



5 April 2013

**Re: ICANN's Proposed Public Interest Commitments Dispute Resolution Procedure (PICDRP)**

Please find below our comments on the current PICDRP draft; we look forward to further community dialogue in developing this mechanism.

**Standing under the proposed PICDRP should be defined**

As currently drafted, the proposed PICDRP would grant standing to file a complaint to any "allegedly harmed person or entity". While we supported the concept of a PIC to allow applicants to meet concerns raised by governments and other stakeholders, we reserve comment on ICANN's proposal to outsource its contractual compliance functions under the PIC to third parties. And irrespective of whether ICANN proceeds with such outsourcing, it is important to develop a nexus requirement for complainant standing under any PICDRP. (Such requirement is present e.g., in the RRDRP.)

**The proposed PICDRP standards should substantially mirror those of the PDDRP**

Any PICDRP standard should require that the complainant specify the exact nature of the *material* (not simply measurable) harm it alleges as the basis for its complaint. (Such requirement of demonstrable harm is present e.g., in the PDDRP.)

Any PICDRP standard should require a complainant to assert and prove, *by clear and convincing evidence*, that the registry operator's *affirmative conduct* in violating one or more of its PICs *caused or materially contributed to* the harm alleged as the basis for its complaint. (We note that with respect to the PDDRP, such standard was agreed after considerable dialogue, including focused discussions with ICANN and registries; drawing on this experience and the agreed-on standards is all the more important in light of the fact that the current PICDRP is missing important safeguards.)

**The proposed PICDRP burden of proof should be "clear and convincing"**

The current proposed PICDRP burden of proof that a complainant must merely prove the allegations made in the complaint "by a preponderance of the evidence" (i.e., a mere balance of probabilities) is untenable, particularly when the proposed remedy includes termination of the registry agreement.

**The proposed PICDRP is missing important safeguards**

It is important that any PICDRP incorporate a Threshold Review Panel to assess whether the complainant has asserted facts sufficient to state a claim. (We note that a single (undefined)

reference is made to such a Threshold Review Panel in section 8.2 – this reference should be clarified and expanded upon; we also note that this safeguard is present in the PDDRP).

We also believe that, similar to the 30-day requirement for the parties “to engage in good faith discussions to resolve the issue prior to initiating [a proceeding]” provided for under the PDDRP, a pre-PICDRP reporting system should be a mandatory prerequisite to the filing of any PICDRP case.

Similarly, as with the somewhat recently developed URS and PDDRP, in addition to cost reimbursement (including reasonable attorney fees) to a prevailing registry operator, any PICDRP should incorporate appropriate sanctions against the filing of abusive complaints determined to be “without merit”. Such graduated sanctions could include: (i) a temporary ban from filing complaints where a reasonably low threshold of abusive complaints is crossed (i.e., 3-strikes), and (ii) a permanent ban from filing abusive complaints after a temporary ban. (In lieu of a permanent ban, a substantial deposit, to be forfeited where the registry operator prevails, could accompany any filings submitted by or on behalf of any party or their affiliate, any of whom have previously been temporarily banned.)

A footnote in the proposed PICDRP observes that a “nominal processing fee [for a pre-PICDRP reporting system] could serve to decrease frivolous complaints and is still under consideration”. While we support inclusion of such a safeguard, we note that by itself, a nominal processing fee is unlikely to provide a meaningful deterrent against frivolous complaints. In addition to a *meaningful* processing fee, any pre-PICDRP reporting system should require an attestation (under penalty) that the report is not being made for any improper purpose (as required in a PICDRP, PDDRP, RRDRP, URS, or UDRP case). Any pre-PICDRP reporting system should also encourage provision of the complaining party’s contact information; this could facilitate important dialogue between the registry and complaining party to better understand the nature of the complaint, clarify any misunderstandings, and mutually consider any proposed remedial measures.

### **Parties should be able to object to appointment of a particular Expert**

As is standard in international arbitration, the parties should be able to challenge the appointment of a particular Expert. (See e.g., [WIPO Arbitration Rules](#) at Articles 24-29; [ICC Rules of Arbitration](#) at Article 14; and ICANN New gTLD Objection Procedure at paragraph 13(d).)

(Also related to the Panel, discretion to determine whether additional material is necessary should rest with the Panel, not the Provider (see paragraph 7.3).)

### **The proposed PICDRP remedies require clarification**

Where an Expert Panel would seek to impose “a variety of gradual enforcement tools” on a registry operator, it might be necessary for the Expert Panel to discuss the technical or operational feasibility of any proposed remedy directly with the registry. Similarly, the registry should be permitted a reasonable time, as judged by the particular circumstances, to implement any proposed remedy.

We also believe that even if a recommended remedy cannot for some reason impact (e.g., delete, transfer, or suspend) domain name registrations made in violation of a PIC, ICANN should clarify that the registry itself would retain discretion to implement such actions in line with its own registration policies. Equally however, while we agree that ICANN should have the authority to implement any Expert Panel-recommended remedies, if any, that ICANN deems appropriate given the circumstances of each matter, it is important that ICANN not have any discretion to impose

remedies beyond those recommended by the Expert Panel (unless explicitly provided for under the ICANN New gTLD Registry Agreement on its own terms).

**ICANN should stay implementation of any PICDRP determination pending any appeal**

As with the PPDRP, ICANN should not direct implementation of any remedy for a PICDRP violation for at least 20 days after the issuance of an Expert Determination, to allow for an appeal to be filed.

We also believe that where a Panel would request appointment of an expert or witness testimony, the parties should be given an opportunity to comment or inform the Panel, and that the same rules for independence and impartiality that are applied to the Expert Panel should apply to experts.

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Finally, we reiterate our view, expressed in our [comments to ICANN on the Revised Registry Agreement and PIC Specification](#) that “if ICANN wishes to involve its compliance function with a range of potential commitments, we believe that any PIC-type mechanism should follow a formal Policy Development Process (PDP) for application to **all** registries, not just New gTLD registries.”

Thank you for considering the above suggestions; please do not hesitate to contact us if we can provide any clarification.

Yours sincerely,

/s/

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