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VIA PUBLIC COMMENT

ICANN
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Re: IRP-IOT Proposed Updates to the IRP Supplementary Procedures

Dear ICANN:

The following comments concern the proposed updates to the Independent Review Process (“**IRP**”) Supplementary Procedures and are based on my extensive participation as counsel in six distinct IRPs—including the first full IRP as well as a currently pending IRP¹—governed by prior and current versions of ICANN’s IRP Supplementary Procedures, as well as more than 30 years of practice in the field of international arbitration as counsel, arbitrator, and advisor to a number of international arbitral bodies.

When the ICANN Board adopted the current Interim Supplementary Procedures for ICANN IRP (“**Interim Procedures**”) on 25 October 2018, both the ICANN Board and the IRP Implementation Oversight Team (“**IRP-IOT**”) affirmed that the Interim Procedures would operate as a provisional set of rules “in the event that an IRP is filed prior to the time that there is a completed set of Updated IRP Supplementary Procedures available[.]”² On

¹ I represented ICM Registry in the first full IRP against ICANN. Since then, I have represented several other claimants—Dot Registry LLC; DotConnect Africa; Amazon.com, Inc.; Afiliis Domains No. 3 Limited; and Altanovo Domains Limited—in IRP proceedings. In addition to my experience with the IRP, I have also represented Employ Media LLC in arbitration proceedings against ICANN through the International Chamber of Commerce and advised participants in the New Generic Top-Level Domain (“**gTLD**”) Program, such as DotMusic Limited and dotgay LLC. I have also assisted a number of registries in developing their dispute resolution policies.

² ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), <https://tinyurl.com/4tt92s8p>, Rationale for Resolutions 2018.10.25.20 - 2018.10.25.21.

3 July 2024, the IRP-IOT published proposed changes to Rules 3, 4, 5B, and 7, along with rationales, for public consultation and requested public comment on those proposals.³

It is widely accepted—including by ICANN⁴—that the IRP Supplementary Procedures require further development to ensure that ICANN complies with its Articles of Incorporation and Bylaws and can be held properly accountable to the global Internet community pursuant to clear rules, international standards, and best practices.⁵ Unfortunately, the proposed changes to Rule 3 and Rule 7 of the Interim Procedures would, in fact, frustrate the IRP’s ability to provide members of the Internet community with a fair and “independent third-party review of Disputes” with ICANN.⁶ In spite of the new proposed rules, ICANN would fall short of its commitment to the United States government to put in place a robust accountability mechanism that it accepted as *quid pro quo* for greater independence.

I. Comments on the Proposed Rule 3 (Composition of the IRP Panel)

The IRP-IOT has proposed changes to Rule 3 of the IRP Supplementary Procedures (“**proposed Rule 3**”) that would require all IRP panelists—including both the claimant’s panelist and the presiding panelist—to be selected from ICANN’s Standing Panel, once that panel is in place. The only exception to this requirement would be if ICANN’s Standing Panel—not the claimant—determines, in its discretion, that it does not have the capacity to seat all panelists necessary for the IRP.

The proposed changes read, in relevant part, as follows:

2. The three Panelists for the IRP Panel will be selected from the Standing Panel, unless a Standing Panel is not in

³ ICANN, Announcement: Implementation Oversight Team seeks input on IRP Supplementary Procedures (3 July 2024), <https://tinyurl.com/4h8wkw2>.

⁴ ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), <https://tinyurl.com/4tt92s8p>, Rationale for Resolutions 2018.10.25.20 - 2018.10.25.21 (stating that there are “some other areas [of the Interim Procedures] that need further development and are not yet ready to be finalized for Board approval.”).

⁵ Bylaws, <https://tinyurl.com/5twtdvdp>, Sec. 4.3(a).

⁶ Bylaws, <https://tinyurl.com/5twtdvdp>, Sec. 4.3(a).

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.***

...

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.⁷

According to ICANN's Bylaws, the Standing Panel is to be comprised of at least seven members who are reviewed and vetted by ICANN, nominated by the Supporting Organizations and Advisory Committees, and then ultimately subject to confirmation by the ICANN Board.⁸ Following their confirmation, the members will receive "training provided by ICANN on the workings and management of the Internet's unique identifiers and other appropriate training"⁹

While the formation of the Standing Panel is already well underway, ICANN has made only limited information available regarding the process, criteria, and standards applied by ICANN to select, confirm, and train the Standing Panel members.¹⁰ Based on the limited public records, the following is known:

⁷ ICANN, IRP-IOT, Proposed changes by the IRP-IOT regarding Rules 3, 4, 5B, and 7 (clean - no red line), <https://tinyurl.com/45fy3d5x>, p. 2 (emphasis added).

⁸ Bylaws, <https://tinyurl.com/5twtdvdp>, Sec. 4.3(j)(ii).

⁹ Bylaws, <https://tinyurl.com/5twtdvdp>, Sec. 4.3(j)(i).

¹⁰ ICANN's Bylaws repeatedly affirm its commitment to transparency. Bylaws, <https://tinyurl.com/5twtdvdp>, Secs. 1.2(a), 1.2(a)(iv), 1.2(b)(ii), and 3.1. This commitment, at minimum, requires that ICANN disclose all information regarding the process by and criteria according to which

- The IRP Community Representatives Group (“**IRP-CRG**”) has apparently conducted an extensive evaluation of the applicants for the Standing Panel, which occurred over the course of an entire year.¹¹ This evaluation seemingly involved interviewing all of the applicants,¹² the use of Odgers Berndtson as an external consultant on the process,¹³ developing and implementing a method to choose the nominees,¹⁴ and some form of quality testing.¹⁵ None of the details of this evaluation process have been made public.
- Based on this evaluation, the IRP-CRG apparently sent the ICANN Board a slate of proposed candidates; the ICANN Board has since confirmed the slate of panelists and “reached out to members to notify them and confirm their continued availability and interest, which they have all confirmed that they are.”¹⁶ No public announcement has been made to-date of the identity of the Standing Panel members.
- ICANN Staff “has been compiling the list of training materials for the panelists themselves.”¹⁷ These training materials have not been made public.

ICANN selected the Standing Panel, as well as any training the Standing Panel members have received or will receive from ICANN and any communications that ICANN has or will have with members of the Standing Panel.

- ¹¹ IRP-CRG, 2022 Meetings, <https://tinyurl.com/2p8x3uja> (showing that the IRP-CRG’s first meeting occurred on 14 March 2022); ICANN, IRP-CRG, 2023 Meetings, <https://tinyurl.com/2h2af3vs> (showing that the IRP-CRG’s final meeting occurred on 6 March 2023).
- ¹² IRP-CRG, Meeting #15 (3 Oct. 2022), Agenda, <https://tinyurl.com/4n2aha7w> (discussing the interview process).
- ¹³ IRP-CRG, Meeting #6 (23 May 2022), Zoom (audio and visual) Recording, <https://tinyurl.com/5fpkuzxu> (containing a presentation by Odgers Berndtson on the selection process).
- ¹⁴ IRP-CRG, Meeting #27 (9 Jan. 2023), Agenda, <https://tinyurl.com/4dh3ymfw>.
- ¹⁵ IRP-CRG, Meeting #21 (14 Nov. 2022), Agenda, <https://tinyurl.com/ymt4579k>; IRP-CRG, Meeting #16 (10 Oct. 2022), Agenda, <https://tinyurl.com/mwhsds2w>.
- ¹⁶ ICANN 79, CF – IRP-IOT Work Session [C] (2 Mar. 2024), Transcript of the Closed Session, <https://tinyurl.com/bd5um29y>, p. 5.
- ¹⁷ ICANN 79, CF – IRP-IOT Work Session [C] (2 Mar. 2024), Transcript of the Closed Session, <https://tinyurl.com/bd5um29y>, p. 5.

ICANN has thus, at minimum, implemented an application process for selecting the Standing Panel members; interviewed and evaluated the applicants; selected a slate of proposed members of the Standing Panel and sent that slate to the ICANN Board for approval; and gathered or developed training materials for the chosen members of the Standing Panel.

A. The Proposed Rule 3's Violations of Applicable Legal Rules and Principles

Based on what can be surmised about the Standing Panel from disparate sources of information, the proposed Rule 3—which mandates selection of IRP panelists from the Standing Panel—would frustrate the IRP's ability to provide an “independent third-party review of Disputes” with ICANN.¹⁸ As such, the proposed Rule 3 violates applicable local laws, fundamental norms of international arbitration, the ICDR Rules, and ICANN's Bylaws. In principle, there is nothing wrong with a standing panel of neutrals. However, where such a panel is put in place without any transparency or proper input from those whose rights will be impacted by the outcomes of the dispute resolution process, as has happened here, the proverbial deck is already stacked—in this case by ICANN and in favor of ICANN.

1. Apparent or Actual Bias of the Standing Panel

The IRP-IOT's proposed Rule 3 requires the selection of panelists from a Standing Panel that either is, or appears to be, systematically biased in favor of ICANN. ICANN is a party in every IRP—which regularly share common legal issues—and ICANN has pre-selected all members of the Standing Panel. If the proposed Rule 3 were adopted, ICANN would be guaranteed that each IRP Panel (which, pursuant to that Rule, is composed of Standing Panel members) would consist only of its hand-selected panelists. The proposed Rule 3 thus violates the foundational norm of international arbitration that arbitrators must be independent and impartial, both in appearance and in fact.¹⁹

¹⁸ Bylaws, <https://tinyurl.com/5twtdvdp>, Sec. 4.3(a).

¹⁹ Gary Born, *International Commercial Arbitration* (3rd ed. 2021), p. 2132; Nigel Blackaby, Constantine Partasides, and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th ed. 2023), ¶ 4.69 (“It is a fundamental principle of international arbitration that every arbitrator, whether acting as a member of

IRPs are specifically designed to hold ICANN accountable through a process consistent with international arbitration norms.²⁰ ICANN is *always* the respondent in IRPs. As a result, ICANN repeatedly takes the same side of the numerous legal issues that recur in IRPs. In particular, ICANN advocates the same side of, among other issues: (i) the level of deference, if any, that should be afforded to ICANN and its Board; (ii) the remedies available in the IRP; (iii) ICANN’s obligations pursuant to its Article and Bylaws; and (iv) the relevance of international law to ICANN’s legal obligations.

For this reason, when selecting members of the Standing Panel, ICANN knows exactly what legal positions that it is likely to take in future IRPs. It is well-positioned to screen and select Standing Panel members that share, or are likely to share, ICANN’s values and interpretations of its Articles, Bylaws, international law, and local law *and* who therefore would be disposed to resolve IRPs in a manner beneficial to ICANN. ICANN’s ability to pre-screen and select the Standing Panel members, including for their expected position on anticipated legal issues, deprives the Standing Panel and its members of the appearance of independence and impartiality and, in all probability, results in a Standing Panel that is actually biased in ICANN’s favor.

Because the proposed Rule 3 would require IRP panelists to be selected from a Standing Panel lacking in apparent, and indeed probable, impartiality and independence, it violates the basic norms that govern IRPs. Impartiality and independence of the decision-maker is a bedrock requirement for any adjudicative procedure. The legal rules and principles applicable to IRPs *explicitly* prohibit individuals from serving as panelists where there is even an appearance, let alone the reality, that they lack independence and/or impartiality:

- *International arbitration norms*: The International Bar Association (“**IBA**”)’s Guidelines on Conflicts of Interest in International Arbitration—widely accepted as codifying fundamental international arbitration norms and

an arbitral tribunal or as a sole arbitrator, must be impartial and independent of the parties not only at the time of accepting the appointment but throughout the entire course of the arbitral proceedings. . . . [T]he concept of ‘impartiality’ is considered to be connected with actual or apparent bias of an arbitrator—either in favour of one of the parties, or in relation to the issues in dispute”); Arif Hyder Ali, Jane Wessel, Alexandre de Gramont, and Ryan Mellske, *The International Arbitration Rulebook: A Guide to Arbitral Regimes* (2019), pp. 285-294.

²⁰ Bylaws, <https://tinyurl.com/5twtdpy>, Sec. 4.3(a)(viii).

applicable by virtue of ICANN’s Bylaws²¹—states that arbitrators “**shall decline an appointment . . . if** facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to **justifiable doubts as to the arbitrator’s impartiality or independence[.]**”²² The IBA Rules of Ethics similarly establish that “[a]rbitrators . . . shall be and shall remain free from bias.”²³

- *International Centre for Dispute Resolution (“ICDR”)’s International Arbitration Rules*: The ICDR Rules—the international arbitration rules applicable in IRPs—require that arbitrators must “be **impartial and independent**”²⁴ and parties can “challenge an arbitrator whenever circumstances exist that give rise to **justifiable doubts as to the arbitrator’s impartiality, or independence[.]**”²⁵
- *American Arbitration Association’s Code of Ethics for Arbitrators in Commercial Disputes*: The Code of Ethics—applicable in IRPs by virtue of the ICDR Rules—requires arbitrators to “avoid conduct and statements that give

²¹ The IRP must “[l]ead to binding, final resolutions **consistent with international arbitration norms** that are enforceable in any court with proper jurisdiction.” Bylaws, <https://tinyurl.com/5twtdpy>, Sec. 4.3(a)(viii) (emphasis added).

²² International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (25 May 2024), <https://tinyurl.com/344mv4jh>, p. 6 (emphasis added); *id.* (explaining that “[d]oubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching the arbitrator’s decision.”). *See also* Arif Hyder Ali, Jane Wessel, Alexandre de Gramont, and Ryan Mellske, *The International Arbitration Rulebook: A Guide to Arbitral Regimes* (2019), p. 286.

²³ International Bar Association, Rules of Ethics for International Arbitrators, <https://tinyurl.com/2jfp867r>, Art. 1 (emphasis added).

²⁴ ICDR, International Dispute Resolution Procedures (including Mediation and Arbitration Rules) (1 Mar. 2021), <https://tinyurl.com/mryv2e9a>, Art. 14(1) (emphasis added). *See also id.*, Art. 14(2) (arbitrators must “disclose any circumstances that may give rise to justifiable doubts as to the arbitrator’s impartiality or independence . . .”).

²⁵ ICDR, International Dispute Resolution Procedures (including Mediation and Arbitration Rules) (1 Mar. 2021), <https://tinyurl.com/mryv2e9a>, Art. 15(1) (emphasis added).

*the appearance of partiality toward or against any party.”*²⁶ Further, it provides that, “while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality.”²⁷

- *ICANN Bylaws*: The ICANN Bylaws similarly establish that “ICANN shall have a separate process for **independent** third-party review of Disputes,”²⁸ namely the IRP. And, while ICANN has not complied with this requirement, the Bylaws also require that “Standing Panel members must be independent of ICANN and its Supporting Organizations and Advisory Committees[.]”²⁹

Pursuant to these norms, an IRP claimant has every reason to challenge the appointment of panelists on the Standing Panel to IRP panels—and the ICDR has every reason to sustain these challenges. The IRP-IOT’s proposed Rule 3 violates the legal rules and norms applicable to the IRP.

2. ICANN’s *Ex Parte* Communications with Standing Panel Members

Beyond establishing that ICANN may handpick the potential members of IRP panels, the proposed Rule 3 also mandates that those panelists must be individuals who have participated in some form of training provided by ICANN, and only by ICANN. ICANN’s actions to train the panelists, and the secrecy in which they have occurred, create both the

²⁶ American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes (1 Mar. 2004), <https://tinyurl.com/bdfw3h8m>, Cannon 1(D).

²⁷ American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes (1 Mar. 2004), <https://tinyurl.com/bdfw3h8m>, Cannon 1(C).

²⁸ Bylaws, <https://tinyurl.com/5twtdvdp>, Sec. 4.3(a).

²⁹ Bylaws, <https://tinyurl.com/5twtdvdp>, Sec. 4.3(q)(i).

appearance and potentially the reality that the Standing Panel is neither impartial nor independent.³⁰

By training the Standing Panel members, ICANN has communicated in depth and likely ***taught*** Standing Panel members about the recurring issues that are critical to the resolution of IRPs, such as the scope of IRP panel authority, or whether panel decisions are binding, or the relevance of the so-called business judgment rule (which ICANN constantly invokes), or ICANN's interpretation of its Articles and Bylaws, amongst others. Beyond the inherent unfairness caused by one party unilaterally training a supposedly independent and impartial panel, ICANN's training would seemingly involve extensive *ex parte* communications with the members of the Standing Panel—in that none of the claimant parties will be involved in such interactions.

Such *ex parte* communications are strictly prohibited by the legal norms governing IRPs, as they fatally undermine both apparent and actual independence and impartiality of the panelists:

- *International arbitration norms*: The IBA's Rules of Ethics for International Arbitrators prohibit "***any unilateral communications regarding the case with any party, or its representatives***" and specifically underscore that, even during the arbitrator selection process, "***the merits of the case [may not be] discussed.***"³¹
- *ICDR Rules*: The ICDR Rules prohibit any party to a dispute from having "***any ex parte communication relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator***, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or impartiality and independence in relation to the parties, or to discuss the suitability of candidates

³⁰ The Bylaws require that the IRP Panel provide an "independent third-party review" of the claimants' disputes with ICANN. Bylaws, <https://tinyurl.com/5twvdpdy>, Sec. 4.3(a); *id.*, Sec 4.3(q)(i) (requiring Standing Panel members to "be independent from ICANN").

³¹ International Bar Association, Rules of Ethics for International Arbitrators, <https://tinyurl.com/2jfp867r>, Arts. 5.1, 5.3 (emphasis added).

for selection as a presiding arbitrator where the parties or party-appointed arbitrators are to participate in that selection.”³²

- *AAA/ABA Code of Ethics for Commercial Arbitrators*: “An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party[.]”³³

By unilaterally communicating with and training members of the Standing Panel, ICANN has created the strong appearance, if not the reality, that the members of the Standing Panel lack independence or impartiality. The proposed Rule 3 should be modified to make it possible for claimants to make their appointment of a panelist from outside the Standing Panel, and also not to require the appointment of the presiding panelist from the Standing Panel. It could nevertheless continue to mandate that ICANN appoint its panelist from the Standing Panel, albeit subject to risk that its appointment would be challenged due to its *ex parte* communications with the Standing Panel Members.

3. ICANN’s Preselection of the Claimant’s Panelist and the Presiding Panelist

The mandate in the IRP-IOT’s proposed Rule 3 that all IRP panelists must be selected from the Standing Panel is also impermissible because it demands unequal treatment of IRP claimants and the only possible IRP respondent—ICANN. While ICANN screens, interviews, pre-selects, and trains *all* members of the Standing Panel—and thus all potential IRP panelists—the claimant has no such right. Instead, the claimant must choose its panelist and accept the appointment of a presiding panelist from the Standing Panel, which includes only individuals who ICANN has already vetted, pre-selected, and approved.

However, the legal norms that govern IRPs—and indeed any adjudicatory process—require the proceeding to be neutral, equal, and fair. The proposed Rule 3 violates these norms by denying the IRP claimant a level playing field for the resolution of its claims

³² ICDR, International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) (1 Mar. 2021), <https://tinyurl.com/mryv2e9a>, Art. 14(6) (emphasis added).

³³ American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes (1 Mar. 2004), <https://tinyurl.com/bdfw3h8m>, Canon III(B).

against ICANN and by affording ICANN a categorical procedural advantage in constituting the IRP panel:

- *International arbitration norms*: Equality of the parties is a fundamental principle of international arbitration.³⁴ It is widely accepted that, regardless of the appointment procedure, this fundamental principle of equality may not be compromised.³⁵
- *ICDR Rules*: The ICDR Rules require that “**the parties [be] treated with equality** and that each party has the right to be heard and is given a fair opportunity to present its case.”³⁶
- *ICANN’s Bylaws*: The Bylaws provide that decisions must be made “**by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment** (i.e., making an unjustified prejudicial distinction between or among different parties)[.]”³⁷ They further prohibit the inequitable application of ICANN’s “**standards, policies, procedures, or practices**” and specifically prohibit singling “**out any particular party for disparate treatment** unless justified by

³⁴ Nigel Blackaby, Constantine Partasides, and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th ed. 2023), ¶ 5.14 (“[T]ribunal enjoys a very broad power to determine the appropriate procedure. . . . It is, however, subject to an overarching respect of due process or natural justice—that is, equality of treatment.”); Arif Hyder Ali, Jane Wessel, Alexandre de Gramont, and Ryan Mellske, *The International Arbitration Rulebook: A Guide to Arbitral Regimes* (2019), pp. 280-281.

³⁵ Howard Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1989), p. 364 (“The model law should guarantee the parties’ freedom to agree on the appointment procedure, **provided that equality is ensured.**”) (emphasis added); Gary Born, *International Commercial Arbitration* (3rd ed. 2021), p. 1778 (“The parties’ autonomy under national arbitration legislation to select the arbitrators is generally subject only to limited exceptions, including **mandatory requirements of equality.**”) (emphasis added); *BKMI Industrienlagen GmbH & Siemens AG v. Dutco Construction*, Cour de cassation [Cass.] [Supreme Court for Judicial Matters], Chambre civile 1, No. 89-18708/89-18726, Arrêt [Judgment] (7 Jan. 1992) (Fr.), p. 2 (“[T]he principle of equality of the parties in the appointment of arbitrators is a matter of public policy; it may only be waived after the dispute has arisen.”) (author’s translation).

³⁶ ICDR, International Dispute Resolution Procedures (including Mediation and Arbitration Rules) (1 Mar. 2021), <https://tinyurl.com/mryv2e9a>, Art. 22(1) (emphasis added).

³⁷ Bylaws, <https://tinyurl.com/5twtdpy>, Sec. 1.2(a)(v).

substantial and reasonable cause, such as the promotion of effective competition.”³⁸

Indeed, various United States courts have declared arbitration agreements that allow one party to select and train the arbitrators for a dispute to be both invalid and unconscionable.³⁹ In *Nitro v. Alticor*, for example, a federal court found that the pre-selection and training of all potential arbitrators by the defendants is unreasonable, unfair, and unconscionable.⁴⁰ The court explained that:

Like the arbitration provision in *Hooters*, the Amway system undermines the neutrality of the proceedings. **While the parties are allowed to choose their own arbitrators, the pool of candidates for this choice is limited by Defendants to those arbitrators whom Defendants have already pre-**

³⁸ Bylaws, <https://tinyurl.com/5twtdpy>, Sec. 2.3.

³⁹ See, e.g., *McMullen v. Meijer, Inc.*, 355 F.3d 485, 493-94 (6th Cir. 2004) (“The type of control exercised by Meijer over the potential arbitrators is analogous to the ‘exclusive[] ... control over the entire panel’ exercised by the employer in *Hooters* and rejected by the Fourth Circuit. *Hooters*, 173 F.3d at 939. Furthermore, the arbitrator-selection procedure used by Meijer allows it to create the type of symbiotic relationship with its arbitrators that we feared would promulgate bias in *Floss*. *Floss*, 211 F.3d at 314. The risk of bias inherent in Meijer’s procedure is demonstrated by the fact that Meijer uses the same panel of five to seven arbitrators in each arbitration hearing in which it participates in the state of Michigan. We find Meijer’s exclusive control over the pool of potential arbitrators particularly problematic because Meijer could easily have adopted a procedure in which an unbiased third-party, such as the AAA or FMCS, selected the pool of potential arbitrators.”); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999) (“The Hooters rules also provide a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decisionmaker. Rule 8. The employee and Hooters each select an arbitrator, and the two arbitrators in turn select a third. Good enough, except that the employee’s arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters. This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decisionmaker would be a surprising result.”); see also *Stewart & Assocs. Int’l, Inc. v. Quixtar Inc.*, Case No. 05-3440-CV-S-RED, 2006 WL 8438384, at *3-*4 (W.D. Mo. Nov. 20, 2006).

⁴⁰ *Nitro Distrib., Inc. et al. v. Alticor, Inc. et al.*, Case No. 03-3290-CV-W-RED, 2005 WL 6936246, Order (W.D. Mo. Sep. 16, 2005), <https://tinyurl.com/2v3hwkzy>, p. 25.

selected in a process that involves an initial screening, then training with a heavy dose of goodwill for Defendants and their manner of operation, then after personal interviews, being hand-picked to be on the list of arbitrators (so long as Defendants deem them to be acceptable). Arbitrators are to be neutral, and allowing such training and influence over the arbitrators as Defendants have in this situation is both unreasonable and unfair.

Although this court has found that none of the Plaintiffs have submitted to arbitration, the court also finds that, in the alternative, arbitration with pre-selected JAMS arbitrators as presently set up by Defendants is unconscionable.⁴¹

As such, the appointment procedures for IRP panels that are set forth in the proposed Rule 3 violate applicable legal requirements of neutrality, equality, and fairness. While ICANN may pre-select and train all potential IRP panelists, the claimants are limited to those panelists and have no parallel right to pre-selection and training. ICANN should not adopt the proposed rule as drafted.

B. Mandatory Modifications to the Proposed Rule 3 Based on the Applicable Legal Rules and Principles

As discussed above, the proposed Rule 3 violates international arbitration norms as well as the other legal rules and principles applicable to IRPs, which prohibit any requirement that an IRP panel be appointed exclusively from a Standing Panel that ICANN has selected and trained. The proposed Rule 3 may not be adopted in its current form. The following modifications to Rule 3 would address, in part, the violations of applicable legal rules and principles that we had identified above.

First, instead of mandating that the entire IRP Panel be selected solely from the Standing Panel, Rule 3 must permit the claimant to appoint a panelist from outside the Standing Panel and permit the presiding arbitrator to be appointed—whether by the parties, the co-panelists, or the ICDR—from outside the Standing Panel, with no preference given based

⁴¹ *Nitro Distrib., Inc. et al. v. Alticor, Inc. et al.*, Case No. 03-3290-CV-W-RED, 2005 WL 6936246, Order (W.D. Mo. Sep. 16, 2005), <https://tinyurl.com/2v3hwkzy>, p. 25 (emphasis added).

on whether or not a candidate is a Standing Panel member. ICANN, of course, would be free to limit itself to members of the Standing Panel for its appointments and to propose Standing Panel members to be the presiding panelist (subject to the next comment regarding ICANN's training of the Standing Panel).

In developing the proposed Rule 3, the IRP-IOT seems to have operated under the mistaken assumption that ICANN's Bylaws mandate selection of panelists only from the Standing Panel. But the Bylaws do no such thing. They permit selection of panelists from outside the Standing Panel when the Standing Panel lacks "the requisite diversity of skill and experience needed for a particular IRP proceeding[.]"⁴² Since the members of the Standing Panel all lack the requisite independence and impartiality, the Standing Panel necessarily lacks the capacity to seat IRP panelists (absent the free and fully informed consent of the claimant to an appointment from the Standing Panel).

Second, ICANN must cease providing training of any sort to the members of the Standing Panel. As explained above, this training amounts to impermissible *ex parte* communication with potential IRP panelists that irredeemably deprives them of impartiality and independence. If ICANN wishes to provide information on its workings to IRP panelists, it may submit this information in the IRP itself—with the claimant free to provide its own information and to comment on that provided by ICANN. Absent the elimination of such training (and the replacement of Standing Panel members who have already received such training), *even* ICANN would be subject to risk of a challenge if it were to appoint its IRP co-panelists from the Standing Panel.

Third, the decision as to whether to appoint the claimant's co-panelist and the presiding panelist from the tainted Standing Panel must be left solely in the hands of the claimant itself. Consistent with the applicable legal rules and principles, *only* ICANN's co-panelist may be appointed from the Standing Panel, absent claimant's consent (and, again, subject to the prior comment on ICANN's impermissible training of the Standing Panel). The ICANN Bylaws do not place the decision as to whether the Standing Panel lacks capacity to seat a panelist in the hands of the Standing Panel.⁴³ Given that the Standing Panel neither

⁴² Bylaws, <https://tinyurl.com/5twtdpy>, Sec. 4.3(k)(ii).

⁴³ Bylaws, <https://tinyurl.com/5twtdpy>, Sec. 4.3(k)(ii).

appears to be nor is independent and impartial, it would, in fact, violate international arbitration norms and the other governing law to place this decision in their hands.

Fourth, although the IRP-IOT’s proposed Rule 3 does not directly address the matter, the apparent intention to allow any IRP decision to be appealed to the Standing Panel is also legally unacceptable. Because the Standing Panel lacks independence and impartiality, the Standing Panel cannot seat independent and impartial Standing Panel members to hear an appeal and therefore an IRP decision cannot be “properly appealed to the *en banc* Standing Panel.”⁴⁴ As such, pursuant to the Bylaws, IRP decisions necessarily “are binding final decisions to the extent allowed by law.”⁴⁵ The proposed Rule 3 should expressly provide that Standing Panel appeals are not available and therefore appeals cannot be “properly” made.

II. Comments on the Proposed Rule 7 (Consolidation, Intervention, and Participation as an *Amicus*)

The IRP-IOT has proposed changes to Rule 7 of the IRP Supplementary Procedures (the “**proposed Rule 7**”) that would leave the current provisions on *amicus* participation contained therein—which afford an effective right to *amicus* participation in an IRP—largely intact and in their current form. However, the minor amendments proposed to the current Rule 7 would, in fact, enlarge the scope of *amicus* participation and permit an entity to choose between intervening in the IRP as a party and participating as an *amicus*.

The proposed Rule 7 provides, in relevant part, as follows:

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)).

⁴⁴ Bylaws, <https://tinyurl.com/5twtdpy>, Sec. 4.3(x)(i).

⁴⁵ Bylaws, <https://tinyurl.com/5twtdpy>, Sec. 4.3(x)(i).

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.

...

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.⁴⁶

A. The Proposed Rule 7's Violations of Applicable Legal Rules and Principles

The proposed Rule 7—which affords a right to *amicus* participation in IRPs with almost no restrictions—is little more than a minor amendment to a predecessor rule. However, the predecessor rule was adopted through a flawed procedure, which denied the public any opportunity to comment on it, and both the predecessor rule and the proposed rule are contrary to basic norms and practices of international arbitration. As such, if it is to stay faithful to its Bylaws, ICANN should not adopt the proposed Rule 7.

1. The Unlawful Adoption of the Proposed Rule 7's Predecessor

As an initial matter, the very concept of *amicus* participation in IRPs was introduced in blatant violation of ICANN's required procedures and at the behest of private interests, specifically Verisign Inc. (“**Verisign**”). The proposed Rule 7 simply replicates the core *amicus* provisions of the prior Rule 7. Indeed, even the IRP-IOT reports that “[m]uch of this text [of proposed Rule 7] is the same as in the ISP [namely the core *amicus* provisions], but with some notable amendments[.]”⁴⁷ I set out below the relevant history to the adoption of Rule 7.

(a) The Introduction of *Amicus* Participation into Rule 7

On 28 November 2016, the IRP-IOT released the Public Comment Draft of the Interim Supplementary Procedures. The version of Rule 7 in that draft provided for the intervention

⁴⁶ ICANN, IRP-IOT, Proposed changes by the IRP-IOT regarding Rules 3, 4, 5B, and 7 (clean - no red line), <https://tinyurl.com/45fy3d5x>, pp. 13-14.

⁴⁷ ICANN, 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, <https://tinyurl.com/bdey2fb6>, p. 29.

of any person or entity in an IRP if they had standing as a claimant in that IRP.⁴⁸ However, it ***did not provide for amicus curiae participation in an IRP***, nor did it provide standing for third parties to participate in an IRP unless they were (or could be) a claimant against ICANN.

The language in Rule 7 providing for *amicus curiae* participation in IRPs appeared for the first time in a draft released—**after** the public comment period for the Public Comment Draft had concluded.⁴⁹ The IRP-IOT “agreed upon” language for Rule 7⁵⁰ provided for the possibility of *amicus curiae* participation. However, such participation was permitted only for disputes relating to the process-specific expert panels and, even then, subject to the discretion of a Procedures Officer:

If a person, group, or entity participated in an underlying proceeding (a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)), (s)he/it/they shall receive notice that the INDEPENDENT REVIEW has commenced. Such a person, group, or entity shall have a right to intervene in the IRP as a CLAIMANT or as an *amicus*, as per the following:

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

Any person, group, or entity that did not participate in the underlying proceeding may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. If the standing requirement is not satisfied, such persons may

⁴⁸ ICANN, DRAFT as of 31 October 2016 – Updates to ICDR Supplementary Procedures, <https://tinyurl.com/ucxa84ar>, p. 8.

⁴⁹ ICANN, DRAFT as of 1 May 2018 – Draft Interim ICDR Supplementary Procedures, <https://tinyurl.com/y959w733>, pp. 8-9.

⁵⁰ IRP-IOT Meeting #39 (7 June 2018), Transcript, <https://tinyurl.com/38kddx6e>, p. 12.

intervene as an *amicus* if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed *amicus* has a material interest at stake directly relating to the injury or harm that is claimed by the CLAIMANT to have been directly and causally connected to the alleged violation at issue in the DISPUTE.⁵¹

The very first proposal for *amicus* participation in IRPs was made without prior publication for public comment and despite the fact that none of the public comments on the draft that was made public had, in fact, requested the addition of *amicus* participation.⁵² It thus failed to satisfy the requirement in the Bylaws that the “Rules of Procedure shall be published and subject to a period of public comment”⁵³ This procedural violation would only be amplified as the proposal was revised into the form that appears in the current Interim Supplementary Procedures.

(b) The Expansion of *Amicus* Participation in Rule 7

At the behest of Mr. David McAuley, the Senior International Policy and Business Development Manager of Verisign, as well as the chair of ICANN’s IRP-IOT, this initial proposal for *amicus* participation—itself accepted in violation of ICANN’s procedure requirements—would be replaced with the much more expansive *amicus* provision of the Interim Supplementary Procedures. This expansion was adopted in order to advance the legal interests of Mr. McAuley’s employer Verisign in the *Afilias Domains No. 3 Limited v. ICANN* IRP.

On 18 June 2018, Afilias Domains No. 3 Limited (“**Afilias**”) initiated the Cooperative Engagement Process with ICANN in response to ICANN’s commencement of the process

⁵¹ ICANN, DRAFT as of 1 May 2018 – Draft Interim ICDR Supplementary Procedures, <https://tinyurl.com/y959w733>, pp. 8-9 (footnotes and comments omitted).

⁵² Only three public comments substantively addressed Rule 7, all of which requested *intervention rights for participants in “process-specific expert panels”* conducted pursuant to Bylaws Section 4.3(b)(iii)(A)(3). ICANN, CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium (2 Feb. 2017), <https://tinyurl.com/yvdze5rz>, PDF p. 47 (emphasis added). The term “process-specific expert panels” is referenced both at Section 4.3(b)(iii)(A)(3) of the Bylaws and in the definition (Rule 1) of Disputes in the Interim Procedures.

⁵³ Bylaws, <https://tinyurl.com/5twtvdpv>, Sec. 4.3(n)(ii).

for delegating the .WEB gTLD to NDC (the “**.WEB CEP**”).⁵⁴ The commencement of the .WEB CEP was posted soon thereafter on ICANN’s website.⁵⁵ The dispute centered on ICANN’s violations of its Articles and Bylaws by, among other things, ICANN’s failure to enforce the New gTLD Program Rules following Verisign’s wrongful subversion of the .WEB auction process and its concealed acquisition of Nu Dotco, LLC’s (“**NDC**”) .WEB application.

With the dispute between Afilias and ICANN already a matter of public knowledge, on 5 October 2018, Mr. McAuley circulated a new draft of the Interim Procedures to the IRP-IOT. The new draft of Rule 7 sought to expand *amicus* participation beyond just disputes arising out of process-specific expert panels and also made such participation effectively a matter of right so long as the party seeking to participate as *amicus* had a “material interest relevant to the DISPUTE”:

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

...

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed amicus curiae has a material

⁵⁴ ICANN, Cooperative Engagement and Independent Review Processes, Status Update (20 June 2018), <https://tinyurl.com/yyhvpv595>, p. 1.

⁵⁵ ICANN publicly announced the CEP on 20 June 2018. See ICANN, Cooperative Engagement and Independent Review Processes, Status Update (20 June 2018), <https://tinyurl.com/yyhvpv595>.

interest relevant to the DISPUTE, he or she shall allow participation by the amicus curiae.⁵⁶

When the IRP-IOT met on 11 October 2018, Ms. Samantha Eisner (at the time, ICANN’s Deputy General Counsel) informed the committee that “we are on the precipice of having IRPs filed”⁵⁷ During the ensuing discussion, Mr. McAuley argued that his proposed changes to Rule 7 were necessary because entities that “have contracts that [are] effected by ICANN have to be able to [protect] their interest in competitive situations.”⁵⁸ It can hardly be doubted that Mr. McAuley was referring to his employer and its contractual interests, which Verisign knew would be at the center of Afilias’ forthcoming IRP.

The next day, on 12 October 2018, Ms. Eisner wrote directly to Mr. McAuley to express her concern that his proposed revisions to Rule 7 went far beyond (a) any of the public comments that addressed Rule 7 and (b) what had been agreed by the IRP-IOT.

As I was thinking through all of this, I realized that giving this ***participation as of right based on “significant interest” is also broader than what the IOT discussed in outcomes of the public comment.*** As I understand, we agreed as an IOT, and we have reflected in the rules, that those who participate in underlying panels should have the ability to participate as of right ***We did not have comments on, nor agree as an IOT (from what I can tell) that having an interest that might be impaired by, or is similar to that which is under discussion should give a right to participation.***⁵⁹

⁵⁶ ICANN, Draft as of 25 September 2018 – UPDATED Draft Interim ICDR Supplementary Procedures, <https://tinyurl.com/54tdf89x>, p. 10 (emphasis added).

⁵⁷ IRP-IOT Meeting #41 (11 Oct. 2018), Transcript, <https://tinyurl.com/db3pxvt6>, p. 15.

⁵⁸ IRP-IOT Meeting #41 (11 Oct. 2018), Transcript, <https://tinyurl.com/db3pxvt6>, p. 14.

⁵⁹ Email from Samantha Eisner to David McAuley (12 Oct. 2018), <https://tinyurl.com/4zns47v3>, p. 1 (emphasis added).

She went on to say:

I don't have an objection to continuing this conversation for the final set of rules, but I think that ***from the principles laid out for the interim set, this inclusion goes far beyond.*** . . . Finally, depending on the scope of the final rule we'd propose, we'd then have to see how significant a change it is from what was posted for comment previously.⁶⁰

Mr. McAuley, however, persisted. He argued his position to Ms. Eisner during a private phone call on 15 October 2018.⁶¹ The next day, reflecting a complete about face with reference to the objections she had just raised to Mr. McAuley's proposal, Ms. Eisner sent proposed language to Mr. McAuley that differed substantially from what had been discussed previously within the IRP-IOT. The language provided that entities could participate in an IRP where either (a) they were part of a contention set for a gTLD that was the subject of the IRP, or (b) if the briefings before the IRP Panel "significantly refer to actions taken by" that entity.⁶² By this time, ICANN Legal had been in possession of Afilias' draft IRP Request for nearly a week and was well-aware that it contained numerous references to Verisign's conduct.

On 17 October, Mr. McAuley sent a redline of the proposed language back to Ms. Eisner, which included yet further amendments that would be advantageous to Verisign. The most significant change in this regard was to demand participation as of right for the entities falling into the categories identified by Ms. Eisner, rather than participation at the discretion of the IRP Panel.⁶³

Over the next 48 hours, Mr. McAuley and Ms. Eisner hammered out that language, which would also include a footnote suggesting that all *amicus curiae* be afforded "broad

⁶⁰ Email from Samantha Eisner to David McAuley (12 Oct. 2018), <https://tinyurl.com/4zns47v3>, p. 1 (emphasis added).

⁶¹ Email from David McAuley to Samantha Eisner (15 Oct. 2018), <https://tinyurl.com/mtvt7m2>, p. 1.

⁶² Email from Samantha Eisner to Bernard Turcotte and David McAuley (16 Oct. 2018), <https://tinyurl.com/4fbud446>, p. 1.

⁶³ Email from David McAuley to Samantha Eisner (17 Oct. 2018), <https://tinyurl.com/4kmfrcpp>. The attachment to this email is found at <https://tinyurl.com/2ep78xvy>.

participation” rights in any IRP.⁶⁴ The final McAuley/Eisner version of Rule 7 bore no resemblance to the November 2016 Public Comment Draft nor to the draft adopted at the conclusion of the comment period. In addition to providing for *amicus* participation, it allowed for *amicus* participation effectively as a matter of right:

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. 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 person, group, or entity seeking to so participate, shall be permitted to participate as an *amicus* before the IRP PANEL:

- i. A person, group or entity that participated in an underlying proceeding (a process specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. 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
- iii. 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.

⁶⁴ Interim Supplementary Procedures for ICANN Independent Review Process (25 Oct. 2018), <https://tinyurl.com/3kpi7tj3>, n. 4 (at p. 12); see Email communications between Samantha Eisner and David McAuley (17–18 Oct. 2018), <https://tinyurl.com/36hu56yh>.

...

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed amicus curiae has a material interest relevant to the DISPUTE, he or she shall allow participation by the amicus curiae.⁶⁵

As the *Afilias* IRP Panel observed, it was highly unlikely that the McAuley/Eisner version of Rule 7 was unrelated to the then-impending IRP:

The two categories of interested parties added to Rule 7 on 16 October 2018 and deemed to have a material interest in the Dispute are quite specific. In the experience of the Panel, they are couched in language that is not typical of legal texts and used to describe parties that may claim intervenor status or request *amicus* participation in legal proceedings. Although it is not inconceivable that it be so, ***it would be a surprising coincidence, in light of the documentary evidence just reviewed, if the articulation of these two categories of potential amici, at the time it occurred, where wholly unrelated to Afilias' CEP, made public shortly before, and its impending IRP, a draft of which had been shared with ICANN less than a week before these categories came into being.*** All the more so given that the documentary evidence establishes that Ms. Eisner and Mr. McAuley were in contact while Ms. Eisner was developing the language by which these new categories of entities were added to Rule 7.⁶⁶

⁶⁵ ICANN, DRAFT as of 19 October 2018 – IRP Supplementary Procedures, <https://tinyurl.com/593h32f4>, p. 10 (emphasis added; footnotes and comments omitted).

⁶⁶ *Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Decision on Phase I (12 Feb. 2020), <https://tinyurl.com/bd7jnnje>, ¶ 175 (emphasis added).

Late 19 October 2018, a Friday evening, Mr. McAuley emailed the IRP-IOT the revised Rule 7. Mr. McAuley asked for any comments—presumably now in his capacity as head of the IRP-IOT—by Sunday, 21 October 2018.⁶⁷ The revised language drafted by Mr. McAuley and Ms. Eisner was never agreed upon, let alone discussed by the IRP-IOT. Nevertheless, Mr. McAuley—now in his “leader” capacity (albeit in finalizing a proposal he had pushed in his “personal” capacity)—deemed the Rules to have been “approved” by the IRP-IOT. **Annex A** contains a redline comparison between the version of Rule 7 “agreed upon” by the IRP-IOT and the version of Rule 7 adopted by the ICANN Board on 25 October 2018.

On 25 October 2018, the ICANN Board adopted the Interim Procedures by approving Resolutions 2018.10.25.20 - 2018.10.25.21 (the “**Resolutions**”).⁶⁸

In sum, the Chair of the IRP-IOT, an executive of Verisign, fully redrafted Rule 7 for the benefit of his employer after it became clear that Afilias intended to bring an IRP concerning .WEB. In private communications, held outside of the IRP-IOT and not disclosed to the global Internet Community until Afilias demanded their production the *Afilias v. ICANN* IRP, this Verisign executive worked with ICANN to craft bespoke rules specifically tailored to allow Verisign and NDC to participate in the *Afilias* IRP. This distortion of Rule 7 to advance purely private interests violated the requirement in ICANN’s Bylaws that the Rule must “ensure fundamental fairness and due process”⁶⁹

(c) The Amendments to *Amicus* Participation in the Proposed Rule 7

The version of Rule 7 that the IRP-IOT has now proposed and published for public comment simply assumes the validity of the current version of Rule 7 and makes minor amendments to that Rule. The IRP-IOT seeks public comment only on its most recent amendments, without drawing into question the fundamental form in which *amicus*

⁶⁷ Email from Bernard Turcotte (on behalf of David McAuley) to Members of the IRP-IOT (19 Oct. 2018), <https://tinyurl.com/3terurv5>.

⁶⁸ ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), <https://tinyurl.com/4tt92s8p>, Rationale for Resolutions 2018.10.25.20 - 2018.10.25.21.

⁶⁹ Bylaws, <https://tinyurl.com/5twtdvdp>, Sec. 4.3(n)(iv).

participation appears in the Rule.⁷⁰ However, it fails to address or resolve the fact that the *amicus* provisions of Rule 7 were adopted as a result of one corporation's attempt to intercede in a then-pending dispute between ICANN and Afilias and were never subject to required scrutiny, including through publication and public comment.

The ICANN Bylaws provide that “[t]he Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN[.]”⁷¹ As explained above, the core provisions of Rule 7 on *amicus* participation—including the right to participate as an *amicus* and the scope of that participation—were introduced without ever being subjected to publication and comment. They were instead introduced and developed under a secretive process driven by Verisign, a private company, with the objective of furthering its interests in an impending IRP.

The current publication and public comment of the proposed Rule 7 does not cure this fundamental procedural flaw with the *amicus* participation provisions. The published materials on the proposed revision to Rule 7 indicate that the only matters for public consideration are relatively minor changes to *amicus* participation. They state that “[m]uch of this text [namely the core *amicus* provisions] is the same as in the ISP, but with some notable amendments.”⁷² At no point do the materials for public comment identify the flawed process through which the provisions on *amicus* participation came to be included in the first place nor do they identify the fact that those provisions were never subject to publication and public comment. In other words, the published materials do not call for comment on the inclusion of *amicus* participation as such, even though it has *never* been subject to proper public comment. The proposed Rule 7 may not be adopted for this reason.

Nor may the proposed Rule 7 be adopted because it is nothing more than a ratification of a prior Rule 7 that was designed and created to benefit Verisign's perceived strategic

⁷⁰ ICANN, 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, <https://tinyurl.com/bdey2fb6>, p. 29.

⁷¹ Bylaws, <https://tinyurl.com/5twtdvdp>, Sec. 4.3(n)(ii).

⁷² ICANN, 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, <https://tinyurl.com/bdey2fb6>, p. 29.

interests in an pending IRP. Section 4.3(n)(iv) of the Bylaws provides that “[t]he Rules of Procedure are intended to ensure fundamental fairness and due process”⁷³ This is also a basic requirement of international arbitration norms.⁷⁴ A rule adopted to benefit the private interests of one individual company, let alone a dominant actor in the gTLD space, violates the Bylaws’ commitment to fundamental fairness and due process.

2. The Unlawful Right to *Amicus* Participation

The language in the proposed Rule 7 that provides certain parties with an effective right to participate as *amicus curiae* is also contrary to the rules, principles, and practices that govern IRPs. This language goes far beyond the *amicus* rights available in any form of international arbitration and, indeed, beyond what is available in the procedural law of the United States and every other jurisdiction I have looked at. It therefore violates the ICANN Bylaws, which require that “[t]he Rules of Procedure shall be informed by international arbitration norms”⁷⁵ and that the IRP shall be “consistent with international arbitration norms”⁷⁶

⁷³ Bylaws, <https://tinyurl.com/5twtdpy>, Sec. 4.3(n)(iv).

⁷⁴ United Nations General Assembly, International Commercial Arbitration: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Report of the Secretary-General, UN Doc. A/CN.9/264 (25 Mar. 1985), <https://tinyurl.com/mxhdm5p9>, p. 44 (recognizing “fundamental principles of fairness”, along with party authority, as part of the “Magna Carta of Arbitral Procedure”); Arif Hyder Ali, Jane Wessel, Alexandre de Gramont, and Ryan Mellske, *The International Arbitration Rulebook: A Guide to Arbitral Regimes* (2019), p. 144; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration*, (2012), pp. 12-17 (“Virtually all regulatory policy questions, including legal ones, can be analysed from the perspectives of fairness . . . considerations of fairness can be further broken down into general principles of due process, equality of treatment, and providing each party with a sufficient opportunity to present its case . . . optimal design of any procedure must think about how it might be sought to be abused. In some cases, a procedure that would work well with parties arbitrating in good faith, may be sub-optimal in the hands of parties seeking to disrupt proceedings”); Gary Born, *International Commercial Arbitration* (3rd ed. 2021), p. 2287 (“The international arbitral process seeks to achieve a number of related objectives. The most significant of these are procedural neutrality, fairness One of the fundamental objectives of most international commercial arbitrations is procedural neutrality”).

⁷⁵ Bylaws, <https://tinyurl.com/5twtdpy>, Sec. 4.3(n)(ii).

⁷⁶ Bylaws, <https://tinyurl.com/5twtdpy>, Sec. 4.3(a)(viii).

Amicus participation remains effectively unknown in commercial arbitration today.⁷⁷ None of the leading institutional rules commonly used in commercial arbitrations—including the ICDR Rules—have been amended to permit *amicus* submissions. It is generally admitted that allowing *amicus* participation—let alone mandatory *amicus* participation—creates significant tension with the fundamentally consensual nature of the arbitral process.⁷⁸ Moreover, it is commonly recognized that *amicus* participation has a significant impact on time and costs, to the detriment of the parties.⁷⁹

To the degree that *amicus* participation has appeared at all in international arbitration, it has been exclusively in investor-State arbitration—that is, arbitration against sovereign States.⁸⁰ It is telling that the Singapore International Arbitration Centre (SIAC) and Beijing Arbitration Commission (BAC) Investment Arbitration Rules include provisions for *amicus* participation,⁸¹ whereas the SIAC and BAC Arbitration Rules, used in international commercial disputes, do not.

⁷⁷ Gary Born and Stephanie Forrest, “*Amicus Curiae* Participation in Investment Arbitration,” 34(3) *ICSID Rev.—FILJ* (2019), p. 638.

⁷⁸ Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A Comparative Study* (2nd ed. 2020), p. 354 (“Unless an individual or a company is a party to the proceedings, an arbitral tribunal sitting in a commercial arbitration will not accept the submission of a third party detailing its position concerning the dispute, i.e., a brief *amicus curiae*.”); Gary Born and Stephanie Forrest, “*Amicus Curiae* Participation in Investment Arbitration,” 34(3) *ICSID Rev.—FILJ* (2019), p. 640.

⁷⁹ Abby Cohen Smutny, “Investment Treaty Arbitration and Commercial Arbitration: Are They Different Ball Games? The Actual Conduct,” 50 Years of the New York Convention: ICCA International Arbitration Conference (2009), p. 172 (“[t]here is no question that all such interventions increase the cost and complexity of the dispute resolution process, particularly as one or both sides often feel compelled to respond to issues raised in an *amicus* or other third-party submission”). See also *Methanex Corp. v. United States of America*, Decision on Petitions from Third Persons to Intervene as “*Amici Curiae*” (15 Jan. 2001), <https://tinyurl.com/yc5umm36>, ¶ 35 (finding that “a burden will be added if *amicus* submissions are presented to the Tribunal and the Disputing Parties seek to make submissions in response.”).

⁸⁰ David Caron, “Light and Dark in International Arbitration: The Virtues, Risks and Limits of Transparency,” *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan* (2018), p. 229 (“I do not see the transparency movement spilling over with anywhere near the same intensity to commercial arbitration”).

⁸¹ Singapore International Arbitration Centre, Investment Arbitration Rules (2017), <https://tinyurl.com/2thpczrm>, Rule 29.2; Beijing Arbitration Commission, Rules for International Investment Arbitration (2019), <https://tinyurl.com/2t38d8ww>, Art. 36(2).

Even in the unique context of investor-State arbitration, *amicus* participation is the exception, not the rule, and is never mandatory. In investor-State arbitration, third parties are permitted to participate as *amici* only if they satisfy a number of strict conditions, all of which are absent from the proposed Rule 7:

1. They must provide “a perspective, particular knowledge or insight that is different from that of the disputing parties.”⁸²
2. They must be fully independent from the parties to the dispute⁸³ because “the non-disputing party shall remain a friend of the court and not a friend of either Party.”⁸⁴ They must establish their independence by disclosing their identity, activities, organization and ownership, including any relationship between them and a party or other non-disputing party, either

⁸² *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission (12 Feb. 2007), <https://tinyurl.com/4wnn844x>, ¶ 13; *Glamis Gold Ltd. v. United States of America*, Award (8 June 2009), <https://tinyurl.com/mur7nssj>, ¶ 286; *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 6 (Decision on Non-Disputing Parties’ Application), <https://tinyurl.com/2jp8sjhu>, ¶ 31; International Centre for Settlement of Investment Disputes, Convention, Regulations, and Rules (2022), <https://tinyurl.com/3e89ajaa>, Arbitration Rule 67(2) (at p. 125) (“In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including: . . . how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the parties[.]”).

⁸³ See e.g., *ESPF Beteiligungs GmbH and others v. Italian Republic*, ICSID Case No. ARB/16/5 (Annulment Proceedings), Decision on the European Commission’s Application for Leave to Intervene as Non-Disputing Party (13 Oct. 2021), <https://tinyurl.com/yu338p4u>, ¶ 51; *Huawei Technologies Co. Ltd. v. Kingdom of Sweden*, ICSID Case No. ARB/22/2, Procedural Order No. 6 (26 June 2024), <https://tinyurl.com/3sccvp2m>, ¶ 29; *Sea Search-Armada, LLC v. Republic of Colombia*, PCA Case No. 2023-37, Decision on Respondent’s Preliminary Objections Under Article 10.20.5 of the United States-Colombia TPA (16 Feb. 2024), <https://tinyurl.com/yeyk8x3z>, ¶ 39 (“[t]he Tribunal cannot allow an *amicus curiae* submission . . . to be used as a vehicle for the pursuit of the interests of private third-party litigants against the disputing Parties . . .”).

⁸⁴ *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award (11 Dec. 2013), <https://tinyurl.com/yc829ur4>, ¶ 27.

direct or indirect.⁸⁵ They must also disclose any person or entity that may provide them with financial or other assistance regarding the submission.⁸⁶

3. They are permitted to submit their opinions only to the extent that it would not unduly burden or unfairly prejudice a disputing party's submission or disrupt the proceedings.⁸⁷

The ICANN Bylaws require that Rule 7 must “conform with international *arbitration* norms.”⁸⁸ They provide no basis whatsoever to deviate from those norms as regards *amicus* participation; to the contrary, while the Bylaws do specifically provide for “joinder, intervention, and consolidation” in IRPs,⁸⁹ they do not provide for *amicus* participation. As such, the provisions of the proposed Rule 7 that afford a near unconditional right to *amicus* participation are contrary to the legal rules, principles, and practices applicable to the IRP. They should not be adopted as drafted.

3. The Unlawful Choice of Participation as an *Amicus* or Party

Even assuming that *amicus* participation in IRPs were permissible, it would remain contrary to the legal rules and principles applicable to the IRP to permit *amicus*

⁸⁵ *Philip Morris Brands Sàrl and others v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016), <https://tinyurl.com/4x3xvzza>, ¶ 55 (rejecting an *amicus* submission as claimants' lawyers participated in the activities of the third party). See also International Centre for Settlement of Investment Disputes, Convention, Regulations, and Rules (2022), <https://tinyurl.com/3e89ajaa>, Arbitration Rule 67(2)(d) (at pp. 125-26).

⁸⁶ International Centre for Settlement of Investment Disputes, Convention, Regulations, and Rules (2022), <https://tinyurl.com/3e89ajaa>, Arbitration Rule 67(2)(e) (at pp. 125-26). See, e.g., *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 (26 June 2012), <https://tinyurl.com/ycxhp5wu>, ¶ 56 (rejecting an *amicus* submission as the third party was financed by another third party that had an ongoing dispute with the claimant).

⁸⁷ *United Parcel Service of America, Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (17 Oct. 2001), <https://tinyurl.com/y9maefh2>, ¶ 69; *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania (I)*, ICSID Case No. ARB/15/31, Procedural Order No. 36 (27 June 2023), <https://tinyurl.com/4v2n7t6r>, ¶ 45.

⁸⁸ Bylaws, <https://tinyurl.com/5twtdvdp>, Sec. 4.3(n)(i).

⁸⁹ Bylaws, <https://tinyurl.com/5twtdvdp>, Sec. 4.3(n)(iv)(B).

participation as an alternative to intervention as a party and to permit such participation without requiring the *amicus* to bear the costs and expenses that its participation occasions.

As explained above, even in investor-State arbitration, *amicus* participation is permissible only when it would not unduly burden or unfairly prejudice either disputing party.⁹⁰ This requirement is consistent with that of the Bylaws that Rule 7 must “ensure fundamental fairness and due process”⁹¹ However, the proposed Rule 7 violates these requirements.

First, it is unduly burdensome and unfairly prejudicial to the IRP parties to permit a third party the choice between *amicus* participation and intervention as a party. This choice allows the third party to appear as an *amicus* and influence the outcome of the proceeding in its favor while escaping from being legally bound by that outcome.

In this regard, the IRP-IOT has it precisely backwards when it asserts that it is “unfair to entities who technically might qualify as a Claimant” but who do not “wish to participate and seek an adjudication as an active Claimant” if they are not eligible to participate as an *amicus*.⁹² To the contrary, if an entity is eligible to intervene in the IRP and has an interest in the outcome of the dispute, it should be bound by the outcome just as the parties are. Any other approach affords the entity a procedural advantage over the parties, as it can try as an *amicus* to get a favorable outcome in an IRP and, if it fails, it may then bring its own separate IRP, without being restrained or impeded by the prior unfavorable result.

Second, it is also unduly burdensome and unfairly prejudicial to the IRP parties for an *amicus* to participate without bearing the cost implications of that participation, *particularly* where the *amicus* could instead intervene and participate as a party. *Amicus* participation is likely to require the parties to provide additional briefing, evidence, and argument and to require the IRP panel to take additional time to resolve the dispute. This

⁹⁰ *United Parcel Service of America, Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (17 Oct. 2001), <https://tinyurl.com/y9maefh2>, ¶ 69; *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania (I)*, ICSID Case No. ARB/15/31, Procedural Order No. 36 (Non-Disputing Parties’ Application) (27 June 2023), <https://tinyurl.com/4v2n7t6r>, ¶ 45.

⁹¹ Bylaws, <https://tinyurl.com/5twtdvdp>, Sec. 4.3(n)(iv).

⁹² ICANN, 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, <https://tinyurl.com/bdey2fb6>, p. 29.

has direct cost implications for the parties. It is unfair that an entity may participate as an *amicus* without having to take into consideration those cost implications and may instead impose them on the parties.

For these reasons, Rule 7 should not afford entities a choice between *amicus* participation and intervention, and it must require that any *amicus* bear the costs and expenses occasioned by its participation in the IRP. The proposed Rule 7 is contrary to applicable legal rules and principles.

B. Mandatory Modifications to the Proposed Rule 7 based on the Applicable Legal Rules and Principles

The proposed Rule 7 violates the legal rules and principles applicable to IRPs in its treatment of *amicus* participation. The norms and practices of international arbitration—binding for IRPs—do not permit *amicus* participation in an IRP at all, and certainly not on the terms and conditions provided for in the proposed Rule 7.⁹³ *Amicus* participation is only permitted in investor-State arbitration—that is certain arbitrations against sovereign States—and, even there, only under highly restrictive conditions. An IRP is, needless to say, not an investor-State arbitration. The *amicus* participation provisions of proposed Rule 7 must be removed in their entirety.

That said, even if Rule 7 were to permit some form of *amicus* participation, the proposed Rule 7 would still need to be modified in the following respects:

First, the proposed Rule 7 may not afford third parties a right to *amicus* participation in an IRP. This right is contrary to the norms of international arbitration applicable in investor-State arbitration (the only form of international arbitration where *amicus* participation is sometimes permitted). In accordance with these norms, an entity may participate as an *amicus only* at the discretion of the IRP panel and *only if* the potential *amicus* demonstrates that (1) it has a unique perspective or knowledge, (2) it is fully independent from the parties, and (3) its participation would not cause undue burden or unfair prejudice to the IRP parties.

⁹³ Even if it were permissible to include *amicus* participation at all in the proposed Rule 7 (which it is not), ICANN would need to subject it to actual publication and public comment—which it has never done, for reasons explained at length above.

Second, the proposed Rule 7 may not permit a third party to choose whether to participate as an *amicus* or to intervene in the IRP. This choice imposes undue burden and unfair prejudice on the IRP parties. Unlike the parties, it permits the third party to choose to influence the outcome of the IRP without being bound by the outcome and thereby get two bites at the apple—once as an *amicus* and a second time as a claimant in a later IRP.

Third, the proposed Rule 7 must require *amici* to bear all of the legal fees and costs occasioned by their participation. *Amicus* participation is time consuming and expensive. Imposing these costs on the IRP parties is unduly burdensome and unfairly prejudicial.

* * *

In light of the above, I submit that the proposed revisions to Rules 3 and 7 of the IRP Supplementary Procedures cannot be adopted in their current form and should be redrafted. Any other course of action would violate the ICANN Bylaws, the norms of international arbitration, and the other legal rules and principles that govern IRPs. The integrity of the IRP as a fair, transparent, and balanced dispute resolution process is fundamental to ICANN's legitimacy and organizational integrity. There should be a zero tolerance, zero risk policy on the part of the Board in this regard. Unfortunately, if the Board were to adopt the proposed amendments to the Rules, it will, in my respectful view, place ICANN in an unnecessary and costly quagmire.

Sincerely,



Arif Hyder Ali
Partner

ANNEX A

In June 2018, the IRP-IOT “agreed upon” language for Rule 7 that provided limited *amicus curiae* participation only for disputes relating to the process-specific expert panels. The revised version of Rule 7 sent to the ICANN Board in October 2018, which was drafted by Mr. McAuley and Ms. Eisner, was never agreed upon by the IRP-IOT and substantially differs from the “agreed upon” version. The below redline demonstrates the significant differences between the two versions.

~~7-7.~~ Consolidation, Intervention, and Joinder³⁰ Participation as an Amicus

~~At the request of a party, a~~ PROCEDURES OFFICER ~~may~~shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an amicus. Except as otherwise expressly stated herein, requests for consolidation, intervention, and ~~joinder. Requests for consolidation, intervention, and joinder/or participation as an amicus~~ are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for ~~interim relief~~consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

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

³⁰ There is no existing Supplemental Rule. The CCWG Final Proposal and ICANN Bylaws recommend that these issue be considered by IOT. See ICANN Bylaws, Article 4, Section 4.3(n)(iv)(B); CCWG – Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, 23 February 2016, Annex 07—Recommendation #7, at § 20.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER.

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

, as provided below. This applies whether or not the ~~Intervention and Joinder:~~

~~If a person, group, or entity participated in an underlying proceeding (a process-specific expert panel as per Bylaw ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)), (s)he/it/they shall receive notice that the INDEPENDENT REVIEW has commenced. Such a person, group, or entity shall have a right to intervene in the IRP as a CLAIMANT or as an amicus, as per the following:-~~

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

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

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

~~Any person, group, or entity that did not participate in the underlying proceeding may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. If the standing requirement is not satisfied, such persons may intervene as an amicus if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed amicus has a material interest at stake directly relating to the injury or harm that is claimed by the CLAIMANT to have been directly and causally connected to the alleged violation at issue in the DISPUTE.~~

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

~~In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.~~

³¹ See ICANN Bylaws, Article 4, Section 4.3(n)(iv)(B).

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

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

Participation as an Amicus Curiae

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an amicus curiae before an IRP PANEL, subject to the limitations set forth below. 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 person, group, or entity seeking to so participate, shall be permitted to participate as an amicus before the IRP PANEL:

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. 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
- iii. 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.

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

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed amicus curiae has a material interest relevant to the DISPUTE, he or she shall allow participation by the amicus curiae. Any person participating as an amicus curiae may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.⁴ The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an amicus curiae.

⁴ During the pendency of these Interim 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

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~~**DRAFT as of 8 May 2018—Interim ICDR Supplementary Procedures**~~

amicus curiae as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

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