

## **IRP-IOT**

**Comparison of the current IRP Interim Supplementary Procedures vs. the changes being proposed by the IRP-IOT regarding Rules 3, 4,5B, and 7 with rationales.**

### **Rule 3: Composition of IRP Panel**

#### ***Introduction-rationale***

*The Current Rule 3 in the Interim Supplementary Procedures (ISP) is a single paragraph which addresses appointment of Panelists from the Standing Panel, conflicts of interest, and Panelist appointment where there is no Standing Panel. The IOT has adopted sub-paragraphs and expanded on this section for greater readability and clarity. The IOT has also sought to apply some time limits and procedures to handle circumstances where a party delays in appointing their Panelist, or the two party-appointed Panelists delay on agreeing to the third Panelist. The IOT has also specifically addressed the possibility envisaged under the Bylaws that the Standing Panel might lack capacity, albeit that this is expected to be a rare occurrence.*

*Bylaws s.4.3(k)(ii) refers to the possibility of not using the Standing Panel because it “does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding”. Much of the discussion of the IOT centred on “lack of capacity” and what is meant by this; whether the additional language from the Bylaws “due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding” should be carried across into the Supplementary Procedures; and who is entitled to raise “lack of capacity”, given the understanding that selecting panelists from outside the Standing Panel, once appointed, is not expected to be the norm. In addition, the IOT briefly considered the importance of tracking Standing Panel lack of capacity for the purposes of future review, and concluded that, whilst this should be done, it is not a matter for inclusion in the Supplementary Procedures.*

1. The IRP Panel will comprise three Panelists, and the IRP Panel will not be considered to have been convened until all three Panelists have been appointed.

*Rationale: Clarifying that all three Panelists must have been appointed to the IRP Panel before it is considered to be in place and thus able to act.*

2. The three Panelists for the IRP Panel will be selected from the Standing Panel, unless a Standing Panel is not in place when the relevant IRP Panel must be convened, or is in place but does not have capacity. 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.

*Rationale: There is an expectation that once the Standing Panel has been appointed that IRP Panelists will be drawn down from the Standing Panel. Nevertheless, Bylaws s.4.3(k)(ii) refers to the possibility of needing to select IRP Panelists from outside the Standing Panel, either because it is not yet in place or because the Standing Panel does not have capacity, e.g., due to other IRP commitments or the*

*requisite diversity of skill and experience needed for a particular IRP proceeding. This possibility of lack of capacity in the Standing Panel is therefore reflected, but without defining further, since this is captured in the Bylaws.*

- a. If one Party has not selected a Panelist within 30 days<sup>1</sup> of the initiation of the IRP then, at the request of the other Party, the Standing Panel shall make the selection from within its ranks. If the Standing Panel has not made such appointment within 5 days of the request, the ICDR's Administrator (Administrator) shall make the selection from the Standing Panel within [14/21] days.<sup>2</sup>
- b. If the two Party-selected Panelists cannot agree on the third Panelist from the Standing Panel within 21 days of the appointment of the later of the two such Panelists, then, at the request of either Party, the Standing Panel shall make the selection from within its ranks. If the Standing Panel has not made such appointment within 5 days of the request, the Administrator shall make the selection from the Standing Panel within [14/21] days.<sup>3</sup>

*Rationale for a and b: Given that the Bylaws have a target of 6 months to complete an IRP, Panel selection must happen promptly and the IOT considered that it is helpful to set out in the Rules the processes available to parties when there is delay. The proposed timings of 5 days, 30 days and 14/21 days are initial proposals on which community input is being sought. Once the IOT has completed drafting the Supplementary Procedures (SP) all timings will be reviewed against the comments received and to ensure that similar timing requirements within the draft SP are coherent.*

*The IOT seeks input on whether the Standing Panel should move panelist appointment along of its own volition, or only where requested to do so by one of the parties.*

*The IOT considers that once the Standing Panel is in place then it should be responsible for resolving panelist appointment issues, but that the IRP Provider's (ICDR) Administrator should act as a fallback where the Standing Panel is unable to reach agreement for some reason.*

*The IOT discussed whether the task of selection, where the parties have not done so, should be assigned to the Standing Panel itself or to its Chair, and concluded that it should be the Standing Panel. The IOT anticipates that, once convened, the Standing Panel will agree its own administrative procedures.*

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<sup>1</sup> All timing to be reviewed prior to finalisation of the Rules.

3. If the Standing Panel, in its discretion, does not have capacity to seat any or all of the Panelists necessary to comprise an IRP Panel for a Dispute, the Standing Panel must notify the Claimant and ICANN in writing as soon as possible, and in any event within 14 days of notification of the initiation of the IRP from the ICDR to the Standing Panel.<sup>4</sup> In the event that a Standing Panel is not in place when the relevant IRP Panel must be convened, or is in place but does not have capacity, the IRP Panel shall be selected on the following basis:

*Rationale: As referred to above, Bylaws s.4.3(k)(ii) refers to the possibility of not using the Standing Panel because it does not have capacity. The IOT understands the intent to be that the Standing Panel will be used, except in exceptional circumstances. The proposed rule, therefore, leaves it to the Standing Panel to raise issues of lack of capacity (of any form). The IOT concluded that, so far as Panelist “diversity of skill and experience” is concerned this is likely to be an exceptional situation. There is not a general expectation in judicial and arbitral proceedings for the adjudicator(s) themselves to have detailed subject-matter expertise, and that Bylaws 4.3 (k)(iv) specifically allows for the IRP Panel to have access to independent skilled technical experts where required. Therefore, the consensus of the IOT is to not propose a specific process for a Party to make representations about lack of capacity, but assumes that a Party will nevertheless raise this if this is a genuine concern. Feedback is welcome on whether a specific challenge process is necessary.*

*The IOT also noted that Standing Panel lack of capacity may not mean that no panelists are available, but rather that the Standing Panel cannot field a 3-person panel, and have sought to reflect this.*

*The proposed timings below of 14, 21 and 30 days are initial proposals on which community input is being sought. Once the IOT has completed drafting the Supplementary Procedures (SP) all timings will be reviewed against the comments received and to ensure that similar timing requirements are coherent. With respect to 3c. community input is specifically sought on whether the [30] days should be from the date of initiation or from when the Standing Panel informs the parties that it does not have capacity, which could be approximately 45 days from the date of initiation.*

- a. If the Standing Panel lacks capacity for seating one or two members of the IRP Panel, the Parties shall try to agree, within 14 days of the notification from the Standing Panel of lack of capacity referred to at [Rule 3(3)] above, to a process for the selection of suitably qualified IRP Panelists utilising, as far as possible, the available Standing Panel members. If the Parties are unable to reach agreement, or where selection of all three members of an IRP Panel is necessary, [Rule 3(3)(b)-(e)] shall apply.

- b. 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.
- c. If one Party has not selected a Panelist within 30 days of the commencement of the IRP then, at the request of the other Party, the Administrator shall make the selection.
- d. If the two Party-selected Panelists cannot agree on the third Panelist, within 21 days, the Administrator shall make the selection of the third Panelist using the list method as described in [Rule 3(3)(e)] below.
- e. The Administrator shall send simultaneously to each Party an identical list of names of persons for consideration as Panelist(s). The Parties are encouraged to agree to a Panelist from the submitted list and shall advise the Administrator of their agreement. If, after receipt of the list, the Parties are unable to agree upon a Panelist, each Party shall have 14 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the Administrator. The Parties are not required to exchange selection lists. If a Party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on the Parties' lists, and in accordance with the designated order of mutual preference, the Administrator shall invite a Panelist to serve. If the Parties fail to agree on any of the persons listed, or if acceptable Panelists are unable or unavailable to serve, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have the power to make the appointment without the submission of additional lists. The Administrator shall, if necessary, designate the presiding Panelist in consultation with the IRP Panel.

*Rationale for e: As with Section 2 above, the IOT considered that it is helpful to set out in the Rules the processes available to parties where there is a delay in Panelist appointment, so as to move the proceedings along. The "list method" process reflects the process set out in the ICDR Rules. The IOT considers that it is helpful to IRP parties to have this contained within this Rule 3, rather than having to cross-refer to the ICDR process. The IOT has not proposed any limit to the number of names which each party may strike out, since this reflects the current ICDR process and the IOT is not aware of this having caused any issues in practice, but input to the contrary is welcomed.*

- 4. In the event that an IRP Panelist resigns, is incapable of performing the duties of a Panelist, or is removed, and the position becomes vacant, a substitute Panelist shall be appointed pursuant to the provisions of this Rule 3 of these Supplementary Procedures.

## 5. Conflict of Interest

- a. A Standing Panel member's appointment to an IRP Panel will not take effect unless and until the Standing Panel member signs, within 7 days<sup>5</sup> of appointment, a Notice of Standing Panel Appointment confirming their compliance with the Conflict of Interest requirements at Bylaws, Article 4, Section 4.3(q)(i) and making any disclosures of material relationships so required. If the Standing Panel member is unable or unwilling to do so within the timeframe, an alternative IRP Panelist will be selected, following the procedures set out in this Rule 3.
- b. Where an IRP Panelist is to be appointed from outside of the Standing Panel, their appointment will not take effect unless and until the proposed Panelist signs, within 7 days of appointment, a Notice of Panelist Appointment confirming their compliance with the same Conflict of Interest requirements as apply to a Standing Panel, as set out at Bylaws, Article 4, Section 4.3(q)(i) and making any disclosures of material relationships so required. If the proposed Panelist is unable or unwilling to do so within the timeframe, an alternative IRP Panelist will be selected, following the procedures set out in this Rule 3.
- c. Prior to accepting any appointment, potential IRP Panelists are also expected to consider whether other circumstances of the relevant IRP are liable to give rise to a conflict of interest or give rise to the appearance of a conflict of interest.
- d. Where, at any time, an IRP Panelist becomes aware of a conflict of interest or circumstances giving rise to the appearance of a conflict of interest, they must recuse themselves.

*Rationale: Bylaws s 4.3(q)(i) refers to some conflict-of-interest criteria that Standing Panel members must adhere to. In addition to general requirements of independence from ICANN, SOs and ACs, these criteria also refer to independence from "any other participant in an IRP proceeding". The IOT understands this to require independence of IRP Panelists selected to hear an IRP, disclosure of potential conflicts of interest, and recusal of the Panelist where such a conflict arises. This Rule 3.5 seeks to reflect that understanding, both for Standing Panel members and for any IRP Panelist appointed from outside of the Standing Panel.*

*IOT welcomes in particular input on the timing for making a conflict-of-interest declaration. IOT proposes a time limit of 7 days for Panelists to confirm they have no COI, in order to keep things moving and bearing in mind that there is a Bylaws expectation that IRPs should be concluded in 6 months. However, depending on the make-up of the Standing Panel some IOT members expressed concern that this may be insufficient time to conduct conflict checks across a large law firm, for example. The IOT did also note, however, that once an IRP is commenced, Standing Panel members could begin their conflict checks immediately, without waiting for Panelist selection, and there will generally also*

*be advance notice of a potential IRP since Claimants are encouraged to enter into CEP first.*

## **Rule 4: Time for Filing**

### ***4A: Principles of Initiation***

1. The written statement of Dispute filed by the Claimant shall be accompanied by the appropriate filing fee, unless a waiver of the fee has been obtained through the process established in accordance with Bylaws, Article 4, Section 4.3(y). Any filing fee paid by the Claimant shall be reimbursed by ICANN at the conclusion of the proceedings.

*Rationale: Bylaws 4.3(n)(i) speak of the IRP rules conforming with international arbitration norms and applying fairly to all parties. A filing fee is the norm in arbitration proceedings (and indeed in judicial proceedings) but clearly should be set at a level so as not to serve as a barrier to justice.*

*Although some IOT members were of the view that there should be no filing fee paid by a Claimant, since this filing fee covers the provider's costs in administering the action and ICANN is responsible for the administrative costs of maintaining the IRP mechanism (per Bylaws 4.3(r)), the majority agreed that a reimbursable filing fee was appropriate (subject to the further considerations below) to serve to deter trivial or vexatious actions.*

2. An IRP will be deemed to have been filed on the date the written statement of Dispute is filed if and only if all fees are paid to the ICDR within three business days (as measured by the ICDR) of the filing of a written statement of Dispute.
3. ICANN is responsible for the costs of the Panelists, including both the costs of the Standing Panel and, where necessary, the costs of any Panelists who are not on the Standing Panel.

*Rationale: Bylaws 4.3(r) expressly states that ICANN bears the costs of the Standing Panel. Regarding non-Standing Panel Panelists this aligns with Bylaws 4.3(r) i.e. that ICANN shall bear all the administrative costs of maintaining the IRP mechanism. There is precedent for this interpretation in the .WEB case, where the claimant's share of panelist costs was ordered to be reimbursed. This also aligns with the CCWG-WSI recommendations on which the Bylaws provisions are based, where ensuring that the costs of panelists were covered was considered essential for the accessibility of the IRP mechanism.*

4. ICANN shall pay the administrative costs of the proceedings as they are incurred, including, but not limited to, the cost of administrative office time required for the IRP proceedings, the cost of hosting virtual hearings, and costs associated with providing copies of documents and other papers to Panelists.



5. In accordance with the Bylaws, each Party is responsible for its own legal fees in connection with the IRP.
6. Notwithstanding the above, where the three-person IRP Panel, on making its IRP Panel Decision, finds that part or all of a Party's claim or defense is frivolous or abusive, it may exercise its discretion to shift all or a portion of the filing fee, Panelist costs, administrative costs, or legal fees to that Party. If the IRP Panel exercises its discretion to shift costs or fees in this way, the Party to whom the costs or fees are shifted may file an opposition to the fee/cost shifting. The IRP Panel may establish deadlines and/or page limits in connection with this opposition. The IRP Panel may also, in its discretion, permit the other Party to file a statement regarding the fee/cost shifting, in accordance with any deadlines and/or page limits the IRP Panel may establish.

*Rationale: aligns with Bylaws 4.3(r). There is precedent for this interpretation on legal fees in the .WEB case.*

#### *Principles of Initiation not addressed in the ISP*

*In addition to agreeing on the text of the Rules captured in Section 4A, the IOT agreed on a number of Principles of Initiation. These are not appropriate for inclusion in the Rules themselves but will form recommendations from the IOT as part of its final output. These Principles of Initiation, with Rationales, are reflected below:*

*The group's principles on Initiation also included the following, which is not captured:*

*1. Need for clarity for Claimants/potential Claimants considering bringing an IRP (referred to hereafter as the claimant):*

*a. All relevant information should be in a clearly identified section of the ICANN website. We understand that this has been in the pipeline for more than a year and should be a priority.*

*b. Relevant rules, forms, etc., should be on the ICANN website. If this is accomplished through links to the ICDR website, then these links should be to the specific place where the information can be found.*

*c. Filing fee (if any) should be clearly identified, rather than the Claimant having to work out what the appropriate fee level is from the general ICDR fee schedule.*

*Rationale: to provide greater clarity for potential Claimants. Claimant should be able to readily find the information, forms and fees that they need on, or on direct links from, the ICANN website.*

*2. The filing fee should be a first gate to limit trivial or vexatious use of the process, but the amount must not be so high as to have a chilling effect, discouraging potential Claimants from using the process.*

3. ICANN should review the filing fee against other similar processes and, if justified, bearing in mind the intent of the filing fee referred to in para 2 above, reduce the fee payable by the claimant, with ICANN covering the balance of the up-front payment required by ICDR.

*Rationale: This aligns with the above and with the spirit of Bylaws 4.3(r), i.e. that ICANN shall bear all the administrative costs of maintaining the IRP mechanism.*

*There is precedent (e.g. .WEB) for ICANN reimbursing CLAIMANT for the filing fee at the end of the proceedings. To the extent that ICANN contributes to the up-front payment required by ICDR, therefore, in order that this should not serve as a bar to the IRP process for CLAIMANTS, this is merely a question of timing.*

4. Other similar processes, as referred to in para 3 above, include other international arbitration proceedings. The assessment should be against the filing fee for a non-monetary claim. Other up front payments charged by other arbitration providers which cover, for example, costs of arbitrators, will be excluded from consideration since this is not a comparable payment and ICANN is responsible for the administrative costs of maintaining the IRP mechanism, including the arbitrator costs.

*Rationale: Bylaws 4.3(a)(viii) refers to resolution consistent with international arbitral norms; 4.3(n)(i) and (ii) also make similar reference.*

5. Deserving [needy] applicants will be entitled to seek a waiver of the fee. Rather than attempting to develop potentially complex rules dealing with such a waiver, this should be addressed via the process envisaged by Bylaws 4.3(y) (establishing a means for meaningful participation for not-for-profits, etc).

*Rationale: While it would be possible to craft rules for an exception process for the filing fee that allows for the IRP to be considered properly commenced in the absence of this fee, and creates a mechanism for late payment if the claimant's request is refused, this would add complexity that may be used relatively infrequently. The Bylaws already require that there should be a mechanism to allow participation for those who otherwise could not afford it, and this could be used to address the inability of a CLAIMANT to pay the filing fee. We have also already developed an exception process to allow for the late filing of an IRP by a CLAIMANT under rule 4 (the safety valve). In a situation where the potential CLAIMANT sought relief from the filing fee and, as a result of that process, was out of time to bring their IRP (because both the statement of dispute and the fee are necessary for the IRP to be timely filed), this would seem a good example of a case where the rule 4 safety valve ought to apply. If the IRP initiation procedure differs in any significant fashion from the ICDR procedure, then it would be preferable to have clear rules set out in the IRP Supplementary Procedures.*

6. Language needs to be clear and terminology needs to be uniform. That uniformity could be addressed via the definitions section, i.e. "X, referred to as Y in the ICDR Rules". This can be dealt with during clean-up at the end.

7. ICDR Form: The ICDR Form for commencement of an IRP should be amended to make it clearer that the Claimant is not agreeing to be bound by those parts of the ICDR Rules and

*procedures which have been superseded by the ICANN IRP Supplementary Procedures. This is an action items for ICANN Legal.*

*Rationale: On reviewing the current form, the IOT concluded that the Claimant is asked to confirm its agreement to certain obligations, such as payments to ICDR, for which, under the ICANN Bylaws and IRP Rules, it is not actually responsible.*

#### **4B: Time to File**

1. A Claimant shall file a written statement of Dispute with the ICDR within the following timeframes:

- a. for Disputes challenging Board or Staff action, within 120 days after the date on which the Claimant became aware of, or reasonably should have become aware of, being materially affected by the action being challenged in the Dispute; or

*Rationale: This is consistent with ISP Rule 4, and had received significant support during previous public comment, over the original proposal of 45 days.*

*The ISP Rule 4 refers to “120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE”. This term “material effect” was considered by the IOT to lack clarity, since a Claimant could be aware of the material effect of an action/inaction without themselves being affected by it, and thus not actually meet the definition of a Claimant eligible to bring a claim. The proposed language therefore mirrors the definition of a Claimant in the Bylaw instead (Bylaws 4.3(b)(i)).*

- b. for Disputes challenging Board or Staff inaction, within 120 days after the date on which the Claimant became aware of, or reasonably should have become aware of, being materially affected by the failure to act being challenged in the Dispute.

*Rationale: Separating out actions and inactions allows for greater clarity of language, compared to ISP Rule 4.*

2. Subject to [Rule 4C and 4D] below, a written statement of Dispute may not be filed more than 24 months from the date of such action or inaction being challenged in the Dispute.

*Rationale: This is intended to reflect a compromise between, (i) concerns raised by the community in previous public comments, and shared by some members of this IOT, that there should be no outer time limit for bringing an IRP (the “repose”), since the Bylaws do not explicitly refer to this, but that the only time limit for a Claimant to bring an IRP should run from when the Claimant “becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute” (Bylaws 4.3(n)(iv)(A), on the one hand, and (ii) the views of other IOT members that there must be certainty for ICANN and the wider*

*community that decisions cannot be open to indefinite challenge, and nothing in the Bylaws specifically prohibits the application of a repose.*

*The IOT discussed this extensively, and whilst the group did not reach full consensus on this issue, there was consensus reached to put this compromise out to the community for comment, whereby a period of Repose of 24 months (the ISP has a Repose of 12 months) is applied, but subject to the exceptions outlined in Rules 4C and 4D below.*

3. Under no circumstances may a Claimant seek to file a written statement of a Dispute more than four years after the date of the action or inaction being challenged in the Dispute.

*Rationale: As noted in this Rule 4B (3), Rules 4C and 4D are designed to be exceptions to the 24 months Repose stated in that Section. Nevertheless, there is still a requirement for ICANN to be able to ensure some foreseeability. As such the IOT reached consensus on proposing an absolute Repose of four years which doubles the standard period of Repose from Rule 4B(2).*

#### ***4C: Timing considerations for a Claimant to file an IRP following a request for reconsideration (RFR)***

##### ***Introduction:***

*This is intended to address concerns raised by the community during previous public comments, and shared by members of this IOT, that the time limits for bringing an IRP should not have the effect of dissuading a CLAIMANT from pursuing other accountability mechanisms, such as the Request for Reconsideration (RFR), which might serve to narrow or resolve the matters in dispute, for fear that by doing so they would be past the deadline to file the IRP.*

*The IOT's initial discussions on this topic considered tolling of the time limit to bring an IRP to account for time spent in a related RFR. Some members of the IOT raised concerns about the complexity and the potentially lengthy period, in total, before an IRP might be brought. The proposal for allowing a period of Fixed Additional Time (FAT) of 30 days arose out of the desire to strike a reasonable balance.*

*The 30-day time period was again a compromise that the IOT reached, having discussed whether 30 days, 60 days, or some other time period for FAT was appropriate. 30 days was viewed as being enough time to allow the Claimant to finalise the documentation to bring their IRP, whilst not unduly delaying the commencement of the action.*

*The IOT also considered the question of whether a Dispute which is appropriate for an IRP might also fall within the scope of the RFR process. Having reviewed the post-Transition Bylaws the majority concluded that this is now the case – whilst not every issue that is eligible for the RFR process would also be eligible for consideration under the IRP, some issues are.*

*The IOT also considered applying the concept of FAT where a CLAIMANT initiates CEP. This will be discussed when the IOT reviews, and if necessary, revises, the CEP rules.*

*The IOT did not agree to apply the concept of FAT to complaints to the Ombuds or to DIDP requests. In the case of complaints to the Ombuds, the IOT met with Herb Waye, the then Ombuds, and heard from him about the types of complaints on which he acts and the procedures followed. The Ombuds himself did not believe it was appropriate to apply FAT in an IRP proceeding where he has received a related complaint, because of the confidential nature and handling of such complaints to the Ombuds.*

1. If, prior to filing a written statement of Dispute, the Claimant filed a Request for Reconsideration (RFR) relating to the same Dispute, which RFR did not serve to wholly resolve the Dispute, the Claimant may submit a written statement of Dispute pursuant to the requirements in [Rule 4A], and as provided in this [Rule 4C].
  - a. If, at the time of publication of the Approved Resolution by the Board on the final disposition of the RFR or publication of the summary dismissal by the BAMC where appropriate, the Claimant is within the timeframe to file a written statement of Dispute as provided in [Rule 4B], and the remaining time to file a written statement of Dispute is greater than or equal to 30 days, the Claimant shall have this remaining time to file a written statement of Dispute.
  - b. If the Claimant is not within the timeframe established above [in Rule 4C(1)(a)], the Claimant shall have 30 days from the time of the publication of the Approved Resolution by the Board on the final disposition of the RFR or publication of the summary dismissal by the BAMC where appropriate to file a written statement of Dispute.

*Rationale for a and b: The IOT have proposed that timings should be by reference to the publication of the RFR decision, since this is information available to all. Some IOT members have argued that timing should run from notification of the decision to the party who brought the RFR, rather than them being obliged to check the ICANN website for publication. Community input is sought on this.*

2. In order to submit a written statement of Dispute under this [Rule 4C], the Claimant, at the time such Claimant filed the RFR relating to the same Dispute, must have been within the timeframes established in [Rule 4B] to file a written statement of Dispute.

#### ***4D: Limited circumstances for requesting permission to file after 24-month limit***

*Rationale: As noted in Rule 4B 3 this is intended to reflect a compromise between concerns raised by the community in previous public comments, and shared by some members of this IOT, that there should be no outer time limit for bringing an IRP, only a time limit that runs from when the Claimant “becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute” (Bylaws 4.3(n)(iv)(A), versus the need for foreseeability for ICANN and the community that decisions cannot be indefinitely challenged. The IOT therefore proposes a process whereby a potential Claimant may request permission to file late, under limited circumstances but within 4 years.*

1. The Claimant may be permitted by the IRP Panel to file its written statement of Dispute after the timeframes set forth above [in Rule 4B] under certain limited circumstances. Such a

Claimant shall seek leave to file a late written statement of Dispute by demonstrating by clear and convincing evidence that either:

- a. exceptional circumstances not caused by the Claimant and out of the Claimant's control prevented the Claimant from either (i) becoming aware of the action or inaction being challenged in the Dispute within the timeframes set forth in [Rule 4B], or (ii) being eligible under the Bylaws as a Claimant within those timeframes; or
- b. exceptional circumstances not caused by the Claimant and out of the Claimant's control prevented the Claimant from being able to file a written statement of Dispute within 24 months from the date of the action or inaction being challenged in the Dispute within the timeframes set forth in [Rule 4B].

The application for leave to file a written statement of Dispute pursuant to [this Rule 4D] shall include an explanation of how the Claimant satisfies the standing requirements set forth in the Bylaws.

2. Any request for leave to file a written statement of Dispute under this [Rule 4D] shall be accompanied by Claimant's proposed written statement of Dispute and must be filed within 30 calendar days of:
  - a. the Claimant becoming aware of being materially affected by the action or inaction being challenged in the Dispute, if the late filing is requested under [4D(1)(a)] above; or
  - b. the Claimant becoming able to file a written statement of Dispute, if the late filing is requested under [4D(1)(b)] above.

Nothing in this [Rule 4D] is intended to preclude a Claimant who has initiated an IRP in the good faith belief that their claim is within time, but where that timeliness is successfully challenged, from then seeking leave to pursue that IRP pursuant to this [Rule 4D].

3. Any request for leave to file a written statement of Dispute under this [Rule 4D] shall be directed to the ICDR, who will appoint a single Panelist to consider and make a determination on the request.
  - a. Where the Standing Panel is in place, ICANN and the Claimant shall endeavour to agree on a single Panelist from the Standing Panel. Where they are unable to do so, either Party may request that the ICDR appoint a single Panelist from the Standing Panel using the procedure set out in ICDR Rule 13(6).
  - b. In the event that no Standing Panel is in place, ICANN and the Claimant shall endeavour to agree on a single Panelist. Where they are unable to do so, either Party may request that the ICDR appoint a single Panelist using the procedure set out in ICDR Rule 13(6).
4. When considering whether an applicant should be permitted to file an IRP Claim out of time, the Panelist shall have regard to the Purposes of the IRP and any jurisprudence of prior IRP Panels relevant to interpretation of this [Rule 4D] in light of such Purposes.

5. For avoidance of doubt, ICANN shall have the right to respond to a Claimant's request for leave to file submitted pursuant to this [Rule 4D]. The IRP Panel may establish deadlines and/or page limits in connection with this response.

## **Rule 5B: Translation**

1. As required by 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:
  - a. translation of submitted written statements, documents that have specific relevance to the subject matter of the Dispute, transcripts and Panelist decisions, and
  - b. interpretation of oral proceedings, ensuring that no Party is unable to fairly participate in the proceedings due to language.

*Rationale – Emphasizing the intent of providing translation services being to ensure that all Claimants can fairly participate in the IRP.*

2. The Claimant’s written statement of Dispute must be submitted in English. No adverse inference as to the need for ICANN to provide translation services will be drawn from the fact that the written statement of Dispute or request for translation services is in English.

*Rationale – Although Claimants are expected to submit their written statement of dispute in English, the fact that they do so will not be interpreted as demonstrating that they have no need of translation services.*

3. A request for translation services:
  - a. must accompany the written statement of Dispute if the Claimant is:
    - i. seeking reimbursement of the costs of translating the written statement of Dispute into English, or
    - ii. seeking translation of ICANN’s written statement in response from English into the language identified by Claimant as Claimant’s preferred language for the proceeding (“Claimant’s Preferred Language”), but
  - b. may otherwise be made subsequent to the written statement of Dispute.

Where the request for translation services is made with the written statement of Dispute, it does not count towards the page limit for the written statement of Dispute.

4. Any request for translation services must be submitted in English, identify the Claimant’s Preferred Language, and include an explanation of why the Claimant needs such services in order to be able to fairly participate in the proceedings. The request for translation services should also explain the extent to which the Claimant or its representative has a suitable level of understanding to permit fair participation in more than one language, including in particular the competency of the Claimant or its representative in an official language of the United Nations. Any accompanying statement explaining the need for translation services shall not exceed five pages of text, double-spaced using 12-point font.



*Rationale for 3 and 4 - The Interim Supplementary Procedures (ISP) do not provide any instructions or specifications as to how a Claimant should advise that it needs official, ICANN-provided, translations services. The IOT concluded that this could cause confusion and delays for both the Claimant and the Panel. To avoid these situations the IOT has included the requirement for a Claimant who requests translation services to make an application to this effect.*

5. Prior to filing any request for translation services, Claimants are strongly encouraged to approach ICANN directly with a request for a stipulation for ICANN to provide translation services in accordance with [Rule 5B(9)]. If stipulated, the IRP Panel still retains scheduling discretion as specified in [Rule 5B(14)].

*Rationale – ICANN representatives on the IOT noted that ICANN already has requirements to provide translation services and could agree to provide translation services to a Claimant without burdening the Panel with having to make this determination. If ICANN agrees to provide translation services, the Panel simply needs to be advised of this.*

6. Requests for translation services generally shall be determined by the IRP Panel, unless ICANN has already agreed to the request. In exceptional circumstances, if a determination is required as a matter of urgency before the IRP Panel is seated, the request may include an application for emergency determination of translation services. Within [TBD] days after receipt of such application, an Emergency Panelist selected from the Standing Panel (or if no Standing Panel is in place, a Panelist appointed by the ICDR pursuant to ICDR Rules) shall be appointed. A determination of the emergency request shall be made as a preliminary issue for the proceeding within [TBD] days after the date of such appointment.

*Rationale – The IOT considered that in exceptional circumstances a Claimant requiring translation services may need such services immediately, in order to be able fairly to participate, and as such might be unable to wait until after the appointment of the IRP Panel before a decision is made.*

7. The IRP Panel shall have discretion to determine:
  - a. whether the Claimant has a need for translation services,
  - b. which documents or hearings relate to that need, and
  - c. the language for which translation services will be provided.
8. In exercising its discretion, the IRP Panel should bear in mind the Purposes of the IRP, set out in Bylaws, Article 4, Section 4.3(a), and in particular Purpose (vii), and should have regard to the following non-exhaustive considerations:
  - a. the materiality of the particular document, hearing or other matter or event requested to be translated, including the need to ensure that all material portions of the record of the proceeding are available in English;

- b. the Claimant’s ability to fairly participate in the proceedings due to the level of understanding of spoken and written English, by an officer, director, principal (or equivalent) with responsibility for the Dispute, and, to the extent that the Claimant is represented in the proceedings by an attorney or other agent, that representative’s level of understanding of spoken and written English; and
- c. level of understanding in another official language of the United Nations (i.e., Arabic, Chinese, French, Russian, or Spanish).

Where Claimant or its representative has a suitable level of understanding to permit fair participation in more than one language, of which one is a UN language, then translation services will be limited to that UN language where possible.

*Rationale - The ISP state that “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 in spoken and written English” which the IOT did not believe to be adequate instructions for the Panel to determine if a Claimant should be provided with translation services. As such the IOT created Section 8 which ensures that the Panel consider ICANN Bylaws, Article 4, Section 4.3(a) and in particular Purpose (vii) which states that “The IRP is intended to hear and resolve Disputes for the following purposes (“Purposes of the IRP”): (vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.” as well as several additional considerations.*

*In particular, the IOT considered that the limitation in the ISP of translations only “from/to English and the other five official languages of the United Nations” risks unfairness to Claimants who do not have sufficient proficiency in any of these languages. The IOT therefore proposes a compromise which limits translation to the official UN languages where possible but does not exclude the possibility of translation into a non-UN language where necessary to permit fair participation.*

- 9. All translation services ordered by the IRP Panel shall be coordinated through ICANN’s Language Services providers and shall be considered an administrative cost of the IRP, paid for by ICANN unless the IRP Panel later orders otherwise pursuant to Bylaws, Article 4, Section 4.3(r).
- 10. A Claimant determined by the IRP Panel not to have a need for translation services must submit all materials in English.
- 11. If the Claimant, at any point during the course of the proceedings, identifies that it no longer requires translation services ordered by the IRP Panel, the Claimant should request the discontinuation of translation services.
- 12. If the Claimant arranges for its own translation, either because translation services are not requested or are denied, such translation shall be considered part of the Claimant’s legal costs, and so borne by the Claimant pursuant to Bylaws, Article 4, Section 4.3(r), and not an administrative cost to be borne by ICANN, unless otherwise ordered by the IRP Panel.

13. A Claimant may rely in the IRP proceedings on its own translation only if it is a certified translation from a qualified independent service provider.

*Rationale for 9 - 13 – Although the ISP reflects similar principles, the IOT considered that the language should be revised, expanded and broken down into subparagraphs for greater clarity.*

14. The IRP Panel may order that the deadlines for submission of documents or other papers, and the timing of any appeal, be amended to take into account reasonable delays generated by the translation of documents, transcripts, or Panelist decisions.

*Rationale – The IOT noted that the ISP does not have any dispositions allowing for modifying the IRP timing requirements when translation is required. The IOT also noted that the various IRP timing requirements were created without considering the requirement for translation and that an IRP requiring translations would probably require that these timing requirements be adjusted. As such the IOT included Section 14 which would allow the Panel to extend various deadlines in an IRP that requires translation.*

## **Rule 7: Consolidation, Intervention, and participation as an Amicus**

*Introduction - Relevant Input from Previous Public Consultation by the IOT*

*Decisions on whether to accept a request for Consolidation, Intervention or Amicus should be made by the Panel and not the Procedures Officer.*

*Rationale - Having considered this, together with feedback arising from past cases that the role of the Procedures Officer has not been well-understood and has caused confusion, the IOT agreed with this suggestion from a number of respondents and has included this change in this proposal.*

*Any third party directly involved in the underlying action which is the subject of the IRP should be able to petition to join, intervene or participate as an Amicus.*

*Rationale - The IOT agreed with this suggestion from a number of respondents and has included this change in this proposal.*

*Multiple Claimants should not be limited collectively in the page limit.*

*Rationale - The IOT agreed with this suggestion from a number of respondents and has included this change.*

*For a challenge to a Consensus Policy, the Supporting Organization responsible for that policy must be in a position to defend their work.*

*Rationale - In the case of a Supporting Organization whose policy is the subject matter of the dispute, the IOT concluded that they ought to be able to choose to join the proceedings either as a party or as an amicus, however the nature of their role is such that they do not meet the definition of a Claimant. The IOT has therefore proposed to use the term Intervening Party where they join as a party.*

### ***General***

1. Any request for consolidation, intervention, and/or participation as an amicus shall be considered and determined by the IRP Panel appointed to the involved IRP, or, in the event of consolidation, by the IRP Panel appointed to the involved IRP which was commenced first (the First IRP). No consolidation will be permitted between binding and non-binding (as provided for under Bylaws, Article 4, Section 4.3(x)(iv)) IRPs, and the nature of any applicable IRP will not be changed from binding to non-binding, or vice versa, as a result of any consolidation, intervention or participation as an amicus.

*Rationale: The IOT agreed with the public comments that the IRP Panel should be the one to determine if consolidation can occur. The IOT also noted feedback reported from past IRP cases that the role of the Procedures Officer has not been well-understood by participants and has caused confusion. The concept of the Procedures Officer is therefore removed, in favour of these decisions being referred to the 3-person IRP Panel, once appointed.*

*In the case of consolidation, where two or more separate IRPs are involved, one IRP Panel must be tasked with the responsibility for making this determination, and it is proposed that this should be the IRP Panel appointed to the IRP that was commenced first in time.*

*In considering consolidation the IOT noted that the Bylaws allow for Claimants to file for non-binding IRPs and that the IRP Panel could be called on to determine if a binding IRP and a non-binding IRP can be consolidated. The IOT considered this and concluded that these two types of IRPs should not be allowed to be consolidated as the final result of the consolidated IRP in that case would change the nature of one of the original IRPs. Further, the IOT concluded that no act of participation by means of consolidation, intervention or participation as an amicus should have the effect of changing the binding/non-binding nature of the proceedings being joined.*

2. Except as otherwise specifically stated herein, actions on requests for consolidation, intervention, and/or participation as an amicus are committed to the reasonable discretion of the applicable IRP Panel. Where all the Parties, proposed Parties and proposed amici consent to the request for consolidation, intervention, and/or participation as an amicus, respectively, then there is a presumption that the applicable IRP Panel will permit the request.

*Rationale: The IOT believed that the First IRP Panel should retain its discretion in making these decisions but that it should provide guidance to that Panel for cases where all parties agree to the action.*

3. In the event that no IRP Panel is in place when a request for consolidation, intervention, and/or participation as an amicus is made, the request will be suspended pending IRP Panel appointment.

*Rationale: Given the First IRP Panel is responsible for these decisions in this proposal, a determination on the application cannot be made until the First IRP Panel is appointed.*

4. In the event that requests for consolidation or intervention are granted, the restrictions on written statements set forth in [Rule 6] shall apply to each Claimant and Intervening Party individually unless the applicable IRP Panel concludes otherwise, in its discretion consistent with the Purposes of the IRP.

*Rationale: The IOT considers it reasonable to allow each party to put forward its own statement in support.*

### ***Consolidation***

5. Consolidation of Disputes may be appropriate when the First IRP Panel concludes that there is a sufficient common nucleus of operative facts 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.

*Rationale: See comments above, the only change is replacing the Procedures Officer with the First IRP Panel.*

6. All motions requesting consolidation shall be submitted to the ICDR with copies to ICANN and any Parties to an IRP which is the subject of a request for consolidation. Motions shall be submitted:
  - a. within [21/28] days of the publication<sup>7</sup> of the later IRP; and
  - b. within 60 days of the publication of the First IRP

unless the First IRP Panel, in its discretion, deems that the Purposes of the IRP are furthered by accepting such a motion after such time limits. The ICDR will direct the request to the First IRP Panel.

*Rationale: The IOT proposes to revisit all timings before finalising the SP, to ensure that they are coherent. Input from the community on questions of timing would be welcome.*

*The IOT considers that, in the interests of avoiding undue delay or duplication, there should be expected time limits for making an application for consolidation, by reference both to the commencement of a later IRP which is seeking to be consolidated into the First IRP, and by reference to the length of time the First IRP has been underway. Since “commencement” of an IRP requires knowledge of a third party proceeding which the applicant may not have, the IOT proposes that time limits should run from publication, since this places everyone in the same position. The Bylaws contain an obligation on ICANN to publish promptly, and Rule 6 contains provision for specified interest parties to be notified. The IOT intends that “Publication of the IRP” should be defined in Section 1, to reflect that publication by ICANN is considered to have taken place when any notice of the IRP and the written statement of dispute have been published on the relevant section of the ICANN website.*

*Rather than make this an outright time limit the IOT considered that the First IRP Panel should have the discretion to accept a later application.*

7. All motions for consolidation must be accompanied by the appropriate filing fee and must explain why the Disputes should be consolidated, in other words:
  - a. What the common nucleus of operative facts is; and
  - b. Why consolidation would foster a more just and efficient resolution than addressing the Disputes individually.

*Rationale: this mirrors Rule 7 (5) above and makes it clear that the moving party is responsible for providing sufficient information to justify granting the request.*

8. All motions for consolidation shall also include a declaration by the moving Party that:
  - a. All statements it makes in its motion are true and correct;

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<sup>7</sup> Publication of an IRP shall refer to the publication by ICANN on its website of notice of the IRP together with the written statement of dispute.

- b. They are not intentionally misleading the Panel; and
- c. They are not filing the motion and seeking to consolidate for improper purposes. Improper purposes include, but are not limited to:
  - I. Having the primary intent to delay either IRP action or the resolution of an underlying proceeding;
  - II. Seeking to harass ICANN, another IRP Claimant or any other Party or potential Party to the IRP proceedings; or
  - III. Having the primary intent of selecting the IRP Panelists who will hear either Dispute.

*Rationale: The IOT was concerned about the potential for misuse of the option to consolidate IRP requests. It therefore proposes that the moving party should include a declaration as to its bona fides.*

- 9. ICANN and any IRP Claimant who is a Party to an IRP which is the subject of a request for consolidation shall be entitled to submit a statement in response within [21/28 days] of receipt of the motion to consolidate.

*Rationale: The IOT considers that, in order to ensure fairness, any non-moving parties who would be impacted by a decision to consolidate should have a right to be heard.*

*As above, the proposed timing of 21/28 days is an initial proposal on which community input is being sought. Once the IOT has completed drafting the SP all timings will be reviewed against the comments received and to ensure that similar timing requirements within the draft SP are coherent.*

- 10. The respective IRP Panels may stay either or both IRPs in their discretion pending a decision on the motion for consolidation, provided that the non-moving Parties shall be granted an opportunity to make representations on any such stay to their IRP.

*Rationale: The IOT was concerned that the work of all relevant IRP Panels would have to continue in each IRP while the request for Consolidation was being considered, potentially resulting in a waste of resources. As such the IOT is proposing to allow the Panels responsible for these IRPs (or the IRP Provider where the Panel is not yet in place) to make the decision to stay either of both while the request for consolidation is being considered.*

- 11. In considering whether to consolidate, the First IRP Panel should consider all relevant circumstances, including, without limitation:
  - a. The views of all the Parties.
  - b. The progress already made in the IRPs, including whether allowing the request would require previous decisions to be reopened, steps to be repeated, or other duplication of work.

- c. Whether an IRP Panel has been appointed in more than one of the IRPs and, if so, whether the same or different Panelists have been appointed.
- d. Whether granting a request to consolidate would create a conflict of interest for an already-appointed Panelist.
- e. How consolidation better furthers the Purposes of the IRP generally, as compared to the proceedings continuing independently.

*Rationale: The IOT noted that the Interim Supplementary Procedures (ISP) do not provide any guidance when considering whether to grant a request to consolidate. After considering this in depth the IOT is proposing the factors in Rule 7 (11) of this rule as a non-exhaustive guideline for the First IRP Panel.*

12. The First IRP Panel should endeavour to make a decision on a motion for consolidation as soon as possible and in any event shall do so within [15] days of final submissions. The First IRP Panel shall provide a brief statement of the reasons for their decision.

*Rationale: Given the expectation in the Bylaws that an IRP be completed in six months, the IOT was concerned about not having any deadline for the First IRP Panel to make a decision regarding a consolidation request, which could significantly extend the time to complete an IRP if such a decision is protracted. After considering this, the IOT is proposing to include this section to institute a deadline for the First IRP Panel to make a decision regarding a request for consolidation.*

*The proposed timing of 15 days is an initial proposal on which community input is being sought.*

13. When IRPs are consolidated, they shall be consolidated into the First IRP, unless otherwise agreed by all Parties or the First IRP Panel finds otherwise.

*Rationale: The IOT considers that there should be consistency as to how cases are consolidated, where possible. After considering this the IOT is proposing as guidance that consolidated IRPs be consolidated into the First IRP unless otherwise agreed by all parties or the First IRP Panel finds otherwise. The First IRP Panel is therefore provided with guidance, without limiting its discretion in this matter.*

14. The First IRP Panel shall continue in place for the consolidated IRP proceedings unless one or more of the Panelists is unable to continue and withdraws due to conflict of interest, in which case the Party whose Panelist withdraws will select a further Panelist in accordance with Rule 3.

*Rationale: The IOT noted a potential gap in the ISP regarding Consolidation. As noted in the previous section it is expected that any consolidated IRPs will be consolidated into the First IRP. Since an IRP Panel is in place at least for the First IRP, since this is tasked with deciding the application, that IRP Panel should continue in place. However, it is necessary to ensure that Panelists in the First IRP reconsider whether they have any conflict of interest with respect to the consolidated actions.*



15. If Disputes are consolidated, each existing Dispute shall no longer be subject to further separate consideration, provided that the First IRP Panel shall have the discretion to determine otherwise.

*Rationale: The ISP provide that consolidated IRPs are thereafter treated as a single case. The IOT noted feedback from past IRPs, however, that this has not always been the case in practice. The IOT therefore proposes to include some discretion for the First IRP Panel to determine how the consolidated actions shall be treated thereafter.*

16. Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the First IRP Panel shall direct that all materials related to the consolidated Dispute be made available to Parties that have 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 First 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.

*Rationale: A similar provision is included in the ISPs, but has been duplicated here to ensure that the rules relating to consolidation are grouped together.*

### ***Intervention***

17. 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 IRP Panel, as provided below. This applies whether or not the person, group, or entity participated in an underlying proceeding (a process-specific expert panel per Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

*Rationale: The only change is replacing the Procedures Officer with the IRP Panel.*

18. 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 IRP Panel may order in its discretion.

*Rationale: No significant change from the ISP.*

19. 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 an Intervening Party to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

*Rationale: No significant change except for replacing “Claimant” in the ISP by “Intervening Party” given the IOT noted that in this context an SO cannot be a Claimant as defined under the Bylaws.*

20. Any person, group, or entity who intervenes pursuant to this section will become a Party in the existing IRP and have all of the rights and responsibilities of other Parties in that matter and be bound by the outcome to the same extent as any other Party.

*Rationale: No significant change except for replacing “Claimant” in the ISP by “Party” given the change made to Rule 7 (19).*

21. All motions requesting permission to intervene shall be submitted to the ICDR, who will direct the request to the IRP Panel and copy the existing Parties to the IRP. Motions should be submitted within [21/28 days] of the publication of the IRP unless the IRP Panel, in its discretion, deems that the Purposes of the IRP are furthered by accepting such a motion after that time limit. Filing a motion to intervene does not stop the clock on the intervener’s own time to bring an IRP unless the IRP Panel exceeds the time for decision-making referred to at [Rule 7(26)] below, and so a potential intervener should consider whether they will be at risk of being out of time, should the motion be rejected.

*Rationale:*

*The ISP required that a motion to Intervene be directed to the IRP Panel. The IOT considered that this was inconsistent with other similar procedures, such as filing of an IRP, and that there could be circumstances where a motion to intervene is made before the IRP Panel has been appointed. The IOT concluded that such a motion should be directed to the IRP Provider, who will ensure its distribution but also copied to the known parties to the IRP in question.*

*The ISP provided that a motion to Intervene needed to be filed within 15 days of the initiation of the IRP. In considering this, the IOT noted that the date of initiation of an IRP could be difficult for an applicant to identify. Therefore, for the reasons referred to in Rule 7 (6) above, the IOT proposes that timing should run from “publication of the IRP,” which is clear and easy to locate. As to the timing of 15 days after the publication of an IRP, the IOT considered this too short and is proposing 21/28 days.*

*The proposed timing of 21/28 days is an initial proposal on which community input is being sought. Once the IOT has completed drafting the SP all timings will be reviewed against the comments received and to ensure that similar timing requirements within the draft SP are coherent.*

*The current text in the ISP states: “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 IOT modified this to remove the reference to the Procedures Officer.*

*Addition of “Filing a motion to intervene does not stop the clock on the intervener’s own time to bring an IRP unless the First IRP Panel exceeds the time for decision-making referred to at Rule 7(26) below, and so a potential intervener should consider whether they will be at risk of being out of time, should the motion be rejected.” The IOT’s discussions on the Time to File (Rule 4) were exhaustive and is proposing this text to avoid any confusion on*

*the part of the applicant. Only if the First IRP Panel delays in making a decision would the clock stop on the proposed Intervener's time to file.*

22. All requests to intervene must be accompanied by the appropriate filing fee, contain the same information as a written statement of Dispute and, explain why the right to intervene should be granted, in other words:
- a. What the common nucleus of operative facts is; and
  - b. Why allowing intervention would foster a more just and efficient resolution than addressing the Disputes individually.

*Rationale: The current text in the ISP addresses both applications for consolidation and for intervention. The IOT considers that necessary rules for these different forms of participation should be grouped together under their respective headings, leading to a small amount of duplication across the sections.*

*The IOT noted that there was no requirement for the applicant to explain why the right to Intervene should be granted and that this is a critical element in such an application. As such, the proposed text includes this additional requirement for filing a motion to Intervene.*

23. All motions for intervention shall include a declaration by the moving Party that:
- a. All statements it makes in its motion are true and correct;
  - b. They are not intentionally misleading the Panel; and
  - c. They are not filing the motion and seeking to intervene for improper purposes. Improper purposes include, but are not limited to:
    - I. Having the primary intent to delay the IRP action or the resolution of an underlying proceeding;
    - II. Seeking to harass ICANN, another IRP Claimant or any other Party or potential Party to the IRP proceedings; or
    - III. Having the primary intent of selecting the IRP Panelists who will hear either Dispute.

*Rationale: As for Rule 7(8).*

24. ICANN and any IRP Claimant who is a Party to an IRP which is the subject of a request for intervention shall be entitled to submit a statement in response within [21/28] days of receipt of the motion to intervene.

*Rationale: As for Rule 7(9).*

25. In considering whether to allow intervention, the IRP Panel should consider all relevant circumstances, including, without limitation:
- a. The views of all the Parties.
  - b. The progress already made in the IRP, including whether allowing the request would require previous decisions to be reopened, steps to be repeated, or other duplication of work.
  - c. Whether granting a request to intervene would create a conflict of interest for an already-appointed Panelist.

*Rationale: As for Rule 7(11), noting that the non-exhaustive list of appropriate factors is more limited than in the case of consolidation.*

26. The IRP Panel should endeavour to make a decision on a motion for intervention as soon as possible and in any event shall do so within [15] days of final submissions. The IRP Panel shall provide a brief statement of the reasons for their decision.

*Rationale: As for Rule 7 (12).*

27. The IRP Panel shall continue in place after an application for intervention is granted unless one or more of the Panelists is unable to continue, and withdraws, due to conflict of interest, in which case the Party whose Panelist withdraws will select a further Panelist in accordance with Rule 3.

*Rationale: As with Rule 7 (14), the IOT noted a potential gap in the ISP regarding Intervention. Panelists in the First IRP must reconsider if they have a conflict of interest as a result of the intervener joining the proceedings, and withdraw if appropriate.*

28. 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 Parties that have intervened 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.

*Rationale: Essentially the same text as in the ISP.*

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

29. Any person, group, or entity that has a material interest relevant to the Dispute, even if they do not satisfy the standing requirements for a Claimant set forth in the Bylaws, may seek leave to participate as an amicus curiae before an IRP Panel, subject to the limitations set forth in [Rule 7(29)-(34)]. The purpose of participation as an amicus curiae is to assist the IRP Panel by offering information, expertise or other input that has a bearing on the issues in the Dispute. For the avoidance of doubt, an amicus curiae is not a Party to the Dispute.

Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the Dispute and, upon request of such person, group, or entity to participate as an amicus curiae, then there is a presumption that the IRP Panel will permit the request:

- a. A person, group, or entity that participated in an underlying proceeding (a process-specific expert panel per Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) the outcome of which is material and relevant to the Dispute;
- b. 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; and
- c. 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.

*Rationale: Much of this text is the same as in the ISP, but with some notable amendments:*

*Under the ISP only those who are ineligible to be a Claimant are permitted to participate as an amicus. The IOT considered this to be unfair to entities who technically might qualify as a Claimant, and did have input into the dispute that they wished to share, but did not wish to participate and seek an adjudication as an active Claimant.*

*The IOT has clarified that anyone seeking to participate as an amicus must make an application to that effect, they do not participate as of right simply because they have a material interest in the Dispute.*

*The persons, groups and entities satisfying subparagraphs (i) through (iii) do not participate as of right, but there is a presumption that they will be permitted by the Panel to do so.*

*Clarifying that the purpose of permitting participation as an amicus is to assist the Panel.*

30. All requests to participate as an amicus must meet the requirements of the written statement (set out at Rule 6), specify the interest of the amicus curiae, include the same declaration as referred to at [Rule 7(8)] and must be accompanied by the appropriate filing fee.

*Rationale: This is the text of the ISP with the added reference to the requirement to make the same declaration as to bona fides as is required of an applicant for consolidation or intervention.*

31. All requests to participate as an amicus curiae shall be submitted to the ICDR, who shall direct them on to the IRP Panel if already in place. Where no IRP Panel is in place the ICDR shall refer the request to the IRP Panel once appointed. Requests to participate as an amicus must be made within 30 days of the publication of the IRP unless the IRP Panel, in its discretion, deems that the Purposes of the IRP are furthered by accepting such a request after 30 days.

*Rationale: As detailed elsewhere in these draft Supplementary Procedures the IOT is proposing to remove the role of the Procedures Officer and the handling of such applications by the IRP Panel. In the IOT proposal, therefore, requests are submitted to the IRP Provider, who will direct them to the IRP Panel, and the IRP Panel will be responsible for making the decision to accept the request.*

*The ISP does not provide any time limit for requesters to submit an application to participate as an Amicus Curiae. The IOT considered this an issue if a request to participate as an Amicus is made once the IRP process is well underway, as this could cause significant delays in completing the IRP. To address this issue the IOT is proposing that requests to participate as an Amicus Curiae should be made within 30 days of the publication of the IRP. Similarly to such requirements for Consolidation and Intervention, the IOT is proposing that the IRP Panel, in its discretion, can accept requests to participate as an Amicus Curiae after the 30-day limit if the Purposes of the IRP are furthered by accepting such a late request.*

*The proposed timing of 30 days is an initial proposal on which community input is being sought. Once the IOT has completed drafting the Supplementary Procedures (SP) all timings will be reviewed against the comments received and to ensure that similar timing requirements within the draft SP are coherent.*

32. ICANN and any IRP Claimant who is a Party to an IRP which is the subject of a request for participation as an amicus shall be entitled to submit a statement in response within [21/28] days of receipt of the motion to participate as an amicus.

*Rationale: The IOT was concerned that the ISP did not provide any opportunity for ICANN and any IRP Claimant who is a Party to an IRP to have any input into the IRP Panel's consideration regarding requests to participate as an Amicus Curiae. To address this issue the IOT is proposing to include the option for those parties to submit a statement in response to the IRP Panel.*

*The proposed timing of 21/28 days is an initial proposal on which community input is being sought. Once the IOT has completed drafting the Supplementary Procedures (SP) all timings will be reviewed against the comments received and to ensure that similar timing requirements within the draft SP are coherent.*

33. If the IRP Panel determines, in its discretion, subject to the conditions set forth above, that the proposed amicus curiae has a material interest relevant to the Dispute and that they have information, expertise or other input that has a bearing on the issues in the Dispute which is likely to assist the IRP Panel, it shall allow participation by the amicus curiae.

*Rationale: Amended to reflect the changes made to Rule 7(29) above.*

34. In addition to the written statement referred to at [Rule 7(30)] above, any person participating as an amicus curiae may, at the request and in the discretion of the IRP Panel, submit to the IRP Panel written briefing(s) on the Dispute or on such discrete questions as the IRP Panel may request briefing, subject to such deadlines, page limits, rights of the Parties to file briefings in response and other procedural rules as the IRP Panel may specify in its discretion.

*Rationale: Revised for greater clarity that any written briefings submitted by an Amicus or only at the request and in the discretion of the IRP Panel.*

35. A person, group, or entity participating as an amicus curiae shall be given access to all publicly-available written statements, evidence, motions, procedural orders and other materials in the Dispute in a timely manner. Where a Claimant or ICANN claims that any such materials are confidential, the IRP Panel shall determine in its discretion<sup>9</sup> whether and if so the extent to which and terms on which such material documents must be made available to a person, group, or entity participating as an amicus curiae.

*Rationale: Amended to mirror the text in relation to consolidation and intervention. The IOT considers that an amicus should be given access to the documents in the IRP.*

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relation to consolidation and intervention. The IOT considers that an amicus should be given access to the documents in the IRP.

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<sup>9</sup> During the pendency of these Supplementary Rules, in exercising its discretion in allowing the participation of amicus curiae and in then considering the scope of participation from amicus curiae, the IRP Panel shall lean in favor of allowing broad participation of an amicus curiae as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.