related to the dispute to make available to a person participating as an amicus curia.

Over to you David.

>> DAVID McAULEY: Bernie you got the short extra when it came to sections to read. So thank you very much for that.

I had my hand up because I want to speak as a participant here.

And I do have concern about this and what I believe is that on joinder intervention, whatever we are going the call it it's essential that a person or entity have a right to join an IRP if they feel that a significant -- if they claim that a significant interest they have relates to the subject of the IRP.

And that adjudicating the IRP in their absence would impair or impede their ability to protect that.

And in addition when there's a question of law or fact that the IRP is going the decide that is common to all that is are similarly situated.

And especially given the finality of these kinds of proceedings it's my view that intervention, whatever term we are using needs to capture that.

So I'm putting that on, I would be happy to provide specific language with respect to this concept tomorrow on list. And we talk about it on Thursday. But that's what I wanted to mention as a participant with respect to this particular rule.

So I'm note you.

>> NIELS TEN OEVER: Go to put my hand down and ask others if they want to comment on what I said or anything else that Bernie read in this rule 7.

>> I just went on mute for a second.



I wanted to ask you to elaborate, as to what about the text, I mean understood the point you were making and I feel I agree with it.

But I wasn't clear what about the text gave rise to a concern that that wasn't be satisfied in the text.

Is it that the role of the procedures officer that you're concerned about? Or what is it?

>> DAVID McAULEY: If you for the question. I didn't think it was clear that that would be a matter of right for someone that makes that claim.

You know the IRP panel can adjudicate it and say okay thank you for your claim but no.

But I think that we have to be clear what we are stating. I didn't think it was clear. And when I thought about this, I mentioned this a couple of months ago I didn't put it in the terms I just did, I just put it much more generally. But when I thought about it I looked at U.S. federal rules of procedure in this respect and those rules are not atypical from rules you will find in a fair number of countries around the world.

So I relied in part on that. So it's just a matter of clarity. So what I would do in language that I would put on the list is I would hope I would be would offer to make it more clear.

So, Malcolm you're welcome to reply or anyone else to the comment on this. If not, Malcolm is your hand still -- do you still want to comment?

>> Sorry, no. I look forward to hearing from you.

>> DAVID McAULEY: So it's my turn to read I go exchange of information rule number 8. I don't see any hands. By the way, it's now 8 minutes before the hour. Let's get through this. And then may be summary dismissal then we will call it quits. But there's by in large we are through the meat of it and there's only several pages left. So on Thursday we may not have a full call but we will discuss some administrative stuff I'll put in email. Reading number 8, exchange of information. IRP panel should be guided by considerations of accessibility and fairness and efficiency a as to both time and cost in its consideration of request for exchange of information on the motion of either party and upon finding of the IRP panel that such exchange of information 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 party custody and control that the panels are likely to be relevant to the material to the resolution of claims and or defenses in the dispute and are

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not subject to attorney privilege and work product doctrine and otherwise protected from applicable law.

Where such methods or exchange of information are allowed all parties granted the equivalent rights or exchange of information.

Motion or exchange of documents should contain specific document and classes of documents or other information sought to subject of dispute along with a explanation of why documents are likely to be relevant and material to the resolution of dispute. Depositions and interrogatories to dispute will not be permitted. In the party expert opinion such opinion must be provided in writing to the other party must have the right of apply to such opinion with a expert opinion of its own.

So, I will say that concludes the reading of that. I'm going to put my hand up as a participant not as lead and ask if anyone else has comments. I don't see any other. And so I will comment as participant. This is in part related to the joinder I just mentioned. And what I suggest and what I think we need is to tighten the rule to ensure that an IRP panel cannot disclose materials or information amongst joined parties that will compromise competitive confidentiality. I think it's possible to gain the system through intervention. But I think we should tighten up the rule.

Make sure that can't happen.

And again, I'll provide language probably by tomorrow that would clarify this and we can discuss it on Thursday.

Or on list.

Does anyone have any comment to that? Or anything else about rule number 8? Gnat seeing or hearing any, I'll ask you Bernie to go through rule number 9, then we will call it quits.

>> BERNARD TURCOTTE: Yes sir, rule 9, summary dismissal IRP panel may summary dismiss any request for independent review where the claimant has not demonstrated it's been materially effected by a dispute. To be materially effected by a dispute the claimant must suffer injury or harm that is causally connected to the violation an IRP panel may also sum rarely dismiss a request for independent review that lacks substance or is frivolous or review.

>> DAVID McAULEY: So rule number 9 is now open for comments or questions? I don't see any hands or hear anything. Before we finish the call, let me just harken back to one thing that Bernie read under

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rule number 7. And it was paragraph, the second paragraph, he read it directly but that paragraph currently reads in the event that requests for consolidation or intervention comma the restrictions on written statements set forth in 6 shall apply. I believe it's missing two words, are granted. I think that the request for consolidation or intervention are granted the unwritten statements shall apply if nobody objects that we will make a note to that as well. We are getting to wind up the call fairly early. By it's a fair break point after number 9 and before we get into interim measures of protection. Anyone have any comment or question or concern they would like to express at the point?

If not I'd like to say two things, one, thank you all for attending. And please I encourage you all to be on the call on Thursday. I recognize Avri may not be able to be. But I encourage us all to be on the call and, also, on list. And to those going to ICANN 63, I look forward to seeing you all there. Thank you for your participation. I believe we are done. Thank you Bernie. I think we can call it off.

# **EXHIBIT J**

# [IOT] Text suggestions following call on Tuesday

**McAuley, David** Contact Information Redacted

*Thu Oct 11 15:57:11 UTC 2018*

- Previous message: [\[IOT\] IOT - DAIRs and captioning for meeting of 20181009](#)
- Next message: [\[IOT\] IOT - Meeting - 201081011 - DAIRs and raw captioning](#)
- Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

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Dear members of the IRP IOT,

On Tuesday's call I promised to suggest some text to reflect the safe harbor on the 12-month portion of the 'Repose' rule (Rule 4 Time-for-Filing) and on the rules 7 and 8 that I mentioned.

My suggestions are attached.

Hope to see you on the call in several hours time.

Best regards,

David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

Contact Information Redacted

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An HTML attachment was scrubbed...

URL: <<http://mm.icann.org/pipermail/iot/attachments/20181011/f7cfbbd7/attachment-0001.html>>

----- next part -----

A non-text attachment was scrubbed...

Name: DMc.IRPrules.Joinder etc.docx

Type: application/vnd.openxmlformats-officedocument.wordprocessingml.document

Size: 19960 bytes

Desc: DMc.IRPrules.Joinder etc.docx

URL:

<<http://mm.icann.org/pipermail/iot/attachments/20181011/f7cfbbd7/DMc.IRPrules.Joinderetc-0001.docx>>

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- Previous message: [\[IOT\] IOT - DAIRs and captioning for meeting of 20181009](#)

- Next message: [\[IOT\] IOT - Meeting - 201081011 - DAIRs and raw captioning](#)
- **Messages sorted by:** [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

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[More information about the IOT mailing list](#)

Dear members of the IRP IOT,

On Tuesday's call I said I would float specific language for a safe harbor with respect to the 12-month overall time limitation in Rule 4 (Repose) and specific language following my comments on Rules 7 and 8. Here below are the suggested texts:

With respect to Rule 4, I propose adding this language at the end of the current first paragraph of the rule:

*During the pendency of these supplementary procedures as "Interim Supplementary Procedures," however, no CLAIMANT shall be time-barred from submitting a written statement of a DISPUTE due solely to passage of the twelve (12) months period described in the second part of the immediately preceding sentence, it being understood that the IRP Implementation Oversight Team continues its consideration of this aspect of such sentence for treatment in the Supplementary Procedures to follow in due course.*

And here below shown in 'track-change' format are my suggestions for rules 7 and 8.

#### **Rule (7): Consolidation, Intervention and Participation as an Amicus**

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, Rrequests for consolidation, intervention, and/or participation as an *amicus* 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 consolidation.

In the event that requests for consolidation or intervention, 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 consistent with the PURPOSES OF THE IRP.

#### **Consolidation**

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

#### **Intervention**

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

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

In addition, any person, group or entity shall have a right to intervene as a CLAIMANT where (1) that person, group or entity claims a significant interest relating to the subject(s) of the INDEPENDENT REVIEW PROCESS and adjudicating the INDEPENDENT REVIEW PROCESS in that person, group or entity's absence might impair or impede that person, group or entity's ability to protect such interest, and/or (2) where any question of law or fact that is common to all who are similarly situated as that person, group or entity is likely to arise in the INDEPENDENT REVIEW PROCESS.

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

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### **Participation as an *Amicus Curiae***

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

### **Rule (8): Exchange of Information**

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

On the motion of either Party and upon finding by the IRP PANEL that such exchange of information 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 the Panel determines are reasonably likely to be relevant and material 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 (including, without limitation, disclosures to competitors of the disclosing person, group or entity, of any competition-sensitive information of any kind). Where such method(s) for exchange of information are allowed, all Parties shall be granted the equivalent rights for exchange of information.

A motion for exchange of documents 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.

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

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.

# **EXHIBIT K**

## IRP-IOT MEETING

Thursday, October 11, 2018 – 19:00-20:00

>> DAVID MCAULEY: Thank you for that. And welcome to Kavouss who just joined us. We are a light group again but I believe we have enough the more forward. This is two calls in quick succession. I'm grateful to the folks that have been able to make it. And let me restate, in just a second, what I hope to -- that we can pursue in the call. First, even though the time is short between calls, let me ask if anybody has any statement of interest change that they want to note.

Not hearing anything or seeing any hands we can press on.

A brief agenda to -- for this call, I think would go the lines of that Bernie and I would continue reading the interim rules just as we were doing the other day. So that we have within the two calls a complete reading on if what the interim rules state. And then after that, to address suggested tweaks that we mentioned in the call on Tuesday. And addressing any that might come up today.

3, to then talk about how to start approaching the issue of repose. It's my assumption that what we will do with the interim rules is we won't be able to finish them on this call because of tweaks and allowing several days or such for people that are not on the call to way in.

But, taking into account that they already have some time. And so to finish those on list and perhaps to given the issue of repose, at least in respect of how to address it. How we plan to address going forward and finally any administrative matters.

So unless anyone wants to make a comment or have a question in the interim, we are going to get started with the reading of the rules.

And I will take advantage of Bernie's kind offer from the other day, which is continuing and mention that we are up to rule 10. And ask Bernie to go ahead and take rule 10 then I'll read and he and I will alternate.

>> BERNARD TURCOTTE: Glad to help out David.

All right.

>> DAVID MCAULEY: Thank you.

>> BERNARD TURCOTTE: All right let's fines ourselves where we are.

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*Note: The following is the output resulting from the RTT (Real-Time Transcription also known as CART) of a teleconference call and/or session conducted into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.*

Interim measures of protection. Rule 10.

A claimant may request interim relief from IRP panel or if an IRP panel is not yet in place from the standing panel. Interim relief may include perspective relief interlocutrice relief of declaratory and injunctive relief and 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 it's described in ICANN bylaws article 4 section 4.3 oiv.

And emergency panelist shall be selected from the standing panel to adjunct requests for interim relief. ICDR rules relating to appointment of panelists for emergency relief. Interim relief may only be provided if the emergency MANAL panelist determines that the claimant has established all of the following factors 1, harm from which there will be no adequate remedy in the absence of such relief.

2, either A, likelihood of success on the merits or B, systole serious questions related on the merits and B, a balance of hard ships tipping to relief.

Interim relief maybe granted on Ex Parte basis in circumstances that the emergency panelist deems exigent. And any party whose arguments were not considered prior to the granting on of such interim relief may submit any opposition to such interim relief, and the emergency panelist must consider I such agents as soon as reasonably possible David over to you.

>> DAVID McAULEY: Thank you Bernie, so that rule 10 is the floor if anyone has a comment, question, concern, please go ahead and speak up now.

And not seeing any hands or hearing any, let's press on to rule 11 standard of review. Which I will read through. I'm taking one quick look again.

Each -- 11 standard of review. Each IRP panel should conduct an objective de novo examination of dispute. With respect to covered actions the IRP panel shall make finding of fact to determine when covered action constituted an action or I believe action B all business puts shall be divided decided in compliance with ICANN's articles and bylaws.

>> C, for claims arising out of the boards exercise of fiduciary duties the IRP panel shall not replace the board's reasonable judgment with its own.

D, with respect to claims that ICANN has not enforced its contractual rights with the respect to IANA naming function contract, the standard of review shall be naming function contract, where the alleged breach has resulted in material harm to the claimant.

IRPs initiated through mechanism contemplated at article 4, section 4.3 aiv of ICANN's bylaws shall be subject.

End of rule 11.

That is now on the floor. And before I ask for questions or comments, Brenda can I ask if you are having any luck trying to get Kavouss back into the meeting?

Brenda may be off trying to get Kavouss.

>> BERNARD TURCOTTE: I believe if she's not answering, these what she's doing.

>> DAVID McAULEY: Let's hope that works out.

So on rule 11 are there any comments, concerns, questions? And not seeing hands or hearing any, we can go to rule 12 Bernie. Over to you.

>> BERNARD TURCOTTE: All right, rule 12, I were panel decisions. IRP panel decisions should be made by simple majority of IRP panel. If any IRP panel member refuse to sign the panel shall endeavor to provide a written statement for the reason of for absence such signature.

End of rule 12.

>> DAVID McAULEY: Thank you Bernie. Any comments, concerns, questions there? A very short rule.

Brenda are you back? I see you say in chat that Kavouss' line did not pick up. Are you back with us?

>> BRENDA BREWER: Yes I'm here.

>> DAVID McAULEY: Can I ask you to keep trying on a reasonable basis?

>> BRENDA BREWER: Termly.

>> DAVID McAULEY: Thank you for all efforts to get him back to us.

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>> BRENDA BREWER: He hasn't joined at all. He had not responded to the invite. But as a courtesy I do try the call out to him, just in case.

>> DAVID McAULEY: Thank you I saw him in Adobe for a while. That was me dialing out to him. I had to enter his name.

When you see the little green arrow next to someone's telephone, that means they are being dialed out to. But I will try again.

>> DAVID McAULEY: Thank you very much.

So then we will move on to rule 13.

Form and effect of IRP panel decision. A IRP panel decision shall be made in writing promptly by the IRP panel based on the documentation and supporting materials and arguments submitted by the parties.

C, subject to article 4 section 4.3 of ICANN's bylaws all IRP panel shall remain public and shall reflect the well reasoned application of the how to dispute was resolved in compliance with ICANN's articles and bylaws, as understood by the light and prior to IRP panel and normals of applicable law. Period, end of rule 13.

Comments? Questions? Concerns?

And I see Kavouss is in with a green arrow. So thank you Brenda for continuing to try.

>> BRENDA BREWER: You're welcome.

>> DAVID McAULEY: Any concerns with that rule? I don't see any hands or hear any comments.

>> BERNARD TURCOTTE: Date Ed David? I have my hand up.

>> DAVID McAULEY: Sorry, I didn't see it.

>> BERNARD TURCOTTE: No problem. That's because I'm such a small guy in this.

I was thinking when you were reading this, that may be we could address Malcolm's issue from the last meeting about insuring that the decisions are posted in English. Maybe it would be a better place to put that in here?

>> DAVID McAULEY: Thanks Bernie, and yes I forgot to do that tweak. I think I took that on. And I think that's a fair comment unless Malcolm has any concerns. I can add in the here. I'll put it on list. Some language that says, probably under 13 A that it would be in English.

And so, thank you, thank you for that Bernie. By the way, that reminds me that compliments to Bernie for decisions, action items and request from the call. That works very well, that this whole process is working very well. So Bernie if you could mention that whole thing just to remind me.

So we are over to rule 14 then it's up to you Bernie then on rule 14.

>> BERNARD TURCOTTE: Yes sir.

Appeal of IRP panel decisions.

An IRP panel decision maybe appealed to the full standing panel sitting within 60 days of issuance of such a decision. En banc standing panel will be reviewed such appealed IRP panel decision based on a clear error of judgment or application of an incorrect legal standard. And the en banc the procedures officer with the respect of procedures consolidation. End of rule 14.

>> DAVID McAULEY: Thank you Bernie. And same, requests or comments. Please speak up now. I don't see hands and I don't hear anything. So we will read on to rule 15. I'm looking one more time.

Okay, rule 15. Costs.

The IRP panel shall fix costs in its IRP panel decision. Except as otherwise provided in article 4, section 4.3 eii of ICANN's bylaws each party on an IRP proceeding shall bear it's own legal expenses, except with the ICANN shall bear all costs associated with the community IRP and as defined in the article 4 section 4.3 d. The ICANN's bylaws. Including the costs of legal council. And technical experts. And in the event it identifies a losing parties claim or defense as frivolous or abusive. End of rule 15 and that's the end of the reading of the rules right now. Concerns or comments about that particular rule would be entertained now.

And I'm looking for hands and or listening and I don't hear or see anything.

So, Brenda I take it you're not having any luck getting in touch with Kavouss.

>> BRENDA BREWER: Correct David, thank you.



>> DAVID McAULEY: Thank you, and thank you for trying.

So we have gotten through the rules. We have some tweaks, we have not identified any on this call with the exception of the one Bernie mentioned with putting the language of decision that Malcolm mentioned Tuesday into I think it was section 13 that we justified.

So Bernie if you would note that in the DAIR report, I will take a swot at that.

Then we new move on to, as I mentioned in the agenda too, the suggested tweak coming out of Tuesday's call. Malcolm's hand is up, go ahead Malcolm and take the floor.

>> MEGHAN HEALLY: I was going to offer language now, for the record if you would like for English copy thing, but I don't have to if you don't like.

>> DAVID McAULEY: Please go ahead and Bernie if you would take notes.

>> MALCOLM HUTTY: The decision of the IRP panel should be posted in English. If the decision is translated into other languages, the English language version should be the authoritative text.

>> DAVID McAULEY: Thanks Malcolm. Where would that appear?

>> That appears in article 13 under form of the decision, it's form and effect of the decision is the article tags of article 13. And you pointed out, that's the recommend precise place to put it. 13 D. You subparagraph under that.

>> DAVID McAULEY: Thank you.

So does anyone -- Malcolm, did you want the say something else?

>> I said you're welcome.

>> DAVID McAULEY: Okay thank you. Any concerns or comments with the suggested tweak that Malcolm just offered?

And I don't see any hands. Malcolm I take it that's your old hand. And not hearing any, so Bernie you kindly make a note of that, you can offer that tweak as discussed.

And so, on the moving to tweaked language.

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In the interim between Tuesday's call and today's call, we very kindly got a comment from Kate, thank you very much Kate. And then also I sent an email to the list several hours ago about provisions that I said I would take.

And so I'd like to start with mine first because I'd like to go in the order of them as they appear in the rules.

And I offered a safe harbor language with respect to the 12 month time limitation in rule 4 time for filing. I'll read it here and then ask if anyone has any comments.

What I wrote and suggested was the following.

During the dependency of the supplementary procedures as interim supplementary procedures no claimant is time barred are few a written statement due solely to passage of the 12 months period of the second part of the immediately preceding sentence being understood that the IRP implementation of this aspect of such sentence for treatment in the supplementary treatment of the procedures to follow in due course.

Anyone have comments or concerns or questions? Sam your hand is up go ahead.

>> SAM EISNER: Thanks David. So I think we have, I know from ICANN side we have some concern, if you go back to some of the principles we put forth in how the IRP, the interim rules would work, it was to not make major changes to what was posted to public comment if they were still under significant deliberation by the IOT. And so the -- with change that you proposed to caveat that has been proposed that actually makes a significant change.

I think that there's some room to tie back dates for period of time to when the new about bylaws went into effect. What away we don't want to do through this is to create the ability for someone who had a claim that was right before the bylaws went into effect but didn't take advantage of an IRP under the old by laws to now still have the opportunity to come forward. So I think we can do something to time back to possibly account 1st, 2016 for a shored period of time. I think maybe October, and then tether it back to 120 day window.

We've through the footnote that we've offered we identified that if the repose period looks different in the final set of rules ICANN would agree to putting in whatever transitional language would need to be put in to not time our people who could have filed under a of repose.

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So we agreed that we are not going to prejudice people who have something that came up under the -- who may have been able to file if the period of time was longer, if there was agreement that the period of time should be longer. That was our commitment, we put it in here, we stand by that.

But I think that the language that you've offered is -- it opens up far too much for -- to allow people to go back really far and isn't the fact that it's not even tethered to the current form of the bylaws creates some concern for us.

>> DAVID McAULEY: Thanks Sam, it's David speaking. I put my hand up because I'm going to be speaking at a participant and not as the lead. I was -- I should have mentioned that when I started speaking about this. Because I offer that language as a participant, not as a lead. That's the way I was speaking about it on Tuesday's call. Let me make that part clear.

I guess I have two comments. One is I didn't -- you're right, you picked up on the fact there maybe claims from the old by laws, etc. Didn't actually I didn't even think on if of that. Much to the extent that creates an issue, I would suggest that you come to the list with language -- come to the list with language on that.

But then the second point I would make is what I'm trying to do is simply say that is to create a recognition that the IOT is discussing repose. That we have not decided to repose yet. And I thought that I was being consistent with what you had offered, you know whenever you first offered it, that while we were deciding the issue someone wouldn't be prejudiced on the second aspect of the time bar rule.

It strikes me that we will probably finish in my opinion, my estimation, I think, we will probably firm the repose rule insofar as sending something to the board prior to the end of the year. Prior to getting reconstituted or bulked up IRP. I think that's reasonable. We have spoken about it so much that I sort of harken back to the email Malcolm sent in the middle of August. There's three possible ways we can move forward on this. So this may not have any really any impact at all you understand the new bylaws. Having said all that, I would ask you to come to listed with language that sort of builds on are on just completely does away with what I did and make the statement. Actually put words there that we can parse. So that's my comment. Thank you very much. And I will then back as lead, I'll recognize Malcolm. Your hand is up, go ahead.

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>> MALCOLM HUTTY: Thank you. I was going to note that Sam just said that ICANN is committed to make sure that people weren't prejudiced by this rule, if the rule is subsequently changed in the final -- in the final rules.

That's great. So why don't we keep it simple and just say that.

Just say that this -- that whether there should be a concept of repose is still under review. And that in the event that it is changed, we will introduce transitional language to insure that nobody was continued to be prejudiced by the temporary adoption of this rule?

>> DAVID MCAULEY: Sorry I was on mute trying to talk through mute.

Thank you Malcolm your Sam your hand is up. First let me make a comment. I wasn't able to look at chat while I was speaking. I think what you're doing is providing language which is fine. But I'll ask you to after the call whatever that language might be put it on list as well.

So anyway, Sam go ahead, your hand is up.

>> SAM EISNER: Thanks David. So just to -- I wanted to level set a bit. Because in the document that were forwarded I don't believe it came up while in what is projected the screen but in the documents that were forwarded you will note that there are very few footnotes in that document but one of the footnotes that suggest persist in the final version is a footnote that I have put the text into the chat on.

And it -- it states that the repose issue was still in effect. And I reflects ICANN's commitment to create transitional language so other people wouldn't be prejudiced.

So the language is already out on the list is can I put it back into the chat. So if the group would be comfortable with that moving forward, you know let us know. But I think it actually, it -- Malcolm was actually basically outlining what this actually says. So I think he noted in chat that it works for him as well. So that might be a way that we can move forward.

>> DAVID MCAULEY: Thanks Sam --

>> DAVID MCAULEY: Thanks Sam when I created the suggested tweak I didn't bring forward the footnotes. Perhaps I should have but I didn't. So you're right to note that.

Malcolm your hand is up. Is that a new hand?

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>> MALCOLM HUTTY: Apologies that was the old hand.

>> DAVID McAULEY: So if it works for Sam and it works formal come I think it's going to work for me and I will guess everyone else on the call, unless I see other hands.

I don't. That sounds like a deal.

So if I could, I think it's a deal. I'll have to look at the record. Bernie I'll look to you to sort of capture what is deal was. I've not been able to follow all of the chat while this was going on. So thank you both.

>> BERNARD TURCOTTE: David.

>> DAVID McAULEY: Yes?

>> BERNARD TURCOTTE: I guess my understanding of what we have just agreed to is basically that the text in the footnote that is currently in the document covers the concerns and therefore we don't have to change anything versus the draft we have been looking at, is that correct Sam?

>> SAM EISNER: That's my understanding.

>> BERNARD TURCOTTE: Thank you.

>> DAVID McAULEY: I make take it that's what the understanding the footnote would be added back, or never went away, I made a mitt ache in putting the footnotes. That's what you're saying is that right?

>> BERNARD TURCOTTE: That's correct.

>> DAVID McAULEY: Before getting to rule 7 I think Kate's suggested tweak is next. It had to do with rule 6.

And Kate you're welcome to read it if you want. Otherwise I will be happy to read it. I will let you decide.

>> KATE WALLACE: Hi David, thanks. This is Kate for the record. I'm trying to find where I have the language. If you have it in front of you that might be the easiest.

>> DAVID McAULEY: Thank you I have a language in front of me.

So, Kate made a suggestion, this is with respect to the last paragraph in rule number 6.

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The title of rule number 6 is written statements. So here's -- I will read through it and I will note when I get to language that Kate has suggested that we add.

For any dispute resulting from a decision of process specific expert panel -- sorry, for -- let me start again.

For any dispute resulting from a decision of a project specific panel that is claimed to be inconsistent with ICANN's articles of bylaws with articles 4.3 B triple IA 3 any purpose entity personally identified within a contention set with the claimant regarding the issue within such expert panel proceeding shall -- and Kate suggests adding the word reasonably after shall.

Shall reasonably notice from ICANN that the reprocess has commenced, ICANN shall. And Kate suggests adding the next four records. ICANN shall under take reasonable efforts to provide notice by two business days calculated at ICANN's principle place of business with notice IRP has commenced period, end of tweak. Do I hear any comments or concerns or questions?

I don't see any hands.

Or hear any.

Thank you Kate. And moving forward then let's move to rule 7.

Consolidated intervention, etc.

And I -- consolidation and intervention., etc. I suggested tweak to this yesterday and I put -- I will read this.

I'm starting with the first paragraph of rule 7. I will skip certainly portions if they are not indicated and mention that. Starting at the first paragraph a procedures officer shall be appointed any request of consolidation intervention and participation as an amicus. And this is where I said verbiage except where otherwise stated here in -- that's the end of my addition and intervention and as amicus as reasonable discretion, etc.

I then moved over to add a paragraph in the section dealing with intervention.

And I added after the paragraph that begins in addition the supporting organizations which developed a consensus policy, etc., etc.

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And before the paragraph that begins any person or group or entity that intervenes as a claimant pursuant to this section will become a claimant, etc., etc.

What I added is the following in addition any person group entity should be a claimant that person group entity is significant interest to subjects of independent review process and adjudicating the group or entities absence might impair the person's group and ability to protect such interests or two any question of law or fact similar situated as group or entity is likely to arise in the independent review process.

The next change I made was in the very paragraph after the next one that begins any person, group or entity that intervenes with the pursuant will become an claimant. In the next paragraph I at the next. Pursuant to rule 8 exchange of information below the IRP panel should direct et cetera, et cetera.

Then the other change I made is in rule 8, exchange of information, I'll read them together since they seem to be related to me. Then I'll get to the hands.

Well no, before I get to rule 8, let me recognize the hands that are up. I see Bernie, Malcolm and Sam. Bernie I'll ask you to tell us who was first.

>> BERNARD TURCOTTE: The order looks like Malcolm then Sam.

>> DAVID MCAULEY: Malcolm go ahead.

>> MALCOLM HUTTY: Okay I'm speaking really relation to rule 7. Thank you for these suggestions David. I support them. In relation to rule 8 I have a view on that thank you.

>> DAVID MCAULEY: Thank you. Sam?

>> SAM EISNER: Thanks David. This is Sam Eisner for the record. So the places where you interlined small additions we are fine with those.

But we do have -- I have some concerns about the second section that the full paragraph that was added that said in addition any group, person group or entity should have a right as a claimant.

You might want to move to a amicus status.

But one of the things that we had talked about, many times as we were going over this, was the fact that claimant has a very specific definition under the bylaws. And only those people who are not just

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impacted by the action but impacted because they allege that ICANN us violated it's article or by bylaws those are the only people that qualify as a claimant. And having just a significant interest related to it, doesn't actually require that someone have an IRP claim against ICANN. It does recognize that they have an interest in what's going on. And I think we don't have any concern with allowing those people to be mart of a proceeding. But giving them claimant status, gives them certain rights under the bylaws that actually opens up the IRP to be used in ways that are not anticipated to if they don't meet the requirement that they are alleging a violation that ICANN violated the bylaws. We could see people that actually support the action that ICANN took. Who would have the interest and would qualify under this paragraph. But they wouldn't meet the status of claimant. So they would be forced to make statements as to what ICANN did in violation of its bylaws but they actually wouldn't believe ICANN violated the bylaws. Let's take the common example right announcement if they were a competing a captain that benefit from ICANN's decision they are actually not going to say ICANN violated the bylaws in taking that decision. Where the claimant is taking that position.

So we are requiring people to take positions that they would not take by this.

So I think we could move that down either to amicus. So I think we put some things into the amicus section that covered this type of interest in a proceeding. And I'd say this is one of the things that we should bookmark and put more attention to before we get to a final set of rules.

If there's a wish to change the scope of who can participate in an IRP.

>> DAVID McAULEY: Thanks -- before I go to you Malcolm Bernie you initially had your hand up, is their something you want to say?

>> BERNARD TURCOTTE: No thank you.

>> DAVID McAULEY: Malcolm you have your hand backup, go ahead.

>> Thank you, Sam makes a fair point. But it's quite limited in its nature. It just points out that some people might not want to be a claimant they might only want to be an am I can cuss that may be a fair point to their claim. This can be easily resolved and better honor your proposal by leaving your proposal intact. But where it says to intervene as a claimant. To say to intervene as an am cuss or claimant in parentheses as appropriate to their position. Close parentheses. And then continue.

That would leave it the options if option to the person to intervene as an amicus and they would also be entitled to intervene as a claimant if they had a claim.

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>> DAVID McAULEY: Thanks Malcolm.

So, I didn't put my hand up by I'm speaking now as a participant. As the person that suggested this. I hear you Sam and I would be willing to look at language, it's possible Malcolm just provided it.

But if it was moved to an amicus thing I would like to look at the language you come up with. You can tell between this and rule 8, where I'm coming from is a cot testify situation. Where members of contracted party houses or others who have contracts with ICANN or others that have contracts that effected by ICANN have to be able to prohibit their interest in competitive situations. That use language largely followed U.S. federal rules of board. But those rules are fairly -- I think, at least in common law countries fairly routinely accepted that someone has an interest can defend themselves they can't look pore the defendant to make sure argument for them.

So I think that Malcolm may have just given the language but Sam if you take a swat what you want to do with this, and put it on list, I will certainly take a look at it.

>> SAM EISNER: I have a new hand.

>> DAVID McAULEY: Sorry, go ahead. I didn't see it.

>> SAM EISNER: This is actually an issue that we discussed even as we were developing the bylaws themselves with Sidley. This is where the IP differs from regular litigation because an IRP has a very limited standing rules. The IRP has a very narrow aspect to it.

And so, we can look at the language and we can try to make some recommendations, I understand where Malcolm is coming from with the choice of the amicus versus claimant. I think it's very important that if we have a right for someone to come in as a claimant, language such as significant interest here doesn't align with the standing requirements of the bylaws which require an allegation of material harm.

And so, that's -- that might be where we make some changes to that.

But if we have -- I understand on the whole that this is an issue that we need to make more progress on for -- as the IOT before we have a final set of rules. If we are not able to completely satisfy, because I think there's definitely room to put in some language to account for a bit broader of representation than is currently within these rules. I hear that, I see that, I think we can do something quickly on the I went rules to get there.

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But will there be a point that we can agree that we could get a set of interim rules in place so that we have something, because from our standpoint, from the ICANN Org side, we are getting very nervous that we are on the precipice of having IRPs filed for which we don't have an adequate set of procedures to meet the bylaws. So we have that pressure. And so your hearing from me kind of -- the dual pressures. I want to work with IOT, I want to help get this right. I want to help these items be reflected appropriately in the rules. But I also think it's essential forever the protection of the organization and everything that this group has worked so hard to do so far to get a set of rules in place quickly. I'm wondering where that balance is. I will come back on list with some proposals of how to integrate some of these ideas into the set of interim rules. But I also would ask that there be some commitment to getting it even more right in a final set of rules. If we can move to that.

>> DAVID McAULEY: Thanks Sam, Malcolm you have your hand backup, go ahead.

>> MALCOLM HUTTY: Yes I wanted to get a quick clarification to for Sam so she knows we are not as far apart as maybe she might think we are. I'm not suggesting -- mostly for you David, for me I'm not suggesting for a moment that we should allow this language in this paragraph to change who is qualified to be claimant.

All this paragraph is intending to say, is that if you are otherwise qualified to be a claimant. If you additionally satisfy the situation described in this paragraph you should be able to intervene as a claimant as of right. Rather than wait for another case.

Similarly if you -- even if you don't qualify as a claimant, but you satisfy the conditions in this paragraph you should be allowed to intervene as an amicus and it shouldn't be merely discretionary. That's the aim. Not the change the definition of who qualifies as a claimant. That should be untouched by this language.

>> DAVID McAULEY: Thanks Malcolm. And I will also make a comment as a participant, Sam, I think that I can live with what Malcolm has just said. I think he's right in what he's saying and I think it's quite possible that we could crack this nut with amicus status as long as it's not discretionary it is a matter of right and as long as amicus can protect the language in did.

And I notice too Bernie gave us a time check, we are running out of time for this call. That gets to point that I agree with you Sam we have the finish this and get through this.

That's one reason why Bernie and I scheduled two calls for this. Get the interim rules out. We recognize that the time has come the get interim rules out and we have to move to repose, etc. I feel the

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pressures myself. So what I'd like to do is discussion on this one and ask you Sam to come back with your amicus language. I would mention to you, that I think I agree with what Malcolm just said I think that would work but I want to look at the language. I would like to move on to rule 8 now unless there's any other comment. Malcolm is that a new hand or old hand?

Must be an old hand.

So if I don't see any other hands, then let's move on to rule 8 I'll mention what I tweak with respect to rule 8 it's in the second paragraph of rule 8 down near the end and this is one sentence incredibly long sentence. I'll read it then I'll mention the parenthetical I suggested added at the end.

On the motion of either party and upon finding by the IRP panel that such exchange of information is necessary to further the purposes of the IRP. The IRP panel may order a party to produce to the other party and IRP panel that the moving party request documents are electronically stored information in the other parties controlled custody or control that the panel determines a reasonably likely to be relevant to the material of the resolution of the claims or defenses in the dispute and are not subjected to attorney-client privilege, work product doctrine or otherwise protected by disclosure by adequate law this is what I'm suggesting to add including limitation to disclosure of competitors to disclosing group or entity to any competency sensitive information of any kind. Period.

So, the floor is open on that for implants, questions, concerns.

I don't see or hear any.

We are basically coming up to the end of this call. So let me try to wrap things up this way. There's some suggested tweaks identified here that I will ask come to list many but I think by in large we as a group have gone through the rules pretty comprehensively. And we will finish the topic on list I believe. And hopefully we can did that beginning with ICANN 63. I will be back on list early in the week with whatever administrative things I think I need to attend to. And I'll certainly look for your language Sam and take a look at it. I want to thank everybody for being here. Once we get the rules done we will turn to repose and I will encourage everyone to consider the public comments. The only mail I can recall is Malcolm's mail from the middle of August. Three possible ways forward. I suggest reading that again.

And then, I have been requested to give some comments along with others at ICANN 63. I sent those slides around, if you have any concerns let us know. Two hands as we wrap up. Sam why don't you go first.

>> SAM EISNER: So I wanted to raise two items. First, I wanted to give a heads up to the group that in anticipation of the IOT being able to complete the set of interim rules we are putting on to the floor's agenda for their meeting at the end of Barcelona the board's consideration of the interim rules to get the rule because there's a step for board approval.

We will coordinate with appropriate committees. And all given that the rules are not yet finalized but the board is waiting to see that.

And I -- on a personal note I wanted to note by thanks for how we have really worked together as a group to get to the interim set of rules. We are really appreciative from the ICANN side, having a set of rules in place I think will be of benefit to everyone and I know we still have more work to do.

In terms of the rules, there was one other action item that I was aware of which Malcolm and I remember charged with going and looking at language on translation. So Malcolm I don't know if you want to report on what we agreed upon. I think we have one change that we agreed we would take out the and ICANN. Or I forget which one but we have a place we agreed that we would take on out some language but otherwise we wouldn't reflect any additional language in there although Malcolm and I agreed that there's a need to continue looking at we are doing the final set of rules to see if there's any caveats we need to include the appropriately reflect the times when ICANN is choosing to make translation available to the community particularly those that aren't used in the IRP, so that there's better understanding around the community and we agree that those are not things that are appropriately charged to either party as administrative or legal costs and those are things that are really sunk in operational costs with ICANN but we will make sure that concept of a choice to make translations that are really for the benefit of the community and not for essentially for use in the IRP are not things that will be appropriately charged to the parties as IRP related cost.

So Malcolm if you can correct whatever I said that might have been wrong in there, please go ahead.

>> MALCOLM HUTTY: No that was fine other than I thought we agreed to leave the text unchanged with no amendments pending that discussion.

>> SAM EISNER: Better.

>> MALCOLM HUTTY: Essentially David we got to the position where now I think Sam and I are completely on the same pages to what we want this to achieve. And well Sam's view for now is that it may be doesn't need any change at all. And I'm content that we come back to this, to check back and to confirm that when we come to the time rules that need to hold up the emergency rules. Provided we

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can come back to that and confirm that. And that the language is actually achieving what I now believe we thought seeking to achieve then I'm happy to defer it now.

>> DAVID McAULEY: Thank you Sam and Malcolm. Is there anything you two think should be written down and put on list so people are aware of it or is it you guys are status quo and we do not need to come to a new -- sorry hold on just a second.

That we may not need to come up with something to put on list.

>> David as a courtesy to those not on the attending the meeting I'd be happy to come out with my own statement and I'm happy to defer this and these are the reasons I'm happy to defer.

>> DAVID McAULEY: You might run it past Sam.

>> Absolutely. It was a point I raised and I'm essentially retracting it for now. So it's probably better, most proper coming from me. But it's that I was concerned to take out my own point.

>> DAVID McAULEY: Thank you both. And it's probably a good idea to let the group know because we are going to if I happen issue this on list. And we will finish it pretty quickly I believe. I think we pretty much gotten through this in pretty good shape. So thanks everyone for your attention on that. I think we can go ahead and wrap up the call. Anyone has any final comments Malcolm you have a hand up, is that old or new.

Old, so if anyone has any comments, please let them make them now. Otherwise what I will say is what I'm going to say in my next email is please pay attention to the list you will see things coming up out, not much but things come out to put it in shape it can be given to board as per what Sam just told us. So my thanks to Bernie for arranging and Brenda for helping us and all attending in the last three days. I'm very appreciative. Having said all that this is the end to the call for those going to Barcelona I'm looking forward to seeing you there. And I'm thankful to all for your contributions. That's all for me. I say goodbye buy.

We can stop the recording.

# **EXHIBIT L**

**Subject:** Added language to the amicus section

**Date:** Tuesday, October 16, 2018 at 11:10:31 AM Pacific Daylight Time

**From:** Samantha Eisner

**To:** Bernard Turcotte, McAuley, David

**CC:** Elizabeth Le

Here is a proposed addition (in underline), including a footnote, for the amicus section:

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL. Similarly, if the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.<sup>[1]</sup> The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

[1] During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in considering the scope of briefing available from *amicus curiae*, the IRP PANEL shall also consider how the purposes of the IRP set forth at Section 4.3(a) of the ICANN Bylaws are furthered, including the need for coherent, consistent and just resolution of DISPUTES.

I hope with this language you are supportive of moving this to the IOT to get clearance on an interim set of procedures. If we are to delay and not have the procedures in place, all entities that have interests in the matters that will proceed to IRP will be impaired.

As we discussed on the call, if we were to give other associated rights for defense of claims or other things that would create a new type of "party" (i.e., not claimant but not amicus) participation in the IRP, I do not think that we have that dictate at this time from the IOT. What I did not mention on the call is that I believe that would be a significant modification from what was posted for comment,

and so even if we could build out procedures that allow that happen in a manner that is consistent with the IRP, we'd still need to take that out for public comment.

Thanks,

Sam

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Samantha Eisner  
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12025 Waterfront Drive, Suite 300  
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USA  
Direct Dial: +1 310 578 8631



# **EXHIBIT M**

# [IOT] IOT - Interim Supplementary Rules

**Bernard Turcotte** Contact Information Redacted

*Fri Oct 19 14:53:45 UTC 2018*

- Previous message: [\[IOT\] IOT - Meeting - 201081011 - DAIRs and raw captioning](#)
- Next message: [\[IOT\] IOT - Interim Supplementary Rules](#)
- Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

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Dear members of the IRP IOT:

First, a word of thanks to those who participated in two productive calls during the week of October 8th.

As mentioned by Sam, we have an opportunity to have the board accept and approve 'interim rules of procedure' at ICANN 63 but we must move quickly to do so. In my opinion, establishing interim rules is timely (considering all the work we have done since October 2016) and appropriate.

Attached is the draft of the interim rules meant to capture what we discussed on the phone in the recent calls. Please take a good look.

I would like to note one particular area - that of Joinder etc. (Rule 7). You may recall that I, wearing my \*participant \*(not leader) hat, had suggested certain text and with Malcom's help we seemed to have achieved compromise.

As Sam attempted to draft the compromise in this respect she encountered difficulty in capturing appropriate language that she felt would be consistent with bylaws. Sam reached out to me in my participant capacity and we discussed over the ensuing days and so the language you will see there is not exactly as discussed on the calls. The language is acceptable to me in my participant capacity. I felt these discussions were appropriate inasmuch as I had raised the issue as participant and knew I would forward the resulting language to the list - a way to try to take advantage of board action at next week's meeting.

Could you please review these rules and if you have any concern please post to the list by 23:59 UTC on October 21. If we are agreed I will forward for board action.

And then, of course, we will turn to the very few remaining items for final rules - they should be able to follow in pretty quick order.

Best regards to all,

David (sent by Bernard)

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URL: <<http://mm.icann.org/pipermail/iot/attachments/20181019/e2470a4a/attachment-0001.html>>

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A non-text attachment was scrubbed...

Name: 10-19- DRAFT Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers.doc

Type: application/msword

Size: 99328 bytes

Desc: not available

URL: <<http://mm.icann.org/pipermail/iot/attachments/20181019/e2470a4a/10-19-DRAFTInterimSupplementaryProceduresforInternetCorporationforAssignedNamesandNumbers-0001.doc>>

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- Previous message: [\[IOT\] IOT - Meeting - 201081011 - DAIRs and raw captioning](#)
  - Next message: [\[IOT\] IOT - Interim Supplementary Rules](#)
  - Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

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[More information about the IOT mailing list](#)

# **EXHIBIT N**

# [IOT] IOT - Interim Supplementary Rules

**Bernard Turcotte** Contact Information Redacted

Sun Oct 21 22:23:03 UTC 2018

- Previous message: [\[IOT\] IOT - Interim Supplementary Rules](#)
- Next message: [\[IOT\] \[CORRESPONDENCE\] Cherine Chalaby to David McAuley - Interim Supplementary Rules for the IRP](#)
- Messages sorted by: [\[ date \]](#) [\[ thread \]](#) [\[ subject \]](#) [\[ author \]](#)

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All,

This is simply to confirm that the deadline is now past and that no responses were received.

Tank You

Bernard Turcotte  
ICANN Staff Support to the IOT.

On Fri, Oct 19, 2018 at 4:53 PM Bernard Turcotte <[turcotte.bernard@gmail.com](mailto:turcotte.bernard@gmail.com)> wrote:

> Dear members of the IRP IOT:  
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> First, a word of thanks to those who participated in two productive calls  
> during the week of October 8th.  
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>  
> As mentioned by Sam, we have an opportunity to have the board accept and  
> approve 'interim rules of procedure' at ICANN 63 but we must move quickly  
> to do so. In my opinion, establishing interim rules is timely (considering  
> all the work we have done since October 2016) and appropriate.  
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>  
> Attached is the draft of the interim rules meant to capture what we  
> discussed on the phone in the recent calls. Please take a good look.  
>  
>  
>  
> I would like to note one particular area - that of Joinder etc. (Rule 7).  
> You may recall that I, wearing my \*participant \*(not leader) hat, had  
> suggested certain text and with Malcom's help we seemed to have achieved  
> compromise.  
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>  
> As Sam attempted to draft the compromise in this respect she encountered  
> difficulty in capturing appropriate language that she felt would be  
> consistent with bylaws. Sam reached out to me in my participant capacity  
> and we discussed over the ensuing days and so the language you will see

> there is not exactly as discussed on the calls. The language is acceptable  
> to me in my participant capacity. I felt these discussions were appropriate  
> inasmuch as I had raised the issue as participant and knew I would forward  
> the resulting language to the list - a way to try to take advantage of  
> board action at next week's meeting.

>  
>  
>

> Could you please review these rules and if you have any concern please  
> post to the list by 23:59 UTC on October 21. If we are agreed I will  
> forward for board action.

>  
>  
>

> And then, of course, we will turn to the very few remaining items for  
> final rules - they should be able to follow in pretty quick order.

>  
>  
>

> Best regards to all,

>

> David (sent by Bernard)

>

----- next part -----

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URL:

<<http://mm.icann.org/pipermail/iot/attachments/20181022/febfd43d/attachment.html>>

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- Previous message: [\[IOT\] IOT - Interim Supplementary Rules](#)
  - Next message: [\[IOT\] \[CORRESPONDENCE\] Cherine Chalaby to David McAuley - Interim Supplementary Rules for the IRP](#)
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