UPDATE & CONSULTATION ON
New gTLD Subsequent Procedures
Consensus Building on Recommendations

Limited Challenge/Appeal Mechanism (v06)

Justine Chew
25 August 2020

Key Issues in Subsequent Procedures

In 2012 Round there was no challenge/appeal mechanism

- Recourse was strictly by way of existing Accountability Mechanisms – RfR, IRP, Ombudsman
- Accountability Mechanisms were clearly insufficient to properly facilitate challenges to decisions on evaluations (e.g. ASP, CPE), and objections (e.g. LPI, Community)

Topic 32: Limited Challenge/Appeal Mechanism

In respect of Evaluations and Objections

- Who would be eligible to exercise which challenges or appeals?
- Who would preside over these challenges or appeals?
- What would be the processes for handling these challenges or appeals?
- What would be the remedies?
- What about costs – filing and losing challenge or appeal?
- How is the ALAC affected by this?

What is the New gTLD Subsequent Procedures ("SubPro")?

- The set of rules and mechanisms applicable to the next round for New gTLDs i.e. they DO NOT apply to legacy TLDs, ccTLDs, or delegated new gTLDs or those still unresolved from the 2012 application round
- "An update" to the 2012 Round rules and mechanisms

Review of existing positions on Appeals for Subsequent Procedures

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.**

Summary of SubPro Recs/IGs: Limited Challenge/Appeal Mechanism

SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

Affirmation with Modification 31.2 also applies

- WG affirms Rec #12 with modification, "Dispute resolution and challenge processed must be established prior to the start of the process, *details of which must be published in the Applicant Guidebook.*"

Recommendation 32.1

- ICANN to establish a mechanism that allows specific parties to challenge or appeal certain types of actions or inactions that appear to be inconsistent with AGB.
- The new substantive challenge/appeal mechanism is not a substitute or replacement for the Accountability Mechanisms in the ICANN Bylaws that may be invoked to determine whether ICANN staff or Board violated the Bylaws by making or not making a certain decision.
- Implementation of this mechanism must not conflict with, be inconsistent with, or impinge access to, Accountability Mechanisms under Bylaws.
- Recommends that the new mechanism apply to the following:

Evaluation Challenges

1. Background Screening
2. String Similarity
3. DNS Stability
4. Geographic Names
5. Technical / Operational Evaluation
6. Financial Evaluation
7. Registry Services Evaluation
8. Community Priority Evaluation
9. Applicant Support
10. RSP Pre-Evaluation

Appeals of Formal Objections Decisions

1. String Confusion Objection
2. Legal Rights Objection
3. Limited Public Interest Objection
4. Community Objection
5. Conflict of Interest of Panelists

Recommendation 32.2

- For transparency, clear procedures and rules must be established for challenge/appeal processes as described in the IG below:

Implementation Guidance 32.3

- Parties with standing to file a challenge/appeal should vary depending on the process being challenged/appealed – see Annex F

Implementation Guidance 32.4

- The type of decision that may be challenged/appealed should vary depending on the process being challenged/appealed – see Annex F

Implementation Guidance 32.5

- Guidance on the arbiter for each type of challenge/appeal is summarized in Annex F
- In the case of challenges to evaluation decisions, the arbiter should typically be from the entity that conducted the original evaluation, but the person(s) responsible for making the ultimate decision in the appeal must be different from those that were responsible for the evaluation
- In the case of an appeal of an objection decision, the arbiter will typically be a panelist or multiple panelists from the entity that handled the original objection, but will not be the same panelist(s) that provided the original objection decision

Summary of SubPro Recs/IGs: Limited Challenge/Appeal Mechanism (c)

SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

Implementation Guidance 32.6

- For all types of appeals to formal objections, the parties to a proceeding must be given the opportunity to mutually agree upon a single panelist or a three-person panel, bearing the costs accordingly. Absent agreement of parties, default will be single panelist.

Implementation Guidance 32.7

- All challenges and appeals except for the conflict of interest appeals should be reviewed under the "clearly erroneous" standard. Conflict of interests should be reviewed under a "de novo" standard

❑ For All challenges and appeals except for the conflict of interest appeals

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.

❑ For Conflict of interest appeals

Under a "***De Novo***" standard of review, the appeals panel is essentially deciding on an allegation of conflict of interest 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.

IMPACT For At-Large Consensus Building

- Look at Annex F on slides no. 12-19

Summary & Impact of Recs/IGs: Limited Challenge/Appeal Mechanism

SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

Implementation Guidance 32.8

- Guidance on the party bearing the cost of a challenge/appeal – see Annex F

- Regarding appeals filed by the Independent Objector and ALAC, WG notes that in the 2012 round, ICANN designated a budget for the IO. WG believes that this should continue to be the case in subsequent procedures, and that ALAC should similarly have a budget provided by ICANN. The IO and ALAC should pay for any costs related to the appeal out of the budget provided.

Implementation Guidance 32.9

- Guidance on the remedy for a successful challenge/appeal – see Annex F

Recommendation 32.10

- The limited challenge/appeal process must be designed in a manner that does not cause excessive, unnecessary costs or delays in the application process, as described in the IG below

Implementation Guidance 32.11

- A designated time frame should be established in which challenges and appeals may be filed; for guidance – see Annex F.

Implementation Guidance 32.12

- Mechanism should include a "quick look" step at the beginning to identify and eliminate frivolous challenges/appeals.

Implementation Guidance 32.13

- A party should be limited to a single round of challenge/appeal for an issue. With the exception of challenges to conflict of interest determinations, parties should only be permitted to challenge/appeal the final decision on an evaluation or objection and should not be permitted to file "interlocutory" appeals as the process progresses. Parties should be able to appeal a conflict of interest determination prior to the objection panel hearing the objection.

IMPACT For At-Large Consensus Building

- IGs 32.8 and 32.9 specifically:
  - As before, ALAC to be given ICANN budget for filing Community / Limited Public Interest objections
  - Similarly, ALAC should be given ICANN budget to pay for any challenge or appeal, including costs awarded

- For Rec 32.10 + IGs 32.11 - Look at Annex F on slides no. 12-19

- IG 32.12 – "Quick look" to apply

- IG 32.13:
  - "Limited" means **single** round of challenge or appeal for one issue on final decision on an evaluation / objection; no interlocutory
  - Exception is challenge to Conflict of Interest determinations

Annex F for Limited Challenge to Evaluations, Aug 2020 (pg 1/3)

Process	Outcome That Might Warrant Appeal	Potential Affected Parties	Parties With Standing	Arbiter of Appeal	Likely Results of Successful Appeal	Who Bears Costs?
[1] Background Screening	(a) Failure - disqualification for application from program	- Applicant	- Applicant	Existing evaluator entity - different ultimate decision maker(s) within the entity	Reinstatement of application	Applicant
	(b) No issues found in background screening	- Applicant - Members of the contention set, if applicable	- Member(s) of the contention set, if applicable	Existing evaluator entity - different ultimate decision maker(s) within the entity	Disqualification from program	Member(s) of the contention set
[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 ultimate decision maker(s) within the entity	Reinstatement of application	Applicant
	(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 ultimate decision maker(s) within the entity	Removal of string from contention set	Filing Party
	(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

Annex F for Limited Challenge to Evaluations, Aug 2020 (pg 2/3)

Process	Outcome That Might Warrant Appeal	Potential Affected Parties	Parties With Standing	Arbiter of Appeal	Likely Results of Successful Appeal	Who Bears Costs?
[3] DNS Stability	Failure - disqualification for application from program	Applicant	Applicant	Existing evaluator entity - different ultimate decision maker(s) within the entity	Reinstatement of application	Applicant.
[4] Geographic Names	(a) Designation as a geographic name as prescribed in the AGB	Applicant	Applicant	Existing evaluator entity - different ultimate decision maker(s) within the entity	Reversal of designation as a geographic name	Applicant
	(b) String is NOT designated as a geographic name as prescribed in the AGB	- Applicant - Relevant government or public authority	- Applicant - Relevant government or public authority	Existing evaluator entity - different ultimate decision maker(s) within the entity	Designation as a geographic name	Applicant/Relevant government or public authority
	(c) Definition of "relevant governments" disputed or other deficiency in documentation	- Applicant - Relevant government or public authority	- Applicant - Relevant government or public authority	Existing evaluator entity - different ultimate decision maker(s) within the entity	Change in definition or reversal of deficiency	Applicant/Relevant government or public authority
[5] Technical & Operations	Failure - disqualification for application from program	Applicant	Applicant	Existing evaluator entity - different ultimate decision maker(s) within the entity	Reinstatement of application	Applicant.
[6] Financial	Failure - disqualification for application from program	Applicant	Applicant	Existing evaluator entity - different ultimate decision maker(s) within the entity	Reinstatement of application	Applicant.
[7] Registry Services	Assignment to extended review by RSTEP and RSTEP disapproves new service	Applicant	Applicant	New panel with different RSTEP panelists selected from standing roster	New Service allowed to be included in New TLD Agreement	Applicant

Annex F for Limited Challenge to Evaluations, Aug 2020 (pg 3/3)

Process	Outcome That Might Warrant Appeal	Potential Affected Parties	Parties With Standing	Arbiter of Appeal	Likely Results of Successful Appeal	Who Bears Costs?
[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 ultimate decision maker(s) within the entity	Decision reversed - community-based application does NOT receive priority	Member(s) of the contention set
	(b) Applicant does not prevail in CPE - community-based applicant must resolve contention through other mechanisms	Applicant	Applicant	Existing evaluator entity - different ultimate decision maker(s) within the entity	Decision reversed - community-based application DOES receive priority	Applicant.
[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 ultimate decision maker(s) within the entity	Decision reversed - applicant receives funding support	Applicant.
[10] RSP Pre-Evaluation	Failure - unable to be designated as pre-evaluated	RSP	RSP	Existing evaluator entity - different ultimate decision maker(s) within the entity	Successful designation as pre-evaluated	RSP

Annex F for Limited Appeal to Objections, Aug 2020 (pg 1/5)

Process	Potential Appellant	Standing?	What is being Appealed?	Arbiter of Appeal	Likely Results of Successful Appeal	Who Bears Costs?	Notes
[1] String Confusion	Applicant	Yes	A determination that there is string confusion with an existing TLD	Existing Provider; Different Panelist(s)	Application is reinstated	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter	15 days to signal intent of appeal, then 15 more days to pay and file appeal
			A determination that there is string confusion with another application	Existing Provider; Different Panelist(s)	Application removed from contention set	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter	15 days to signal intent of appeal, then 15 more days to pay and file appeal
	Existing TLD Objector	Yes	A determination that there is not confusion with an existing TLD	Existing Provider; Different Panelist(s)	Application does not proceed	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter	15 days to signal intent of appeal, then 15 more days to pay and file appeal
	Another Applicant Objector	Yes	A determination that there is not confusion with another application	Existing Provider; Different Panelist(s)	Application is placed into Objector's contention set	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter	15 days to signal intent of appeal, then 15 more days to pay and file appeal

Annex F for Limited Appeal to Objections, Aug 2020 (pg 2/5)

Process	Potential Appellant	Standing?	What is being Appealed?	Arbiter of Appeal	Likely Results of Successful Appeal	Who Bears Costs?	Notes
[2] Legal Rights Objection	Applicant	Yes	A determination that the applied for string infringes the legal rights of the Legal Rights Objector	Existing Provider; Different Panelist(s)	Application is reinstated	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter	15 days to signal intent of appeal, then 15 more days to pay and file appeal
	Legal Rights Objector	Yes	A determination that the applied for string does not infringe the legal rights of the Legal Rights Objector	Existing Provider; Different Panelist(s)	Application does not proceed	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter	15 days to signal intent of appeal, then 15 more days to pay and file appeal

Annex F for Limited Appeal to Objections, Aug 2020 (pg 3/5)

Process	Potential Appellant	Standing?	What is being Appealed?	Arbiter of Appeal	Likely Results of Successful Appeal	Who Bears Costs?	Notes
[3] Limited Public Interest Objection	Applicant	Yes	A determination that the applied for string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.	Existing Provider; Different Panelist(s)	Application is reinstated	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter	15 days to signal intent of appeal, then 15 more days to pay and file appeal
	3rd Party Objector	Yes	A determination that the applied for string is not contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.	Existing Provider; Different Panelist(s)	Application does not proceed	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter	15 days to signal intent of appeal, then 15 more days to pay and file appeal
	Independent Objector	Yes	A determination that the applied for string is not contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.	Existing Provider; Different Panelist(s)	Application does not proceed	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter (The IO must pay for an unsuccessful appeal out of its budget)	15 days to signal intent of appeal, then 15 more days to pay and file appeal
	ALAC	Yes	A determination that the applied for string is not contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.	Existing Provider; Different Panelist(s)	Application does not proceed	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter (The ALAC must pay for an unsuccessful appeal out of its budget)	15 days to signal intent of appeal, then 15 more days to pay and file appeal

Annex F for Limited Appeal to Objections, Aug 2020 (pg 4/5)

Process	Potential Appellant	Standing?	What is being Appealed?	Arbiter of Appeal	Likely Results of Successful Appeal	Who Bears Costs?	Notes
[4] Community Objection	Applicant	Yes	There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted	Existing Provider; Different Panelist(s)	Application is reinstated	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter	15 days to signal intent of appeal, then 15 more days to pay and file appeal
	Community Objector	Yes	A determination either that: (a) the Objector does not have standing and/or (b) there is not substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted	Existing Provider; Different Panelist(s)	Application does not proceed	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter	15 days to signal intent of appeal, then 15 more days to pay and file appeal
	Independent Objector	Yes	There is not substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted	Existing Provider; Different Panelist(s)	Application does not proceed	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter (The IO must pay for an unsuccessful appeal out of its budget)	15 days to signal intent of appeal, then 15 more days to pay and file appeal
	ALAC	Yes	A determination either that: (a) the ALAC does not have standing and/or (b) there is not substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted	Existing Provider; Different Panelist(s)	Application does not proceed	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter (The ALAC must pay for an unsuccessful appeal out of its budget)	15 days to signal intent of appeal, then 15 more days to pay and file appeal

Annex F for Limited Appeal to Objections, Aug 2020 (pg 5/5)

Process	Potential Appellant	Standing?	What is being Appealed?	Arbiter of Appeal	Likely Results of Successful Appeal	Who Bears Costs?	Notes
[5] Conflict of Interest of Panelists	Applicant or Objector	Yes	One or more panelist(s) has actual conflict of interest which could influence the outcome	**To be determined by IRT**	Panelist removed and replaced	Non-prevailing party bears the cost of the proceeding fees charged by the third-party arbiter	Must be filed within 15 days from notice of the appointment of the Panelist(s); stops objection from proceeding until outcome of appeal