

25th July 2018

Consultation on the Independent Review Process Draft Supplementary Rules of Procedure proposed by Implementation Oversight Team

Statement by the ISPCP

The ISPCP thanks the Implementation Oversight Team for the opportunity to comment on changes to the Draft Supplementary Rules of Procedure for the IRP (the “Draft Rules”).

The ISPCP also thanks the IOT for taking note of concerns we raised in the first public comment round, and support the proposed changes to address our concerns.

We support the IOT’s proposal to extend the period of the deadline for filing from 45 days to 120 days. This will be especially welcome to non-contracted parties, such as ISPs, who may not be familiar with ICANN and the options available to bring a claim under the IRP prior to the need to do so (unlike contracted parties, who often be able to anticipate the need to bring a claim).

The ISPCP especially recalls the criticisms raised in the previous public comment round that the then Draft Rules could have prevented certain actions from ever being challenged through the IRP in some circumstances, because the deadline for filing a dispute would have elapsed before filing a dispute was permitted under the rules. The ISPCP would regard that as completely unacceptable: as set out in the bylaws, the IRP should be available to resolve disputes between materially affected parties and ICANN. Claimants should be required to act promptly to make use of the IRP, but the ability to set a deadline for filing must not be used to exclude certain claimants or types of dispute entirely.

Under the Draft Rules, claimants may only challenge ICANN in the IRP if they have been materially affected by ICANN’s action. This rule must be aligned with the rule on deadline for filing. It is therefore entirely correct that the permitted time to file an IRP claim must run from the date when the claimant was so affected. The time for filing cannot be calculated from an earlier date, such as when ICANN took the decision complained about, as this disregards the time that may elapse between decision and implementation (which could amount to a considerable period, even years). To do so would in some circumstances entirely deprive claimants of the opportunity to challenge the legitimacy of ICANN’s actions, regardless of how promptly the claimant acts. That cannot be acceptable, and is entirely outside the proper purpose of a timing rule.

We are grateful to those who spotted this flaw in the original proposal in the previous public comment round, and to the IOT for acting to correct it.

The ISPCP therefore strongly supports the decision to remove from Draft Rules the “supplementary deadline” of one year from the date of ICANN’s action or decision. The deadline of 120 days that the IOT now proposes is entirely sufficient to ensure prompt action and meet the purposes of the IRP as set out in the bylaws. We urge the IOT not to revert this change.