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Draft IRP Updated Supplementary Procedures: Report of the IRP IOT

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

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

The proposed Updated Supplementary Procedures (USP) is now presented for a final reading by the CCWG-Accountability prior to publication for public comment.

Background

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

Full implementation of the WS-1 Recommendations requires:

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

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

Major Issues

The IOT was unable to reach full consensus on three issues, which were referred to the CCWG-Accountability meeting in plenary session. These open issues were first presented to the CCWG-Accountability on 20 September 2016. A first reading of was held on 25 October 2016.

First, the IOT sought the input of the full CCWG on the applicability of the updated rules to existing but unresolved IRPs. For the reasons discussed in Section 2 (Scope) below, the proposed Updated Supplementary Procedures (USP) do not apply retroactively.

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Second, the IOT sought CCWG input on the outside date for filing an IRP claim. For the reasons discussed in Section 4 (Time for Filing) below, the proposed USP provides that IRP claims must be filed within 45 days of the date on which a claimant first becomes aware of the material affect of the action or inaction giving rise to the dispute, but in any case, no more than twelve (12) months from the date of the alleged Bylaws violation.

Third, the IOT sought CCWG input on whether witness testimony/cross examination should be permitted in IRP hearings. Based on these discussions, the USP provides that hearings – whether via video conference or in person – should ordinarily be limited to legal argument only, but that witnesses would be permitted where 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.

Summary of Changes

1. Definitions.

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

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

2. Scope.

The Updated Supplementary Procedures (USP) specify that the new rules apply to cases filed on or after their effective date, but not to cases filed prior to that date. The section also provides that in the event of further changes (Amended USP), which are to be expected in this transition period, a party to an IRP subject to the USP may seek to apply provisions of the Amended USP on the basis that application of the prior rules would be unjust and impracticable to the requesting party and application of the amendments would not materially disadvantage any other party’s substantive rights. Note, however, that the standard of review set out in Section 11 is established by ICANN’s Bylaws. Accordingly, Section 11 of the USP cannot be amended without a corresponding Bylaws change. Thus, while the USP may be modestly adjusted as this work is finalized, retroactive application of modified procedural rules is unlikely to have a substantive impact on ongoing proceedings.

The IRP Implementation Oversight Team had significant discussions regarding application of the same standard (unjust/impracticable without material disadvantage to the other party) to cases filed before the effective date of the USP. In particular, several members of the IOT felt that the claimants should have the right to seek application of the revised standard of review retroactively as a matter of fairness. This issue was discussed in CCWG-Accountability plenary sessions in September and October. The group elected not to provide for this kind of retroactivity based on concerns about unintended consequences, including increased complexity and potential Bylaws violations resulting from doing so.

3. IRP Panel Composition.

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

4. Time for Filing.

This section establishes that IRP claims must be filed within 45 days of the date on which a claimant first becomes aware of the material affect of the action or inaction giving rise to the dispute, but in any case, no more than twelve (12) months from the date of the alleged Bylaws violation. The provision seeks to balance the fact that individuals may not always become aware of ICANN actions when they occur with the need for certainty about the finality of ICANN actions. Note, however, that actions or inactions giving rise to an IRP claim can occur more than twelve months following the adoption of a particular rule. For example, were ICANN to interpret a policy in a manner that violated the Bylaws, the time period would run from the date on which the offending interpretation occurred, not the date on which the policy was adopted.

In addition, this provision requires that any applicable fees must be paid to the dispute resolution provider within three days of filing an IRP request.

5. Conduct of Independent Review.

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

The USP also provides that hearings – whether via video conference or in person – should ordinarily be limited to legal argument only, but that witnesses would be permitted where 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.

6. Written Statements

This section is unchanged from existing Supplementary Procedures

7. Consolidation, Intervention, and Joinder.

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

8. Discovery Methods.

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

9. Summary Dismissal

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

10. Interim Measures of Protection

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

11. Standard of Review

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

- (i) Did the ICANN Board act without conflict of interest in taking its decision;*
- (ii) Did the ICANN Board exercise due diligence and care in having sufficient facts in front of them;*
- (iii) Did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

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

While modifications to the Updated Supplementary Procedures are generally permitted, this Section 11 is dictated by the ICANN Bylaws and cannot be modified without a corresponding Bylaws amendment.

12. IRP Panel Decision

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

13. Form and Effect of an IRP Panel Decision

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

14. Appeal

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

15. Costs

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