

2017-06-20 New gTLD Subsequent Procedures PDP Work Track 3

The call for the New gTLD Subsequent Procedures Sub Team – Track 3 – String Contention, Objections & Disputes will take place on **Tuesday, 20 June 2017 at 15:00 UTC for 60 minutes.**

08:00 PDT, 11:00 EDT, 16:00 London BST, 17:00 CEST

For other times: <http://tinyurl.com/jvnut4n>

Agenda:

1. Welcome / Review Agenda
2. SOIs
3. Status Update from Plenary Chair
4. New gTLD Accountability Mechanisms
 - A. Revised IRP
 - B. PICDRP – lessons learned
5. Discussion topics for ICANN 59 F2F
6. AOB

[Mp3](#)

[AC Chat](#)

[AC Recording](#)

[Attendance](#)

Apologies:

Dial outs: Cheryl Langdon-Orr

On audio only: Jamie Baxter

[Slides](#)

Notes/Actions:

1. *Status Update from Plenary Chair*

-- In the last meeting we focused on the last of the three drafting teams on the community comment issues -- rounds/first come, first serve.

-- Next meeting -- CC1 topic and then each Work Track will take one of their issues to get input from the community.

-- Working on the cross-community meeting: GeoNames at the top level for two sessions. Put out a strawperson of the proposals and trying to develop a single story. We wanted to show that we could fabricate a possible solution. Encourage everyone to read the strawperson and the chart comparing the various proposals.

2. *New gTLD Accountability Mechanisms -- Slide 3*

Charter: Examine whether dispute resolution and challenge processes are adequate redress options or if additional redress options specific to the program are needed.

-- Independent Review Process (IRP)

-- Public Internet Dispute Resolution Procedure (PICDRP)

-- Registry Restrictions Dispute Resolution Procedure (RRDRP)

-- Trademark Post Delegation Dispute Resolution Procedure (TM-PDDRP) -- best dealt with in the RPM PDP, not in this PDP

A. Independent Review Process (IRP)

David McAuley, Lead, IRP Implementation Oversight Team, Verisign Policy Team

Slide 5 -- IRP

- Bylaw Section 4.3
- Came into effect 01 October 2016

Slide 6 -- IRP (Purpose)

- See Section 4.3 (a) of the Bylaws
- Ensure (a) against exceeding mission; (b) compliance with Articles/Bylaws
- Empower community/claimants to enforce compliance
- Ensures accountability
- Address claims ICANN failed to enforce IANA Naming Functions contract
- Provide vehicle for direct IANA customers to seek resolution of PTI service complaints
- Reduce disputes by creating precedent in connection with policy development and implementation...

Slide 7 -- IRP (Purpose) Cont.

- Accessible, transparent, efficient, consistent, and just resolution of disputes
- Leads to binding, final resolutions
- Provide vehicle for resolving disputes/alternative to civil litigation

Slide 8 -- IRP (Main Pillars)

- New Standard of Review -- substantive review of whether ICANN's actions or inaction are a failure to enforce the Bylaws
- Standing Panel
- Updated 'Supplementary' Rules of Procedure

Slide 9 -- IRP (Main Pillars) Cont.

- New standard of review (scope) of IRP
- Address claims that ICANN (Board, individual directors, officers, or staff) acted/failed to act in a manner that violated the Bylaws
- Exceeded scope of mission
- Resulted from response to advice or input from AC/SO
- Resulted from decisions of process-specific expert panels that are claimed to be inconsistent with Articles or Bylaws

Slide 10 -- IRP (Main Pillars) Cont.

- Resulted from a response to a DIDP request
- Arose from claims involving rights of the EC
- Claims of non-enforcement of ICANN's contractual rights with respect to the IANA Naming Function Contract
- Claims regarding PTI service complaints by direct customers of the IANA naming functions that are not resolved through mediation

Slide 11 -- IRP (Main Pillars) Cont.

Excluded from Scope of IRP:

- EC challenges to the result(s) of a PDP, unless the SO(s) that approved the PDP supports the EC challenge
- Claims relating to ccTLD delegations and re-delegations;
- Claims relating to Internet numbering resources, and
- Claims relating to protocol parameters.

Slide 12 -- IRP (Main Pillars) Cont.: Nature of Review "objective, de novo" -- Section 4.3(i)

Slide 13 -- IRP (Main Pillars) Cont.

Standing Panel:

- At least 7 members
- Secretariat/admin support
- ICANN issuing Expressions of Interest
- Seeking/vetting applications
- Panel nominations by SOs/ACs and confirmation by the Board

Slide 14 -- IRP (Main Pillars) Cont.

- 5-year term
- Panelists must be independent
- Individual cases to be heard by 3-member panel.
- Appeals to full standing panel possible (Section 4.3(w));
- Resolution within six months is target (Section 4.3(s));
- Enforcement in court envisioned if needed (Section 4.3(x)).

Slide 15 -- IRP (Mail Pillar) Cont.

Rules of Procedure:

- First draft of updated rules
- Review of public comments underway; making progress.
- Time within claim must be filed
- Retroactivity of 1) standard 2) rules
- Joinder of interested parties
- Challenges to consensus policies

Slide 16 -- Miscellaneous

- Cooperative Engagement Process
- Conciliation efforts to narrow issues under review
- IRP IOT status
- Access consideration

Questions/Discussion:

- Don't think the changes go far enough. The substantive review is whether an action or inaction caused a breach of the Bylaws, but there is nothing that would act of an appeals mechanism for a breach to the AGB unless it also breached the Bylaws.
- Not every violation of the AGB would be construed as a violation of the Bylaws
- Doesn't cover appeals where staff or contractors got the decision wrong.
- If someone doesn't like the decision of the string similarity panel, for example, there is nothing anyone can do to get that decision reviewed.
- Not dissimilar from PTI service complaints. Panel may have to wrestle with this, but there are some unclear areas.
- Question: The scope of the work in Workstream 2 re: the scope of an IRP -- what is a valid claim to be filed in an IRP? Seems that Workstream 2 is not going to be able to change the scope of Workstream 1. Is this in scope? Answer: Anything that would change the scope of an IRP would have to be suggested as an amendment to the Bylaws. See 4.3(b) is scope re: "covered actions" that violate articles or Bylaws. Gets to the further notion that this deals with someone being materially affected by the action to have standing -- has to be harm.
- Not arguing that we should be pushing for a change in the scope of the IRP; arguing that we could consider developing a new gTLD appeals process that would go into the AGB.

From the chat:

Jeff Neuman: New IRP is a "Substantive review of whether they violate the bylaws." But that is different than a substantive review of whether the Guidebook was breached, correct?

Jeff Neuman: In other words, would a breach of something in the Guidebook be a violation of the bylaws?

Jeff Neuman: This is what we need to consider....

Jim Prendergast: or an action by a contractor to ICANN - IRPs have discovered some actions there that didnt seem right - especially in the CPE space.

Jeff Neuman: @Jim, but it is a stretch to argue that all breaches of the guidebook are violations of the bylaws....which is why many have argued that an appeals process is required

Jim Prendergast: correct

Jim Prendergast: which leads to the question of - are the 4 on the first slide enough?

Anne Aikman-Scalese (IPC): @Jeff - It seems that a breach of ByLaws or Mission is not the same as a decision which 'breaches' the Guidebook. Directors are held to standard of Mission and ByLaws and can review decisions of panel. I am not seeing basis for "breach" of Guidebook per se unless the action or inaction breaches mission or bylaws.

Anne Aikman-Scalese (IPC): I doubt we can change the scope of the revised IRP at this point in time. It's a function of the consensus and Chartering Org approval accomplished in WS1.

John Laprise: I like the IRP structure

Jeff Neuman: @Anne - correct ; which is again why many believe an appeals process is necessary for substantive decisions, or actions or inactions of icann staff or its contractors in violation of the guidebook

Anne Aikman-Scalese (IPC): @Jeff - Does Request for Reconsideration apply in the circumstances you describe and is there an appeal from that?

Jeff Neuman: Requests for Reconsideration is not a substantive review of whether provisions of the Guidebook were breached.

Anne Aikman-Scalese (IPC): What is the standard of review in Request for Reconsideration?

Jeff Neuman: Standard of Review for Reconsideration: (c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that the Requestor has been adversely affected by:(i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);(ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.

Susan Payne: does the cost sanction work the other way - if ICANN does not meaningfully engage in CEP?

Jeff Neuman: So, there is still NO mechanism to handle cases where the ICANN staff, contractor, or board just got a decision wrong substantively.

Jeff Neuman: unless it is of such a degree to violate the mission, core values or bylaws

Anne Aikman-Scalese (IPC): @Jeff - Issue of "breach" of Guidebook provision is very touchy. In the past, the Board has received policy advice - both from the GNSO and from the GAC, that arguably varied from the Guidebook provisions. When you consider that the Board is already bound to one degree or another in relation to voting majorities that apply to GNSO advice (2/3 to overcome) and GAC Advice (60% to overcome) and by IRP on Mission and ByLaws violations, I think you are putting the Board in a very difficult position where they won't be able to make decisions on issues that arise after the Guidebook is finalized if you say there can be IRP on Guidebook breaches.

Anne Aikman-Scalese (IPC): Thanks Jeff. Agree IRP does not cover breach of guidebook so worth looking at in Sub Pro.

B. PICDRP -- Lessons Learned

Kiran Malancharuvil, Policy Counselor, MarkMonitor

-- First PICDRP that made it to the Standing Panel stage

-- Purpose: Ensure new gTLDs operated in the public interest.

-- PICDRP was a way for parties to bring a complaint against registry operators re: fraud and malicious conduct.

-- Process is arduous and complicated, uncertain and lack of transparency.

-- The problems with PICDRP:

(1) transparency violations -- ICANN regularly shared all of the coalition's filings with the respondent (TLS), but refused to share any of the respondent's filings. Approached ICANN but didn't get a satisfactory answer.

(2) In the dark from when we filed and we got the decision. No notice of the composition of the Standing Panel to identify conflicts of interest.

-- After PICDRP gave its findings -- TLS submitted to ICANN Compliance a mediation plan to address the violations, but we did not receive any information. No way to understand what happened to know if the remedy was appropriate.

-- During the Standing Panel's deliberations ICANN instructed the panel on the scope of the PICDRP -- process violation of ICANN's neutral role in the decision of the PICDRPs.

-- Concerns expressed by Panelists.

-- Registry operator TLS after the PICDRP was filed and decided and after remediation, engaged in retaliatory behavior by claiming we had a confidentiality breach by association/proxy. Requested termination of our accreditation with them. Complainants aren't protected from retaliation.

Questions/Discussion:

-- Question: Stages during which information you shared with ICANN and the procedural methods where you weren't kept informed, was that before you made it to the panel? Where did ICANN stop having a role? Answer: Vast majority happened before the panel. Once panel was convened it was sealed off, except for ICANN instructing them on the scope. Will note the question and respond on the list.

-- General comment/question: To what extent are we aware of actions ICANN has taken on the other half of the PICDRP enforcement mechanism -- simple complaint to Compliance the results in some kind of action by ICANN that the PICs are being enforced.

From the chat:

Anne Aikman-Scalese (IPC): PICDRP was originally drafted as a complaint to be filed outside of ICANN and adjudicated by a neutral not selected by ICANN staff. Too bad that was not the structure was adopted because these problems would not have arisen in that procedural context.

Jeff Neuman: [Co-Chair Hat off][Former Registry Hat on]: When we started this PIC Process the registries asked that it only be ICANN that enforces / does not enforce the PICs. ICANN did not want to exclusively take on that role since it did not feel like it had the knowledge or expertise to do so. It also did not want to take on the liability of making the decisions. Registries did not want to be left without an appeals process if the decision was made exclusively by an outside provider (especially if the panel made an overly harsh decision), so thus the compromise was that the Panel makes a recommendation, but ICANN determines the remedy such that a registry can challenge under the contractual provisions in their agreement. This is why it is so complex.

Anne Aikman-Scalese (IPC): "Registries did not want to be left without an appeals process if the decision was made exclusively by an outside provider" - i.e. registries knew that they would be protected to some degree by ICANN itself due to relationship. This goes to the core of definition of "public interest" and who should be deciding what is in the public interest - the old "GPI" debate.

Anne Aikman-Scalese (IPC): QUESTION: Should a PICDRP decision be appealable to IRP now that scope of IRP includes review of panel decisions? QUESTION

Anne Aikman-Scalese (IPC): I think Alan also means that ICANN Compliance is supposed to be monitoring compliance with PICs - e.g. Are eligibility provisions be applied in Safeguarded strings?

Alan Greenberg: A complaint to Compliance would not result in your being compensated, but it in theory should address any violation.

Kiran Malancharuvil: Hi Alan, thanks. We aren't seeking compensation, just addressing the violation

Steve Chan: FYI, WT2 submitted questions to contractual compliance on complaints related to PICs. We will make sure that the responses are made available to both WTs 2 and 3.

3. ICANN59 Topics

Slide 18: ICANN59 F2F Meeting Topics

-- How GAC Advice & GAC Early Warnings impact the freedom of expression and the application process

Slide 19: Meetings:

Tuesday, 27 June, 0830-1200: [GNSO New gTLD Subsequent Procedures PDP Working Group Face-to-Face Meeting](#)

Tuesday, 27 June, 1700-1830: <https://schedule.icann.org/event/B3pX/cross-community-discussion-geographic-names-at-the-top-level-session-i>

Thursday, 29 June, 1515-1830: <https://schedule.icann.org/event/B3pD/cross-community-discussion-geographic-names-at-the-top-level-session-ii>