



UPDATE & CONSULTATION ON
New gTLD Subsequent Procedures

ACCOUNTABILITY MECHANISM (APPEALS) v02

Justine Chew
16 October 2019

SNAPSHOT OF KEY ELEMENTS

Accountability Mechanism (Appeals)



ALAC STATEMENTS support or have touched on:

- New substantive appeal mechanism specific to New gTLD Program
- Improvement to the post-delegation DRP - need for accessible, expeditious, **limited appeals process** which considers elements of accessibility, fairness, filtering of frivolous appeals, dealing with COI
- Standing to appeal
- Remedies
- Arbiter



RELATED SubPro Areas/Topics include:

Substantive vs Procedural appeals

- Objections – incl. distinction b/n Community Objections and opposition in CPE
- Application Evaluation
- Bylaw-related procedural appeals



COMPETITION, CONSUMER CHOICE & TRUST (CCT) RECOMMENDATIONS

- Rec. 35: SubPro PDP should consider adopting new policies to avoid potential for inconsistent results in string confusion objections. In particular, consider
 - ❖ **3) Introducing a post dispute resolution panel review mechanism.**

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 16 Oct 2019

- SubPro WG deliberations on public comments to Initial Report on topic of Accountability Mechanisms (i.e. Appeals) took place on 1, 3 & 7 Oct 2019. **Discussions ongoing on proposed elements of New Appeals Mechanism.**
- Applicable 2007 policy
 - Rec #12 “Dispute resolution and challenge processes must be established prior to the start of the process.”
 - Implementation Guideline R: “Once formal objections or disputes are accepted for review there will be a cooling off period to allow parties to resolve the dispute or objection before review by the panel is initiated.”
- Other Policy goals
 - Dispute resolution and challenge processes should be transparent, fair and cost effective

Special Note to CPWG

- *When we speak of “Accountability Mechanisms”, we mean per Bylaws, Request for Reconsideration, Independent Review Process, Ombudsman*
- *Within SubPro context, we are looking at rights and forms of appeals to decisions made during evaluation, objections either by ICANN Org/Board, external evaluators, external third party DRSPs, as well as post-delegation dispute resolution procedures.*

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 16 Oct 2019

In General

ALAC STATEMENT support:

- 3 Oct 2018
 - ❖ New substantive appeal mechanism specific to New gTLD Program for looking beyond ICANN violations of Bylaws to include whether (original) action was in line with AGB.
 - ❖ Process must be transparent, panellist, evaluators, IO free of COI
 - ❖ Post-delegation DRP: call for clearer, more detailed, better-defined guidance on scope and adjudication process of proceedings, role of parties involved prior to initiation of DR procedures; single or 3-person panel subject to agreement between parties to dispute
- Departure from 30 May 2017 CC2 comment
 - ❖ Existing accountability mechanisms (RfR, IRP, Ombudsman) adequate avenues to address issues in New gTLD Program. #
 - ❖ If appeals allowed, then only for error of fact that ICANN had available at the time.

SUBPRO WG Deliberations:

High Level Agreement:

- If a new substantive appeal mechanism is established, the process must be transparent and ensure that panelists, evaluators, and independent objectors are free from conflicts of interest -- **Standard of review for Appeals still in discussion**
- Post-delegation DRP: The parties to a proceeding should be given the opportunity to agree upon a single panelist or a three-person panel - bearing the costs accordingly.
- Post-delegation DRP: Clearer, more detailed, and better-defined guidance on scope and adjudication process of proceedings and the role of all parties must be available to participants and panelists prior to the initiation of any post-delegation DRP

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 16 Oct 2019

In General – Cont'd

ALAC STATEMENT supports:

- Limited Appeals Process:
 - ❖ Should cover both substantive and procedural appeals, since can be difficult to distinguish strict rights to either types
 - ❖ Also consistent with outcomes of CCWG on Enhancing ICANN Accountability which led to similar changes to ICANN Bylaws
 - ❖ **# Should apply to all decisions made by ICANN, evaluators, DRSPs in connection to program - from 2012 round appeal mechanisms were clearly insufficient to properly facilitate challenges to decisions on evaluations (e.g. ASP), objections and contention resolution (i.e. CPE)**

SUBPRO WG Deliberations:

- In general, no opposition to prelim recommendation to establish a new substantive appeal mechanism specific to the New gTLD Program. But what form, how?
- **Recognised CCT-RT Rec #35 ... 3) Introducing a post dispute resolution panel review mechanism**

Outstanding Items / New Ideas:

- How would it differ to ICANN's existing Accountability Mechanisms? **When would new appeal mechanism versus Request for Reconsideration apply, for eg.? Still being considered.**

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 16 Oct 2019

Elements of New Appeal Mechanism

[What are the types of actions or inactions that should be subject to this new limited appeals process?](#)

ALAC STATEMENT supports:

- Limited Appeals Process:
 - ❖ Should cover both substantive and procedural appeals, since can be difficult to distinguish strict rights to either types
 - ❖ Should apply to all decisions made by ICANN, evaluators, DRSPs in connection to program - from 2012 round appeal mechanisms were clearly insufficient to properly facilitate challenges to decisions on evaluations (e.g. ASP), objections and contention resolution (i.e. CPE)
 - ❖ Eg: decision-maker not providing justification/reason, weak reason; inactions, delays in decision/action leading to prejudice

SUBPRO WG Deliberations:

Comments range in support of Limited Appeals Process:

- Just substantive appeals – misinterpretations of application text, unsupported claims/assumptions by evaluators for withholding points, unsupported claims/misuse of facts, decisions by ICANN Org, Board, evaluators, dispute panels
- Narrow appeals process for all applicants where parties identify either a reasonable inconsistency in outcome or a specific argument as to why the panel failed to apply the proper standard.
- Decisions of ICANN, evaluators, and dispute panels by parties directly impacted by the decision
- Substantive appeal for redress of broad spectrum decisions e.g. qualification as a Community Applicant, Objections, CPE

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 16 Oct 2019

Elements of New Appeal Mechanism (Cont'd)

Who should have standing to file an appeal? Does this depend on the particular action or inaction?

What measures can be employed to ensure that frivolous appeals are not filed? What would be considered a frivolous appeal?

ALAC STATEMENT states:

- Limited Appeals Process available to any party which is directly aggrieved by an event of action or inaction. The appeal is likely to depend on the particular action or inaction
- Conduct an administrative check to establish that filing fee is paid and the appeal contains at least one ground of appeal

SUBPRO WG Deliberations:

Comments:

- Generally, parties directly impacted by the decision has standing:
 - Directly impacted parties, which may include an applicant not directly a party to the original decision (for example because they are in a contention set)
 - The losing party in an objection process who can identify either a reasonable inconsistency in outcome (as compared to similarly situated objections/parties) or a specific argument as to why the panel failed to apply the proper standard
- Should ACs have standing (& funding) to file an appeal? If not, why not?**
- To stem frivolous appeals:
 - Apply quick look mechanism
 - Incorporate a summary judgment process

Should ALAC have standing & funding to file an appeal?

Proposed ALAC response:

- Tied to funding to file LPI and/or Community Objections*
- The question of standing should not be considered by SubPro – it is for ALAC itself to decide whether it has standing to file an objection, determined by Objection DRSP, also subsequent appeal
- Be relayed in the interim to SubPro WG as additional feedback to question arising from SubPro Initial Report
- Incorporated into ALAC statement to:
 1. SubPro new call for public comments to additional issues **and/or**
 2. Call for public comments to SubPro Final Report

□ * 3 Oct 2018 Recap

"Yes, the ALAC believes strongly that ICANN should continue to fund all objections filed by us in the future rounds. As ICANN's primary organisational constituency for the voice and concerns of the individual Internet user, the ALAC bears a responsibility as an established institution to pursue Limited Public Interest and/or Community objections against applications for New gTLDs which it believes does not benefit individual Internet end users as a whole.

The existing limits or conditions placed on funding for ALAC objection filing and Dispute Resolution Procedure (DRP) costs already form an arduous "stress test" to not only establish the validity of a contemplated Community objection, but also support for it within At-Large....."

□ 16 Oct 2019

"The ALAC has no funding ability beyond that supplied by ICANN. It is not feasible for the ALAC to raise funds to finance an appeal (or objection) or to bear costs under a "loser pays" model if its appeal is unsuccessful.

Any withholding of ICANN funding for the ALAC to file objections and/or appeals would be tantamount to denying ALAC the ability to fulfill its duty under the Bylaws as the primary organisational constituency for the voice and concerns of the individual Internet user.

As to any contemplated limits to the number of appeals or quantum of ICANN funding to ALAC in light of ICANN budgetary constraints, the ALAC believes that its ICANN funding must commensurate with number of applications received.

The question of standing for the ALAC to file an objection and appeal is beyond the scope of the Subsequent Procedures PDP WG. It is a question for the ALAC to consider and the Dispute Resolution Service Provider and Appeals Arbiter to determine in respect of an objection and appeal, respectively."

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 16 Oct 2019

Elements of New Appeal Mechanism (Cont'd)

If there is an appeals process, how can we ensure that we do not have a system which allows multiple appeals?

Who should bear the costs of an appeal?

ALAC STATEMENT states:

- Clearly lay out appeals process paths and include a stipulation that disallows multiple appeals
- (Does not object to “loser pays” model but) the costs of an appeal should be fixed in advance and all parties involved should be given prior notice of the same.
- *Could also allow consolidation of related appeals to control costs*

SUBPRO WG Deliberations:

Other Comments:

- Use an approach comparable to a court of final appeal, for example by designating that there is only one round of appeal on any decision.
- Limit the number of appeals where appropriate to ensure that appeals are handled as efficiently as possible -- have a "final decision" rule so that appeals are only available based on a final decision rather than allowing parties "interlocutory" appeals as the process progresses
- General support for “loser pays” model

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 16 Oct 2019

Elements of New Appeal Mechanism (Cont'd)

What are the possible remedies for a successful appellant?

Who will be the arbiter of such an appeal?

ALAC STATEMENT stated/suggested:

- Remedy depends on the nature of the appeal
- Board Accountability Mechanisms Committee could be arbiter, supported by a subject matter expert if need be

SUBPRO WG Deliberations:

Other suggestions on remedies:

- Remedy to be required to be included in written appeal.
- Reinstatement of an otherwise disqualified application
- Removal from contention set if decision led to such placement
- Generally the appropriate remedy would likely be the reversal of the appealed decision
- General support for “loser pays” model

Other suggestions on arbiter:

- Standing panel populated with individuals experienced in appellant case proceedings / Independent organization with sufficient expertise
- Independent third-party dispute resolution provider, but different to original decision-maker

SNAPSHOT OF SUBPRO WG DELIBERATIONS
New Appeals Mechanism Elements as at 16 Oct 2019 (p1/3)

Process	Outcome That Might Warrant Appeal	Potential Affected Parties	Parties With Standing	Arbiter of Appeal	Likely Results of Successful Appeal	Who Bears Costs?	Notes
[1] Background Screening	(a) Failure - disqualification for application from program	- Applicant [- Members of the contention set, if applicable (suggestion from WG member)]	- Applicant	Existing Evaluator Entity - Different individual Evaluator?	Reinstatement of application	Applicant - Should there be a partial refund if Applicant wins.	
	(b) No issues found in background screening	- Applicant [- Members of the contention set, if applicable (suggestion from WG member)]	[- Member(s) of the contention set, if applicable (suggestion from WG member)]	Existing Evaluator Entity - Different individual Evaluator?	Disqualification from program	Member(s) of the contention set - Should there be a partial refund if Applicant wins.	
[2] String Similarity	(a) Found to be similar to existing TLD, Reserved Names, 2-char IDNs against one-char (any) and 2-char (ASCII) - disqualification for application from program	- Applicant - Existing TLD Operator	- Applicant - Existing TLD Operator (No standing, but can file objection)	Existing Evaluator Entity - Different individual Evaluator?	Reinstatement of application	Applicant - Should there be a partial refund if Applicant wins.	
	(b) Found to be similar to another applied-for TLD - inclusion in a contention set	- Applicant - Other applicants in contention set	- Applicant - Other applicants in contention set	Existing Evaluator Entity - Different individual Evaluator?	Removal of string from contention set	Filing Party - Should there be a partial refund if Filing Party wins.	
	(c) Found NOT to be similar to an existing TLD, Reserved Names, 2-Char IDNs....	- Applicant - Existing TLD Operator	- May not be appealed; Existing TLD can always file an objection	N/A	N/A	N/A	
	(d) Found NOT to be similar to another applied-for-TLD	- Applicant - Other applicants in contention set	- May not be appealed; Other applicants can file objection	N/A	N/A	N/A	

SNAPSHOT OF SUBPRO WG DELIBERATIONS
New Appeals Mechanism Elements as at 16 Oct 2019 (p2/3)

Process	Outcome That Might Warrant Appeal	Potential Affected Parties	Parties With Standing	Arbiter of Appeal	Likely Results of Successful Appeal	Who Bears Costs?	Notes
[3] DNS Stability	Failure - disqualification for application from program	Applicant	Applicant	Existing Evaluator Entity - Different individual Evaluator?	Reinstatement of application	Applicant - Should there be a partial refund if Applicant wins.	
[4] Geographic Names	<i>(a) Designation as a non-capital city name or other geographic name</i>	<i>Applicant</i>	<i>Applicant</i>	<i>Existing Evaluator Entity - Different individual Evaluator?</i>	<i>Reinstatement of application</i>	<i>Loser Pays: In the case of a successful appeal, costs are a part of program costs?</i>	Skip until work of Work Track 5 Complete
	<i>(b) Definition of "relevant governments" disputed or other deficiency in documentation</i>	<i>Applicant</i>	<i>Applicant</i>	<i>Existing Evaluator Entity - Different individual Evaluator?</i>	<i>Reinstatement of application</i>	<i>Loser Pays: In the case of a successful appeal, costs are a part of program costs?</i>	Skip until work of Work Track 5 Complete
[5] Technical & Operations	Failure - disqualification for application from program	Applicant	Applicant	Existing Evaluator Entity - Different individual Evaluator?	Reinstatement of application	Applicant - Should there be a partial refund if Applicant wins.	
[6] Financial	Failure - disqualification for application from program	Applicant	Applicant	Existing Evaluator Entity - Different individual Evaluator?	Reinstatement of application	Applicant - Should there be a partial refund if Applicant wins.	
[7] Registry Services	Assignment to extended review by RSTEP and RSTEP disapproves new service	Applicant	Applicant	Existing Evaluator Entity - Different individual Evaluator?	New Service allowed to be included in New TLD Agreement	Applicant - Should there be a partial refund if Applicant wins.	

SNAPSHOT OF SUBPRO WG DELIBERATIONS
New Appeals Mechanism Elements as at 16 Oct 2019 (p3/3)

Process	Outcome That Might Warrant Appeal	Potential Affected Parties	Parties With Standing	Arbiter of Appeal	Likely Results of Successful Appeal	Who Bears Costs?	Notes
[8] Community Priority Evaluation	(a) Applicant prevails in CPE - community-based applicant receives priority	Members of the contention set	Member(s) of the contention set	Existing Evaluator Entity - Different individual Evaluator?	Decision reversed - community-based application does NOT receive priority	Member(s) of the contention set - Should there be a partial refund if Applicant wins.	
	(b) Applicant does not prevail in CPE - community-based applicant must resolve contention through other mechanisms	Applicant	Applicant	Existing Evaluator Entity - Different individual Evaluator?	Decision reversed - community-based application DOES receive priority	Applicant - Should there be a partial refund if Applicant wins.	
[9] Applicant Support	Applicant is determined to not meet the criteria - (in 2012, applicant had no recourse. Preliminarily, this WG is considering allowing the applicant to proceed at the normal application amount.)	Applicant	Applicant	Existing Evaluator Entity - Different individual Evaluator?	Decision reversed - applicant receives funding support	Applicant - Should there be a partial refund if Applicant wins.	

SNAPSHOT OF SUBPRO WG DELIBERATIONS
New Appeals Mechanism Standard of Review as at 16 Oct 2019

One of the remaining topics for Appeals is what the standard of review should be --- 2 choices being considered:

- ❑ Under a “*De Novo*” standard of review, the appeals panel is essentially deciding the issues without reference to any of the conclusions or assumptions made by the evaluator/dispute panel. It can refer to the evaluator/dispute panel to determine the facts, but it need not defer to any of the findings or conclusions. It would be as if the appeals panel is hearing the facts for the first time.
- ❑ Under a “**Clearly Erroneous**” standard of review, the appeals panel must accept the evaluator’s or dispute panel’s findings of fact unless the appeals panel is definitely and firmly convinced that a mistake has been made. In other words, it is not enough that the appeals panel may have weighed the evidence and reached a different conclusion; the evaluator’s/dispute panel’s decision will only be reversed if it is implausible in light of all the evidence.

In theory it could be possible to have different standards of review depending on what is the issue being appealed. For example, for Conflicts of Interest determinations, we could state that such an appeal would be on a De Novo standard, but for all other appeals, Clearly Erroneous.

SNAPSHOT OF SUBPRO WG DELIBERATIONS

Appeals as at 16 Oct 2019

Elements of New Appeal Mechanism (Cont'd)

In utilizing a limited appeal process, what should be the impact, if any, on an applicant's ability to pursue any accountability mechanisms made available in the ICANN Bylaws?

ALAC STATEMENT suggested:

- If the Board Accountability Mechanisms Committee is made the arbiter of a limited appeals process, then accountability mechanisms made available in the ICANN Bylaws would automatically be incorporated

SUBPRO WG Deliberations:

Other comments **still being discussed**

- Use of appeals process should not limit access to accountability mechanisms. Reinstatement of an otherwise disqualified application
- Unsuccessful appeal would substantially reduce the likelihood of successfully pursuing these other mechanisms.