Fletcher, Heald & Hildreth, P.L.C. Comments in Response to the New Draft of the "Updated Supplementary Procedures" for ICANN's Independent Review Process

Thank you to the IOT Team for its hard work on the *Draft Updated Supplementary Procedures*. We have analyzed them closely and respectfully submit there is a long way to go until they are complete. To ensure "fundamental fairness and due process" (guaranteed by *Draft Updated Supplementary Procedures,* Section 5, *Conduct of the Independent Review*), we share the following critically necessary changes to the provisions addressing Notice, Intervention by Right, Opportunity to heard in review of Emergency Petitions, and the scope of remedies IRP Panels may provide in certain types of hearings.

We are particularly concerned about the effect of the proposed *Updated Supplementary Procedures* in two specific circumstances:

- Challenges to decisions from Another Arbitration Tribunal; and
- Challenges to a Supporting Organization's Consensus Policy.

These are the IRP actions that may be taken pursuant to "decisions of process-specific expert panels" and resulting "from action taken in response to advice or input from any Advisory Committee or Supporting Organization" under ICANN Bylaws, Sections 4.3(b)(iii)(2) and (3).

I. Review of All Arbitration Tribunals (e.g., "Decisions of Process-Specific Expert Panels")

In the ICANN Applicant Guidebook for New gTLDs, the Community and the Board created 3 forums for disputes to be handled by well-regarded, international Dispute Resolution Providers. They are:

a. The World Intellectual Property Organization (WIPO) for New gTLD Legal Rights Objections;
b. The International Chamber of Commerce (ICC) for Community Objections; and
c. The International Center for Dispute Resolution (ICDR) for String Confusion Objections.

The Applicant Guidebook expressly rejected any avenue of appeal from the decisions of these arbitration tribunals. Upon losing the dispute, the rules required an applicant to withdraw their New gTLD Applications. A few applicants nonetheless were permitted to use the IRP to challenge the decisions – but without the Winning Parties' who had prevailed in the original dispute being present! As a matter of fundamental fairness and due process, winning parties must be given notice of, and be allowed to participate in, such challenges.[1]

[1] It is easy for a losing applicant to file a Request for an IRP based on the argument that another arbitration forum made a decision that is "inconsistent with the Articles of Incorporation or Bylaws." But such a proceeding acts as an appeal of the decision of the underlying arbitration tribunal and is grounded in facts and arguments of the underlying proceeding to which ICANN was not a party. The winning party is a much-needed part and a rightful voice of this IRP proceeding.

To protect and effectuate interested parties' fundamental right to participate effectively in an IRP review of an arbitration tribunal's decision, we propose three essential procedural safeguards.

A. PROVIDE ACTUAL NOTICE TO ALL ORIGINAL PARTIES TO AN UNDERLYING THIRD PARTY PROCEEDING

First, the rules of the *Updated Supplementary Procedures* should provide actual and timely notice of any appeal of or other post-decision challenge of any underlying decision to (a) all parties to the underlying arbitration proceeding and (b) plus notice to the underlying tribunal provider (called the "Dispute Resolution Provider" in the New gTLD Applicant Guidebook).

Fair is fair: all affected entities should know when an appeal or challenge to a dispute has been brought, and very few people actually read and follow ICANN's IRP page. (Further, initial notices, briefs and other filings in IRP actions are often posted weeks after they were filed – creating a disadvantage for other materially affected parties from the start.)

Such actual notice is fully consistent with the rules governing the original dispute. For example, all Dispute Resolution Providers for New gTLD Objections (*e.g.*, WIPO, ICC, and ICDR) require that ALL Notices, Filings, Pleadings, and Communications of the Parties to the DRP – from the very start of the Community, String and Legal Rights Objections – be copied in realtime and, at the time of filing be sent to all other parties in the proceeding. Fundamental fairness and due process in the IRP require nothing less.

Accordingly, the *Updated Supplementary Procedures* must include a new Notice Provision, to include:

1. **"Where the filing invokes New ICANN Bylaws Section 4.3(b)(iii)(A)(3) – *i.e.*, the Covered Action 'resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws' – the Claimant must:**

    a. **Send a copy of its Notice of Independent Review Process and its Request for Independent Review Process together with all statements, exhibits, attachments, legal authorities, witness statements, and other reports or materials to all Parties to the original "process-specific expert panel" proceeding and decision;**

    b. **Use the most recent email addresses available for the Representatives of the Parties: *i.e.*, either those email addresses used by the expert panel when that panel provided its decision to the Parties or, if the Claimant has actual knowledge of a change of email address, to the new email address of a Representative of a Party (*e.g.*, where a law firm has merged and changed email addresses) and submit a signed, scanned statement attesting to the electronic delivery of all of the materials commencing the proceeding to all Parties to the Underlying Decision and to the Dispute Resolution Provider and list the names and email addresses of those who were sent these filing materials; and**

    c. **If a Claimant does not comply with the above procedures within 24 hours of submitting its Request for IRP, the process shall terminate.**

2. ICANN Staff shall send a follow-up notice of Commencement of the IRP proceeding to the Dispute Resolution Provider that administered the "process-specific expert panel" and to all Parties to that decision.

3. The Claimant, ICANN, and the IRP Panel and Administrators shall send to the Dispute Resolution Provider and all Parties to the underlying proceeding all correspondence, filings, and communication with ICANN, the IRP Panel, and the IRP Forum Provider. No part of an IRP dispute involving a third-party "process-specific expert panel" shall take place ex parte. All Parties to the underlying proceeding shall be copied on all matters in the IRP unless they "opt-out" by email to ICANN and the IRP Forum and request to be removed from distribution."

B. PROVIDE A MANDATORY RIGHT OF INTERVENTION TO ALL PARTIES TO THE UNDERLYING ARBITRATION PROCEEDING FOR WHICH REVIEW IS SOUGHT

Second, the Updated Supplementary Procedures must permit any party to an arbitration proceeding resolving a gTLD dispute to intervene as a matter of right in an appeal of or other post-decision challenge to the arbitral decision. While losing Claimants may dream of enter into a room with ICANN alone to privately challenge their losing decision in an underlying tribunal, such private challenges are fundamentally unfair and a violation of due process to the winning party and every other party that participated earlier. Such challenges also are inconsistent with the legal systems of all developed countries. All parties to the underlying proceeding should have an equal opportunity to be heard.

(Due to the "consolidation" that is recommended in the ICANN rules for third-party proceedings, such as the Community Objections, there can be multiple parties in such a proceeding. Each party has a right to be heard and participate.)

Winning parties (and other losing parties) may or may not choose full participation in an IRP proceeding, as they may not have the time, inclination, or funding to do so. To assure that at least cost is no barrier for such parties' voices, concerns, and defenses to be heard, the following critical options should be added to the Updated Supplementary Procedures to ensure that all relevant information is made available to the IRP Panel:

To Section 7. Consolidation, Intervention, and Joinder, add:

"A. As a matter of right, any Party or Parties to the decision of a "process-specific" expert panel shall be entitled to participate in an IRP proceeding challenging that decision as a matter of right. In such a case, any Party to the underlying proceeding may:

1. **Submit a "Request to Intervene as a Full Party." The other Party or Parties may then participate fully in:**
    a. **The selection of the IRP Panelists;**
    b. **Any pre-hearing motions, including Emergency Petitions, Procedural Pleadings (*e.g.*, Motions to Dismiss for Lack of Standing or Timeliness), and Substantive Pleadings (*e.g.*, reasons to reject the pleadings for lack of merit);**
    c. **Any Discovery that is conducted; and**
    d. **Any Hearings that are held.**
    e. **Parties who chose to intervene in this full manner shall be responsible for their share of the costs of the IRP Panel, which shall be shared equally**

with the side that they are supporting (*e.g.*, ICANN's side or Claimant's side). Such a "Request to Intervene as a Full Party" must be reviewed by the ICDR to verify the claim of Party status in the underlying proceeding is truthful. Upon such verification, intervention will be allowed. No argument against such intervention will be allowed by the IRP Forum and, if made, will be denied.

2. **Alternatively, any Party or Parties to the decision of a "process-specific" expert panel shall be entitled individually, collectively, or in combination thereof, to file a "Friend of the IRP" Brief in response to:**
    a. **Claimant's Request for Independent Review Process;**
    b. **Any Pre-Hearing Motions, including Requests for Emergency Relief and Procedural Pleadings (*e.g.*, Motions to Dismiss for Lack of Standing or Timeliness); and**
    c. **Any Additional Memoranda, Supplemental Memoranda, Post-Hearing Briefs and similar substantive material presented to the IRP Panel.**

Submissions by the Winning Party or Parties of "Friend of the IRP" Briefs and Responses shall be of the same lengths as that allowed to the Claimant's Briefs and Responses with respect to length, with the same right to file exhibits, witness statements, evidence, and similar materials under IRP rules."

[Note: while ICANN Counsel is excellent, ICANN was not involved in the preparation or presentation of the briefs, arguments, hearings or other proceedings of the underlying dispute. It was the Parties, e.g., the Community and the Applicant (Community Objections) or another Registry and the Applicant (String Confusion) that presented the case below. Their briefs and arguments are not published and are generally only partially reflected in the decision of the Underlying Dispute Resolution Panel. As the decision of the underlying tribunal may be reversed, the actual arguments, evidence and reasoning presented in the underlying dispute are highly relevant to the IRP Panel and best presented by those who made the arguments. The Party that won the Underlying Proceeding is in the best position to defend its interests and must be allowed to do so.]

C. REQUIRE THE IRP PANEL TO HEAR FROM ALL PARTIES TO THE UNDERLYING PROCEEDING BEFORE DECIDING UPON ANY REQUEST FOR INTERIM RELIEF OR DEMAND FOR INTERIM MEASURES OF PROTECTION

Third, IRP Panel should be barred from stopping enforcement of the underlying decision or granting other interim relief to a Claimant until the Winning party in the underlying dispute has an opportunity to be heard regarding such relief. While it may be appropriate for losing parties (e.g., the Claimant) to seek to stop the underlying decision from going into effect, ***it is not fair to do so without hearing from the Winning Party or Parties about the harm that will take place if the decision is delayed in its implementation.*** As a matter of fairness and due process, no request for Interim Measures of Protection (provisions set out in Section 10 of Updated Supplementary Procedures) must be allowed to take place without hearing from all other parties to the underlying proceeding; these are the parties who the delay will most immediately impact.

To implement this principle, the following language must be added to Section 10 of the *Updated Supplementary Procedures*:

To Section 10. Interim Measures of Protection, add:

"B. No Request for any of the Interim Measures of Protection sought by the Claimant (including, but not limited to, "prospective relief, interlocutory relief, or declaratory or injunctive relief" shall be heard by the IRP Panel, Emergency Panelist, or any other appointed party, without giving the Winning Party or Parties, and other parties as appropriate, a full, fair, equal, and timely right to be heard.

1. **The Winning Party or Parties from any Underlying Arbitration Tribunal shall be entitled to be heard on any or all of the following factors, including:**
    - **(i) Harm arising from any Interim Request of the Claimant (or Other Parties that may be added);**
    - **(ii) Both: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and**
    - **(iii) The balance of hardships and the harm to the Winning Party (Parties) should the Underlying Decision be further delayed in its implementation."**

[Note: As was true in Part I.B, above, ICANN was not a party to the underlying proceeding, so ICANN Counsel would not know the deep, substantial, and real monetary and other harms that may befall the Winning Party should implementation of the decision it won be further delayed or suspended – perhaps for weeks, months or years. Further, how can a Panelist weigh the "balance of hardships" (Section 10 (iii)) without hearing from both sides?]

II. Review, Appeal or Challenge to the Consensus Policy of a Supporting Organization

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The second, key area of concern regarding the Updated Supplementary Procedures centers on the provisions for reviewing, challenging, or changing "Consensus Policies created by Supporting Organization." See ICANN Bylaws, Section 4.3(b)(iii)(2). Truly, and with respect, what do senior commercial arbitrators know about our ICANN Multistakeholder Process, and why should ICANN Counsel alone be required to defend the Community's Consensus Policy – without the Supporting Organization and Stakeholder Groups that negotiated the Consensus Policy in good faith (and great effort) – should these groups choose to participate?

As everyone in our Community knows, and as the revised Bylaws affirm, the Multistakeholder Community charters, negotiates, drafts, edits, reviews comments on, and finalizes Consensus Policy Recommendations. The Council of the Supporting Organization – e.g., the GNSO Council – accepts them (as appropriate), and the ICANN Board approves them (when appropriate and upon review by the Advisory Committees). The ICANN Staff serves as a facilitator of the Supporting Organization's Policy Development Process, but not the negotiators. In the case of a challenge, therefore, should not the Community be allowed to defend its Consensus Policy alongside ICANN Counsel?

To enable a Supporting Organization to defend one of its Consensus Policies, it needs: a) timely notice to the Supporting Organization of an IRP filing against such a one of its consensus policies, and b) the full

opportunity by the Supporting Organization (and its Stakeholder Groups) to present arguments and evidence in defense of the Consensus Policy in the IRP proceeding.

Further, how far may an IRP Panel go in its ruling on a Consensus Policy dispute? We respectfully submit that fundamental principles of fairness and due process require an IRP Panel not revoke a Consensus Policy unilaterally, but to send back to the Community those parts of the Consensus Policy that it determines need to be revised and reworked.

By analogy, a court that reviews a challenge to regulation generally is not permitted to substitute its own judgment for the expert agency that wrote that regulation. Under the concepts of "judicial remand" and "limited review," judges generally may not rewrite laws and regulations, but must send them back to the legislators and agencies that wrote them to be reviewed and reworked with the public. For example, In the United States, federal courts regularly find sections of new regulations that they determine are contrary to law or arbitrary and capricious. In such cases, those courts generally send these sections back to the regulatory agency that wrote them – e.g., the Food & Drug Administration, the Federal Trade Commission or the Federal Communications -- to be revised through the public notice and comment procedures of the US Administrative Procedure Act. See 5 US Code Section 706, Scope of Review.

For Consensus Policies, it is only fair that the IRP Panel that invalidates a portion of the policy must send it back to the ICANN Board for revision. The ICANN Board should, in turn, return the invalidated portion of the Consensus Policy to the Supporting Organization for review and revision (with the Community).

We recommend the following three specific changes below to implement this principle.

A. PROVIDE ACTUAL NOTICE TO THE ICANN SUPPORTING ORGANIZATION, STAKEHOLDER GROUP, WORKING GROUP CHAIRS AND ICANN COMMUNITY THAT DEVELOPED THE CONSENSUS POLICY BEING CHALLENGED

The Updated Supplementary Procedures should supplement its new Notice Provision (adding to Section I.A above), to include:

> **"4. Where the filing invokes a challenge to an ICANN Consensus Policy, adopted by a Supporting Organization and accepted by the ICANN Board pursuant to the public notice and comment processes of the ICANN Process, Actual Notice to the Supporting Organization and Stakeholders that adopted the Consensus Policy must be provided, as follows:**
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> **a. The Claimant shall send a copy of the Request for IRP and its Initial Written Statement, with all evidence, exhibits, and attachments, to the Council Chair of the Supporting Organization that enacted the Consensus Policy, the heads of each Stakeholder Group in the Supporting Organization and the Chair(s) of the Working Group that developed the Consensus Policy;**
> **b. The Claimant shall submit a signed, scanned statement to ICANN and the ICDR attesting to the electronic delivery of all of the materials commencing this proceeding to all Parties listed in subsection 1 above, and list the names and email address of those who were sent these materials, within 24 hours of submitting its Request for IRP, or this proceeding will terminate; and**

c. **Within 3 business days of receiving the Notice of IRP and/or Request for IRP in any action involving a Consensus Policy, ICANN Counsel shall publish a Notice of the IRP Action and Details of the Challenge to an Adopted Consensus Policy in the then-current place where ICANN posts matters open for public comment (currently https://www.icann.org/public-comments#open-public). (The goal being to provide notice of a challenge to ICANN policy in the place where the Community is most likely to read about policy changes.)**

5. **The Claimant and ICANN shall continue to send electronic copies of all filings, pleadings, requests, and correspondence of the IRP to the Council Chair of the Supporting Organization that passed it, the heads of the Stakeholder Groups, and Chair(s) of the Working Party that created the Consensus Policy unless any party or parties requests to be removed from the distribution list.**

B. MANDATORY RIGHT OF INTERVENTION TO THE IRP FOR THOSE WHO PARTICIPATED THE CREATION OF THE CONSENSUS POLICY AND THOSE WHOSE INTERESTS ARE REPRESENTED IN OR AFFECTED BY IT.

The Updated Supplementary Procedures also should permit those most closely involved in enacting a particular Consensus Policy to participate by right in any proceeding to modify or repeal it. Allowing a single disgruntled stakeholder to challenge and renegotiate a Consensus Policy with ICANN Counsel alone in their own corporate or personal interest is unfair and does not serve the interests of the Multistakeholder Community. Accordingly, the following changes must be made to the Updated Supplementary Procedures to ensure fair and balanced representation of all materially-affected parties in the right to participate in an IRP Proceeding:

To existing Section 7. Consolidation, Intervention, and Joinder, add:

"The Council of the Supporting Organization that passed the Consensus Policy, any and all Stakeholder Groups that participated in the development of the Consensus Policy, and any and all Chair(s) of the PDP WG that wrote or reviewed the Consensus Policy may intervene as of right in this IRP proceeding.

a. **The Council that enacted the Consensus Policy may participate in the choice of Panelists without cost or any escrow payment requirement;**
b. **The parties listed above, separately, collectively, or in several groups, shall be entitled to submit "Friend of the IRP" briefs to respond to any initial submissions by the Claimant, any supplemental submissions of the Claimant, or other submissions by the Claimant.**
c. **The parties listed above, separately, collectively, or in several groups, shall be entitled to participate in any hearing that is held, whether online, by telephone, in person, or by other means.**
d. **The length of the responsive submissions of the parties above shall be the same as the length allowed the Claimant for the submission with respect to which the responsive submission is filed.**

[Note: Similar to Sections I.B and I.C above, ICANN Counsel is outstanding, but never participated in the day-to-day negotiations and compromises of the Policy Development Process. Rather, it was the Community members who researched, reviewed, discussed, debated, drafted and edited the Consensus

Policy; these Community members will be most familiar with the Consensus Policy's arguments and defense. Since the IRP Emergency Panelist holds the power to "stay" or stop implementation of a Consensus Policy and the full IRP Panel holds the power to reverse of overturn an ICANN Consensus Policy – the result of years of work – it is critical to due process that the Community that participated in the creation of this policy have the right, ability, and opportunity to fully and fairly defend it.]

C. LIMIT WHAT THE IRP PANEL CAN DO WHEN OVERTURNING A CONSENSUS POLICY – STANDARD OF REVIEW AND REMEDIES

Certainly the IRP Panel has the power to set aside a Consensus Policy as a violation of the ICANN Bylaws. But how likely is that after months and years of stakeholder input, Community review, Council review and Board review?

More likely is the situation where the IRP Panel finds some aspect of the Consensus Policy to be contrary to ICANN Bylaws – some part, but not all or even most of the Consensus Policy.

Precedent in other areas teaches that when a Community writes a rule that Community should have the right to revise the rule – consistent with any direction or guidance that a judge or tribunal might offer. It is a principle of judicial restraint that a court that sets aside a portion of a regulation or legislation *must send it back to the expert agency that created it to revise it* – consistent with the Community-based proceedings it used originally. To achieve fairness and due process, such must be the case here.

Consistent with this principle, the Updated Supplementary Procedures should be modified as follows:

To the end of Section 11, *Standard of Review*, add:

"The IRP Panel may not substitute its judgment for that of the Supporting Organization's Council or the ICANN Board by rewriting a Consensus Policy. After hearing from all Materially-Affected Parties of the Supporting Organization (including Stakeholder Groups) and Co-Chairs of the Working Group who choose to participate, the Panel may determine that all or a portion of a Consensus Policy is contrary to ICANN Bylaws.

If the IRP Panel makes such a determination, it shall provide one or more of the following remedies:

1. **Identify to the ICANN Board the specific portions of the Consensus Policy that it found to violate the ICANN Bylaw;**
2. **Indicate what portions of the Consensus Policy (if any) do not violate the ICANN Bylaws;**
3. **Remand the Consensus Policy to the ICANN Board for review with the Council that adopted it in accordance with the IRP Panel's decision; and**
4. **Indicate whether the Panel recommends that the Consensus Policy should be suspended pending Board and Supporting Organization review and rewriting.**

Prior to any determination by an IRP Panel that a Consensus Policy should be suspended pending Board and Supporting Organization review and revision, the IRP Panel must request input from the materially-affected parties and the Supporting Organization and its Stakeholder Groups whether any harms or dangers may arise from the Policy's suspension.

The IRP Panel must provide notice to the materially affected groups and an adequate opportunity for them to be heard regarding (a) the harms they may suffer from the Policy's suspension and (b) other courses of action that the Panel should consider taking in lieu of such suspension."

III. Additional Issues for This Proceeding and the Cooperative Engagement Process ("CEP") Discussion

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A. Fairness and Due Process Require That Equivalent Changes in Notice and Mandatory Right of Intervention be Made to ICANN's Cooperative Engagement Process

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While not the subject of this comment proceeding, Claimants challenging "decisions of process-specific expert panels" or Consensus Policies must not be allowed to negotiate privately with ICANN via the Cooperative Engagement Process (CEP). The CEP -- ICANN's pre-IRP negotiation – empowers its participants to resolve their differences prior to bringing an IRP claim. The whole idea is avoid the IRP filing. *Accordingly, it is consistent with fairness and due process for CEP negotiations to include all directly impacted and materially affected parties in the negotiations, should they choose to participate, so that they have the power to represent and protect their own interests.*

Therefore, we ask that the IOT share these comments with the CEP Work Stream 2 Subgroup and recommend that that subgroup make equivalent changes to the CEP that are equivalent to the proposed changes submitted here for the *Updated Supplementary Procedures* of the IRP.

B. Strongly Urge the IOT Not to Copy Entire Bylaw Sections into the *IRP Updated Supplementary Procedures*

We are surprised to see large sections of the *Updated Supplementary Procedures* copied from the ICANN Bylaws. While we can understand references to the Bylaws, wholesale copying can lead to problems, particularly if there develop inconsistencies between the two versions. Which one should parties follow?

To avoid this unnecessary problem, we recommend that the *Updated Supplementary Procedures* simply reference relevant ICANN Bylaw sections. Then the researcher can check the relevant Bylaws section and return to the *Updated Supplementary Procedures* for additional guidance.

For example, the definitions section might state*:*

1. **"Definitions**

   The definitions of Claimant, Covered Actions and Disputes are set out in Section 4.3(b) of the ICANN Bylaws."

   [Continue with definitions of "Emergency Panelist" and other terms not defined in the Bylaws.].

C. Review of the International Centre for Dispute Resolution Itself

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Every institution needs a review process. If the International Centre for Dispute Resolution ("ICDR") institution and IRP process is the review for the ICANN Board and its decision, who acts as the reviewer of the ICDR? What is the review process for the ICDR work and the quality of its Panels' ability to follow the rules as set out in the ICANN Bylaws and the IRP Updated Supplementary Procedures?

We would urge the IOT to give this important oversight issue some thoughts – and action.

In conclusion, thank you for your consideration of these comments.

Respectfully submitted,
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