

**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).