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Department:
Science and Technology
REPUBLIC OF SOUTH AFRICA

NIPMO

NATIONAL INTELLECTUAL PROPERTY
MANAGEMENT OFFICE

An initiative of the Department of Science and Technology

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PRACTICE NOTE 1 OF 2014

DRAFT DISPUTE PANEL RULES OF PROCEDURE

Version 1

Date: 7 November 2014

Lefapha la Saense le Thekenoloji • uMnyango wezeSayensi neTheknoloji • Muhasho wa Saints na Thekinoodzhi • Departement van Wetenskap en Tegnolgie • Kgoro ya Saense le Theknolotši • Ndzawulo ya Sayense na Theknoloji • LiTiko leTesayensi ne Theknoloji • iSebe lezeNzululwazi neTeknoloji • UmNyango wezeSayensi neTheknoloji

Batho Pele - putting people first

TABLE OF CONTENTS

1.	PREFACE.....	3
2.	INTRODUCTION	5
2.1.	Dispute resolution process	6
2.2.	Dispute Panel mandate and composition	5
3.	FIRST STAGE: PROCEDURE FOR LODGING A NOTICE OF INTENTION TO BE HEARD (IP2 FORM)	9
3.1.	Notice of intention to be heard (IP2 form)	9
3.2.	The hearing	12
4.	SECOND STAGE: DISPUTE PANEL REVIEW OR APPEAL OF NIPMO'S DECISION (IP3 FORM)	14
4.1.	Lodging an IP3 form with NIPMO	14
4.2.	What happens after an IP3 form has been lodged with NIPMO?	15
5.	THIRD STAGE: PROCEDURE FOR JUDICIAL REVIEW	17

1. PREFACE

The purpose of this Practice Note, entitled “*Draft Dispute Panel Rules of Procedure*” is to inform and clarify the rules and procedures applicable in the management of disputes that may arise following an administrative decision by the National Intellectual Property Management Office (“NIPMO”).

This Practice Note sets out the procedure to be followed by the aggrieved recipient when lodging disputes following an administrative decision issued by NIPMO, as well as the time frame for the dispute settlement process. This Practice Note may be updated from time to time to account for future developments.

Section 9(6) of the Intellectual Property Rights from Publicly Financed Research and Development Act, (Act 51 of 2008; “IPR Act”) reads as follows:

“Any administrative decision of NIPMO that adversely affects a recipient must be dealt with in terms of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).”

In this Practice Note any word or expression to which a meaning has been assigned in the IPR Act; including the Regulations to the IPR Act and Guideline 1 of 2012, shall have the meaning so assigned.

In addition, the following terms shall have the meaning assigned below:

Administrative action	means ¹ “any decision taken, or any failure ² to take a decision, by- (a) an organ of state, when – <i>(ii) exercising a public power or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect...</i> ”
Decision	means ³ any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to – (a) making, suspending, revoking or refusing to make an order, an award or determination; (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; (d) imposing a condition or restriction; (e) making a declaration, demand or requirement; (f) retaining, or refusing to deliver up an article; or (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly

¹ According to the Promotion of Administrative Justice Act (Act No, 2 of 2000; PAJA), section 1

² “failure,” in relation to the taking of a decision, includes a refusal to take the decision

³ According to the Promotion of Administrative Justice Act (Act No, 2 of 2000; PAJA), section 1

2. INTRODUCTION

2.1 The Dispute Panel: legislative mandate and composition

The IPR Act provides for the establishment, by the Minister of Science and Technology, of a Dispute Panel whose function is “*to hear and determine disputes relating to administrative decisions of NIPMO*”⁴. The Dispute Panel is accountable to the Minister for its actions and must on an annual basis provide the Minister with a report detailing a summary of its activities and decisions⁵.

The Dispute Panel must consist of at least 5, but no more than 20, members with experience and expertise in areas relating to at least, intellectual property protection and management, commercialisation, dispute resolution and business⁶. The Minister must further also appoint a Chairperson from the members of the Dispute Panel⁷.

The role of the NIPMO Dispute Panel is separate and distinct from that of the NIPMO Advisory Board. The Advisory Board is an independent body appointed by the Minister to **advise** NIPMO on the “*performance of its functions, the exercise of its powers and the execution of its duties, including providing guidance and assistance to NIPMO in the implementation of the Act and these regulations*”⁸.

⁴ Regulation 7(1) of the IPR-PFRD Act: The Minister must establish a Dispute Panel to hear and determine disputes relating to administrative decisions of NIPMO.

⁵ Regulation 7(2)

⁶ Regulation 7(3)

⁷ Regulation 7(5)

⁸ Regulation 6(1)

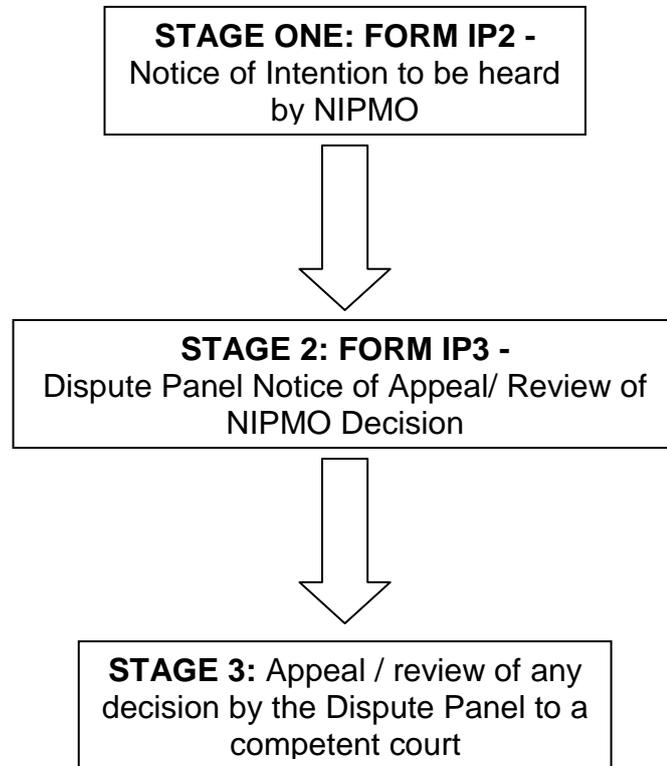
The distinction between these two bodies may best be illustrated as follows:

	DISPUTE PANEL	ADVISORY BOARD
MANDATE	To hear and determine disputes relating to administrative decisions of NIPMO.	To advise NIPMO on the performance of its functions, the exercise of its powers and the execution of its duties, including providing guidance and assistance to NIPMO in the implementation of the IPR Act and its regulations.
SKILLS REQUIRED OF MEMBERS	Experience and expertise in areas relating to at least, intellectual property protection and management, commercialisation, dispute resolution and business.	Expertise in research, research management, higher education environment, intellectual property protection and management, technology licensing and commercialisation, technology transfer and business.

2.2 Overview of the dispute resolution process and the three possible stages for resolution

Regulations 5(5) to 5(8) and 7(9) to the IPR Act provides for a **three stage dispute resolution processes** for any administrative decision of the NIPMO which may adversely affect a recipient⁹. These processes are divided into three distinct stages which must occur in the order as indicated in the flow diagram and outlined in the text below:

⁹ Section 1 of the IPR Act: “**recipient**” means any person, juristic or non-juristic, that undertakes research and development using funding from a funding agency and includes an institution.



2.1.1 Stage One

According to Regulation 5(5) of the IPR Act

“Following an exercise by NIPMO of any discretionary power vested in NIPMO in terms of the Act or these regulations, the outcomes of which adversely affect the rights of a recipient, the recipient must, if the recipient intends to make representations on the matter, within 14 days of notification of a decision by NIPMO, lodge with NIPMO a notice of intention to be heard on Form IP2.”

Stage one thus relates to the lodgement of a notice of intention to be heard by NIPMO by the aggrieved recipient on an IP2 Form entitled “*Notice of Intention to be heard by NIPMO*”. NIPMO must grant the aggrieved recipient an opportunity to

make representations on the matter in a hearing, following which, NIPMO will consider the aggrieved recipients' arguments and make a decision.

2.1.2 Stage Two

If the aggrieved recipient is still dissatisfied with NIPMO's decision after stage one has taken its course, the aggrieved recipient may **then**¹⁰ lodge a notice for review or appeal of NIPMO's decision with the Dispute Panel, this process being initiated on an IP3 Form entitled *Dispute Panel Notice of Appeal/ Review of NIPMO Decision*. The lodgement of a notice of appeal or review of the NIPMO decision with the Dispute Panel constitutes **stage two** of the dispute resolution process.

2.1.3 Stage Three

The decision by the Dispute Panel is not final. Regulation 7(9) of the IPR Act provides that decisions of the Dispute Panel are subject to appeal or review by a competent court at the instance of the aggrieved party. The consideration of a competent court of the decision made by the Dispute Panel constitutes **stage 3** of the dispute resolution process.

¹⁰ Regulation 5(8) of the IPR Act: After such hearing, should NIPMO not reverse its decision, the affected recipient may within 14 days of NIPMO's decision, lodge a notice in Form IP3 with the Dispute Panel for review or appeal of NIPMO's decision.

3. STAGE ONE: PROCEDURE FOR LODGING A NOTICE OF INTENTION TO BE HEARD (IP2 FORM)

The Regulations to the IPR Act outline the procedure to be followed in the event a recipient is adversely affected by an exercise by NIPMO of its discretionary power¹¹. A recipient may **only** refer a dispute to the Dispute Panel for adjudication¹² **after** the dispute has been handled according to the procedure described in Regulations 5(5) to 5(7), which provides the aggrieved party with an opportunity to be heard by NIPMO. The referral of a dispute to the Dispute Panel is referred to in this Practice Note as stage two of the dispute resolution process.

Stage one of the dispute resolution procedure is set out below:

3.1. *Notice of intention to be heard by NIPMO (IP2 form)*

The lodgement by a recipient of a notice of intention to be heard by NIPMO is the first step an aggrieved recipient must make in the dispute resolution process. The aggrieved recipient must lodge an **IP2 Form** (Annexure B) **with NIPMO within 14 days** of notification of NIPMO's decision, indicating its intention to be heard¹³. The recipient will receive an acknowledgement letter indicating the date the IP2 form was received. This letter must be sent within 7 days from the date the IP2 was received.

3.1.1. How to contact NIPMO:

The postal, physical and email address of the office of NIPMO are listed in Annexure A of this Practice Note. Documents may only be filed with NIPMO at the address listed in Annexure A within the prescribed time period.

¹¹ Regulations 5(5) to 5(7) of the IPR Act

¹² The Concise Oxford English Dictionary (11th edition) defines "adjudicate" as: "*make a formal judgement on a disputed matter*".

¹³ Regulation 5(5): Following an exercise by NIPMO of any discretionary power vested in NIPMO in terms of the Act or these regulations, the outcomes of which adversely affect the rights of a recipient, a recipient must, if the recipient intends to make representations on the matter, within 14 days of notification of a decision by NIPMO, lodge with NIPMO a notice of intention to be heard in Form IP2.

3.1.2. How to file an IP2 Form with NIPMO:

The recipient must hand deliver, post or email the completed IP2 Form to the physical, postal, or email address, respectively, listed in Annexure A. In the case of email the recipient is requested to submit the original document to NIPMO on or before the date of the proceedings. An official acknowledgment letter will be sent to the recipient indicating the date the IP2 Form was received. This acknowledgement letter will be sent within 7 days from the date the IP2 Form was received by NIPMO.

3.1.3. How to prove an IP2 Form was lodged with NIPMO:

A recipient must prove to NIPMO that an IP2 Form was lodged in terms of this Practice Note, by providing NIPMO:

- a) with a copy of proof of mailing the Form IP2 by registered post to NIPMO;
- b) with a copy of a receipt signed by, or on behalf of NIPMO, clearly indicating the name and designation of the NIPMO staff member and the place, time and date of delivery (if an IP2 Form was delivered by hand); or
- c) with a copy of the acknowledgement letter from NIPMO.

3.1.4. Can more than one recipient file on the same matter?

Regulation 5(5) states:

“Following an exercise by NIPMO of any discretionary power vested in NIPMO in terms of the Act or these regulations, the outcomes of which adversely affect the rights of a recipient, the recipient must, if the recipient intends to make representations on the matter, within 14 days of notification of a decision by NIPMO, lodge with NIPMO a notice of intention to be heard in Form IP2.”

Any recipient that is adversely affected by an administrative decision made by NIPMO may lodge an IP2 Form with NIPMO. Therefore, in the event that NIPMO makes an administrative decision that adversely affects the rights of two or more recipients, each affected recipient may file on the same matter

separately. Each recipient will be afforded an opportunity to present their arguments at a hearing.

3.1.5. Who must sign the IP2 Form?

An IP2 Form must be signed by an authorised representative of the recipient. The IPR Act is silent on scenarios where two or more parties are adversely affected by an administrative decision of NIPMO. According to the proceedings of the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as “CCMA”), *"if proceedings are jointly instituted or opposed by more than one employee, documents may be signed by an employee who is mandated by the other employees to sign the documents. A list, in writing of the employees who have mandated the employee to sign on their behalf must be attached to the referral document"*¹⁴.

The above proceedings of the CMMA have therefore been extrapolated to the proceedings of completing and signing of an IP2 Form. If proceedings are jointly instituted or opposed by more than one recipient, the IP2 Form may be signed by a person who is mandated/authorised by the other recipient(s). A list, in writing, of the recipient(s) who have mandated the specific person to sign on their behalf must be attached as supporting documentation to the relevant IP2 Form.

3.1.6. What happens after a Notice of Intention to be Heard by NIPMO (IP2 Form) has been lodged?

Once an IP2 Form is lodged with NIPMO by an aggrieved recipient, NIPMO will within 7 days of receipt, acknowledge receipt of the IP2 Form **AND** provide the recipient with dates, times and place where such hearing could take place. The aggrieved recipient must within 7 days¹⁵ of receiving NIPMO's proposal, respond (via email or registered post) to NIPMO with a suitable

¹⁴ Rules for the conduct of proceedings before the CCMA Part One: Serving and filing of Documents

¹⁵ Regulation 5(6)

date, time and place from the options provided by NIPMO. NIPMO will send an acknowledgement letter, confirming all the selected details of the hearing.

3.2. The hearing

Regulation 5(7) states that *“Any hearing in terms of this regulation must take place **within 30 days** of receipt by NIPMO of the notice of intention to be heard.”*

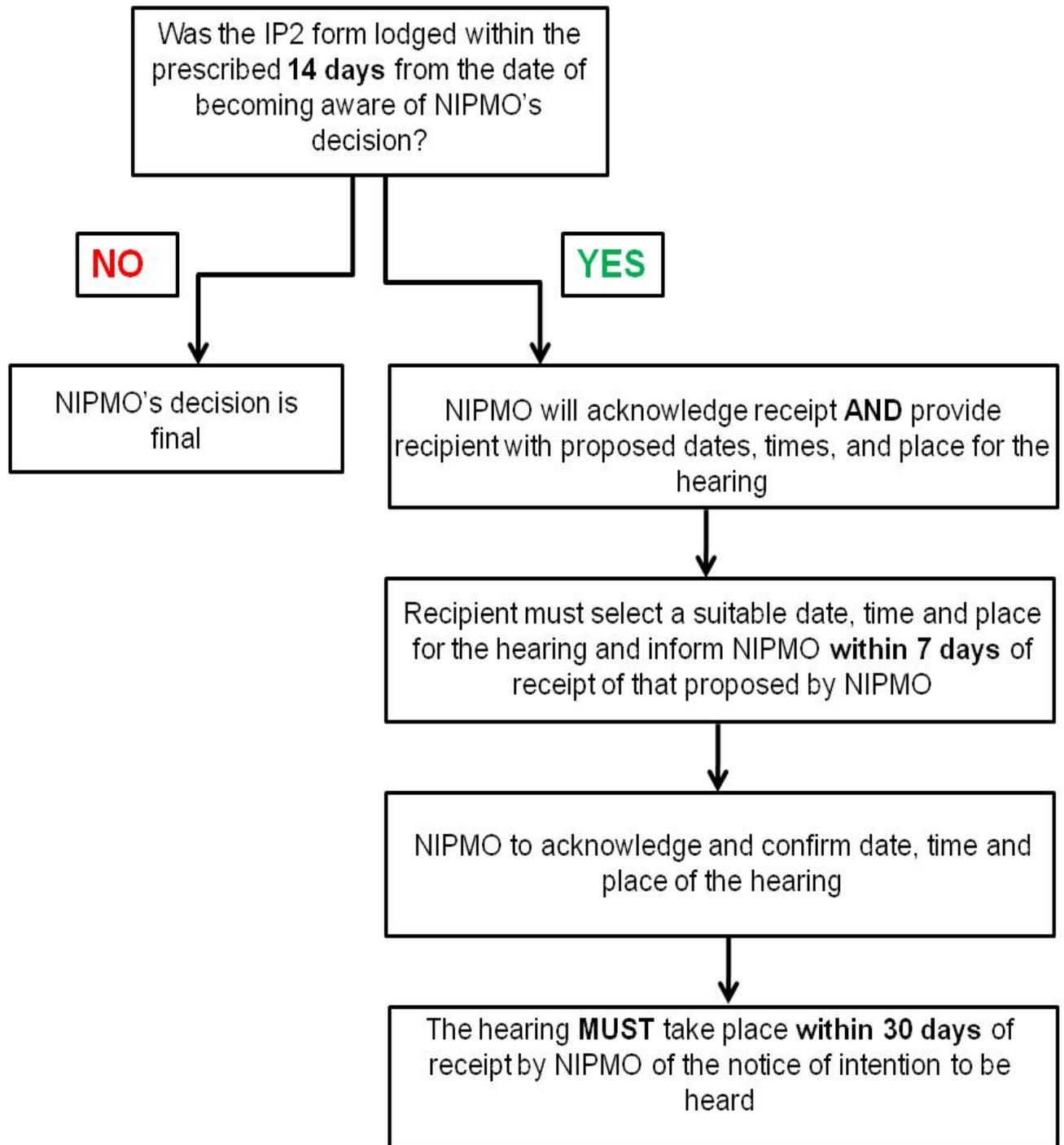
3.2.1. Procedure for the hearing

As stated above, an aggrieved recipient is granted an opportunity to make representations on the matter at a hearing. Such hearing will be presided over by the Head of NIPMO. Following the hearing, the Head of NIPMO will consider the aggrieved recipients' arguments and make a decision.

In the event that the initial administrative decision which adversely affected the recipient was made by the Head of NIPMO, the Head of NIPMO will recuse¹⁶ him/herself from presiding over the matter at the hearing. The Department of Science of Technology's Deputy Director- General of Programme 2: Technology Innovation or his/her authorised delegate will be called in to preside over the meeting, to give consideration to the aggrieved recipients' arguments and make a decision.

¹⁶ The Concise Oxford English Dictionary (11th edition) defines "recuse" as: " *excuse oneself from a case*"

The lodging of the Notice of intention to be heard by NIPMO (IP2 Form) and time frames are further illustrated below for ease of reference:



4. STAGE TWO: DISPUTE PANEL REVIEW OR APPEAL OF NIPMO'S DECISION (IP3 FORM)

Stage two **to the dispute resolution process** comes into effect after NIPMO elects not to reverse its original decision after an IP2 Form has been submitted by a recipient.¹⁷

Should NIPMO not reverse its decision following the hearing (stage one), the recipient may, **within 14 days** of receiving NIPMO's communication not to reverse its decision, lodge a notice on **Form IP3** (Annexure C) entitled "*Dispute Panel Notice of Appeal/ Review of NIPMO Decision*" with the Dispute Panel requesting an appeal or review of NIPMO's decision.

4.1 How to contact NIPMO:

The postal, physical and email address of the office of NIPMO are listed in Annexure A of this Practice Note. Documents may only be filed with NIPMO at the address listed in Annexure A within the prescribed time period.

4.2 Who must sign the IP3 Form?

An IP3 Form must be signed by an authorised representative of the recipient. The IPR Act is silent on scenarios where two or more parties are adversely affected by an administrative decision of NIPMO. According to the proceedings of the CCMA, "*if proceedings are jointly instituted or opposed by more than one employee, documents may be signed by an employee who is mandated by the other employees to sign the documents. A list, in writing of the employees who have mandated the employee to sign on their behalf must be attached to the referral document*"¹⁸.

The above proceedings of the CCMA have therefore been extrapolated to the proceedings of completing and signing of an IP3 Form. If proceedings are

¹⁷ Regulation 5(8): After such hearing, should NIPMO not reverse its decision, the affected recipient may within 14 days of NIPMO's decision, lodge a notice in Form IP3 with the Dispute Panel for review or appeal of NIPMO's decision.

¹⁸ Rules for the conduct of proceedings before the CCMA Part One: Serving and filing of Documents

jointly instituted or opposed by more than one recipient, the IP3 Form may be signed by a person who is mandated/authorised by the other recipient(s). A list, in writing, of the recipient(s) who have mandated the specific person to sign on their behalf must be attached as supporting documentation to the relevant IP3 Form.

4.3 How to file an IP3 Form with NIPMO:

The recipient must hand deliver, post or email the completed IP3 Form to the physical, postal, or email address, respectively, listed in Annexure A. In the case of email the recipient is requested to submit the original document to NIPMO on or before the date of the Dispute Panel hearing. An official acknowledgment letter will be sent to the recipient indicating the date the IP3 Form was received. This acknowledgement letter will be sent within 7 days from the date the IP3 Form was received by NIPMO.

4.4 How to prove an IP3 Form was lodged with NIPMO:

A recipient must prove to NIPMO that an IP3 Form was lodged in terms of this Practice Note, by providing NIPMO:

- a) with a copy of proof of mailing the Form IP3 by registered post to NIPMO;
- b) with a copy of a receipt signed by, or on behalf of, NIPMO clearly indicating the name and designation of the NIPMO staff member and the place, time and date of delivery (if an IP3 Form was delivered by hand); or
- c) with a copy of the acknowledgement letter from NIPMO.

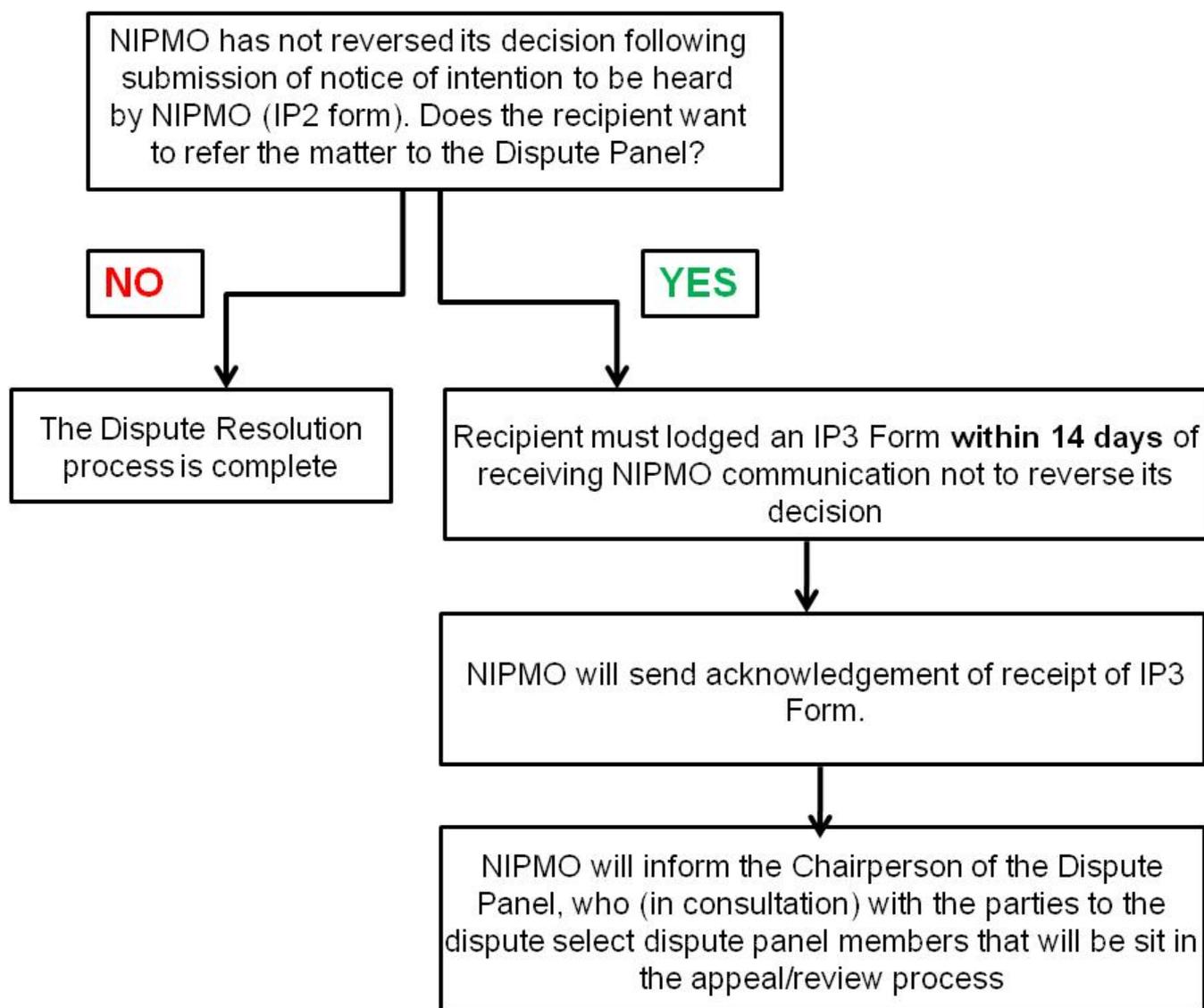
4.5 What happens after an IP3 Form has been lodged with NIPMO?

NIPMO will inform the Chairperson of the Dispute Panel and the Chairperson, in consultation with the parties to the dispute, will select members of the Dispute Panel who will sit and review NIPMO's decision¹⁹. The Dispute Panel

¹⁹Regulation 7(6): A sitting of the Dispute Panel for any matter will be made up of at least 3 members selected by the Chairperson of the Dispute Panel in consultation with the parties to the dispute.

will establish its own rules of procedure which NIPMO will publish. NIPMO will provide secretariat and administrative support to the Dispute Panel.²⁰

The lodging of the Dispute Panel Notice of Appeal/Review of NIPMO Decision (IP3 Form) and time frames are further illustrated below for ease of reference:



²⁰ Regulation 8(2)

5 STAGE THREE: PROCEDURE FOR JUDICIAL REVIEW

Section 33(1) of the Constitution of the Republic of South Africa, 1996 guarantees everyone the right to administration that is lawful, reasonable and procedurally fair. Any decision of the Dispute Panel is subject to appeal or review by a competent court at the instance of any aggrieved party²¹. This procedure must be done in accordance with the provisions of PAJA.

Proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date of receiving the Dispute Panel's decision²².

²¹ Regulation 7(9) of the IPR Act

²² Section 7(1) of PAJA

ANNEXURE A

For purposes of this Practice Note, all documents are to be served to the following addresses

Physical address: Suite 15, The Enterprise Building
6 Mark Shuttleworth Street
The Innovation Hub
Persequor Ext 10

Attention: Director: Regulatory & Compliance

Email address: info@nipmo.org.za

Postal address: Department of Science and Technology
Private Bag X894
Pretoria

Attention: NIPMO, Director: Regulatory & Compliance

ANNEXURE B



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Department:
Science and Technology
REPUBLIC OF SOUTH AFRICA

Private Bag X894, PRETORIA, 0001, RSA. DST Building 53, CSIR Scientia Campus, Meiring Naude Road, Brummeria, PRETORIA, 0184. Tel: +27 12 843 6300, Fax: +27 12 349 1030

FORM IP2

Notice of Intention to be heard by NIPMO (Act 51 of 2008; Reg. 5(5))

		NIPMO REFERENCE NUMBER				
RECIPIENT						
Contact Details						
NIPMO DISCRETIONARY POWER IN ISSUE (please provide supporting documents)						
DATE OF NIPMO EXERCISING DISCRETIONARY POWER						
(Day)		(Month)		(Year)		
REQUIRED ACTION FROM NIPMO						
<i>Request for a hearing</i>						
NAME OF AUTHORISED REPRESENTATIVE OF RECIPIENT	SIGNATURE			DATE		
				(Day)	(Month)	(Year)

ANNEXURE C



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Private Bag X894, PRETORIA, 0001, RSA. DST Building 53, CSIR Scientia Campus, Meiring Naude Road, Brummeria, PRETORIA, 0184. Tel: +27 12 843 6300, Fax: +27 12 349 1030

FORM IP3

Dispute Panel Notice of Appeal / Review of NIPMO Decision (Act 51 of 2008; Section 9(6); Regulation 5(8))

		NIPMO REFERENCE NUMBER		
RECIPIENT				
Contact Details				
NIPMO DECISION BEING APPEALED / REVIEW REQUESTED (please provide supporting documents)				
DATE OF NIPMO DECISION				
<i>(Day)</i>		<i>(Month)</i>		<i>(Year)</i>
BASIS OF APPEAL / REVIEW (please provide particulars of appeal / review)				
NAME OF AUTHORISED REPRESENTATIVE OF RECIPIENT	SIGNATURE		DATE	
			<i>(Day)</i>	<i>(Month)</i>