The ICANN GNSO "Business Constituency"

Comment on Updated Supplementary Procedures for Independent Review Process (IRP)

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Business Constituency Submission

GNSO//CSG//BC

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter. The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. Promotes end-user confidence because it is a safe place to conduct business
2. Is competitive in the supply of registry and registrar and related services
3. Is technically stable, secure, and reliable.

The BC welcomes to opportunity to comment on the **Updated Supplementary Procedures for Independent Review Process (USP)[1].** We applaud the work of the IRP Implementation Oversight Team (IRP-IOT) to develop these supplementary procedures.

We note that the community was unable to reach consensus on three issues – the retroactive application of updated supplementary procedures for existing IRPs, statute of limitations for filling an IRP, and the permissibility of witness testimony / cross examinations during IRP hearings. We will comment on each of these issues.

Retroactive Application of Supplementary Procedures

We support the current draft of the USP, which does not permit the retroactive application of supplementary procedures. Retroactive application of the new USP to existing IRPs would be inherently unfair to both of the parties involved in the IRP, causing additional legal expenses and delaying proceedings already underway.

However, one issue that should be explicitly clarified in the scope section of the USP is what vintage of ICANN Bylaws will control for any IRP disputes pending at the time of adoption of the post-IANA transition bylaws. The BC strongly believes that the new Bylaws should control, as these provide a claimant with substantially improved rights. In particular, the decision of the IRP panel is now binding upon ICANN, whereas in the past the ICANN Board could choose to reject the findings of the IRP panel. ICANN must be willing to apply this same standard to pending IRP cases, or else the credibility of its claim to embrace the new accountability mechanisms developed by the community could be suspect.

Statute of Limitations for filing an IRP

The BC has very serious concerns about the currently proposed limitations on the time to file an IRP, which consists of a two-part test. The first part of the test is that the IRP must be filed within 12 months of the date of action or inaction. Moreover, a claimant must file their IRP within 45 days of "becoming aware of the material effect of the action or inaction." ICANN's Bylaws indicate that the Rules of Procedure "are intended to ensure fundamental fairness and due process" and that the rules "shall be informed by international arbitration norms." In our view the proposed time limits for filing an IRP are not fair, do not reflect the reality of the speed at which ICANN moves as an organization, and are not convincingly informed by international arbitration norms.

[1] ICANN public comment page at https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en

With regard to the proposed time limits, it is important to note that the current Rules of Procedure for the IRP process do not have a time limit at all. Moving to a deadline of 45 days from the date of awareness of an action or inaction that gives rise to a dispute is inherently problematic and unfair – particularly at a time when ICANN should be increasing its accountability pursuant to binding commitments to the community.

Additionally, the proposed filing deadlines make little practical sense, particularly in the context of ICANN's slow moving systems and processes, whereby it can take years for a policy to be developed, approved by the Board, and then actually implemented. And even then, it is possible for the actual implementation of the policy to change at a later date. This very situation is implicitly acknowledged in the Bylaws. Section 4.3(c) (i) states that EC challenges to the results of a PDP are *excluded* from the IRP process, unless the Supporting Organizations that approved the PDP supports the EC bringing a challenge. This exception to an exception is in the Bylaws because the SOs and ACs involved in the CCWG were concerned that ICANN's implementation of a policy would be outside of the scope of ICANN's mission or in violation of its Bylaws.

The development of these Updated Supplementary Procedures is a classic example of how slowly ICANN moves, and why ICANN must have more generous timeframes for a claimant to bring forth an IRP. It is now 9 months since the ICANN board adopted the revised Bylaws. The updated procedures are still being drafted, and consensus has yet to be reached on three important aspects of the procedures. The USP should reflect these realities and allow potentially harmed parties to file an IRP throughout the entire lifetime of a policy.

It is critical to note that ICANN's use of arbitration within its Bylaws is novel. Generally speaking, arbitration is an alternative dispute resolution mechanism that is explicitly agreed upon by two parties, via contract. There are also some instances of binding arbitration clauses being incorporated into the bylaws of for-profit entities, which limited the forum and remedies available to shareholders of those organizations. ICANN's usage of arbitration, via its Bylaws, to impose an arbitration regime onto individuals and organizations with no shareholder interest or direct contractual relationship with ICANN is unusual. Due to this unusual application of arbitration, it is highly improbable that ICANN can truly adopt rules of procedure that are consistent with international arbitration norms. Arbitration is not widely used in this manner, so we cannot know what is normative from a statute of limitations perspective. Therefore, the IRP-IOT should err on the side of protecting the rights and remedies of the aggrieved party, and not impose arbitrary and unjustifiable deadlines.

Even more troubling is that the courts have relied upon ICANN's consensus based, multi-stakeholder model to reject attempts at overturning arguably onerous language in ICANN's agreements with contracted parties. We actually applaud the courts for giving such weight to bottom up, community generated policy.[2] But at the same time, if courts give the same weight to these Updated Supplementary Procedures, the likelihood of a successful legal challenge to the USP seems dim.

[2] https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-motion-dismiss-first-amended-complaint-28nov16-en.pdf (Page 7)

Apart from our other arguments related to the statute of limitations to file an IRP, the current proposed language creates a transitional situation that could result in the inability of a currently harmed party to file an IRP. Consider a scenario where a party is materially impacted by action or inaction by ICANN taken more than 45 days prior to the adoption of the Updated Supplementary Procedures. For whatever reason, the harmed party has not yet filed an IRP. After the new Rules of Procedure are adopted and become applicable to this dispute, ICANN could very easily challenge that the statute of limitations to file an IRP, under the updated rules, has expired. We suggest that the USP be updated to add language that specifically addresses this transition scenario. It is critical for the IRP-IOT to err on the side of preserving the rights of a potentially harmed party in the drafting and implementation of these Updated Supplementary Procedures.

In light of these concerns, the BC recommends that the IRP-IOT impose a moratorium on imposing any time limits related to bringing forth an IRP until further studies can be conducted by the ICANN community to assess the potential impacts of such time limits.

Such a moratorium would make it clear to the ICANN community that ICANN is taking its accountability enhancements seriously. ICANN should support the further study of these issues by ensuring sufficient budgetary resources are in place to engage with third party experts and consultants.

It is imperative that ICANN recognize and act upon our strenuous objection to the proposed statues of limitations in the Updated Supplementary Procedures prior to their adoption. The proposed limits are unfair, inconsistent with international arbitration norms, and may create substantial concerns around the legitimacy of ICANN as a standalone, multi-stakeholder model organization.

However, if there is not sufficient support from the ICANN community for such a moratorium, then the BC suggests some revisions to the time lines proposed by the IRP-IOT, as described below.

A 4-Jan-2017 legal memorandum was provided to the ICANN CCWG-Accountability IRP Implementation Oversight Team by its Counsel, Sidley Austin LLP. That memorandum addressed whether the draft USP timing language is consistent with the "agreement in principle" on timing of claims asserting a facial challenge, with this conclusion:

> As currently drafted, Section 4 of the Draft Supplemental Rules does not capture the Agreement in Principle described above. The current draft language is more limited than the Agreement in Principle in that it allows only for challenges that are brought within 45 days of the date the claimant becomes aware of material harm by an invalid action or inaction *and* in any event within 12 months of the action or inaction giving rise to the claim. Therefore, as currently drafted, a facially invalid action or inaction could not be challenged by a claimant if the material impact to the claimant (harm or injury) arose at a time such that the claim could not be filed within 12 months from the ICANN decision that created the facial invalidity.
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> ICANN's Amended Bylaws2 ("Bylaws") control the drafting of the Supplemental Rules. The CCWG-Accountability Final Report3 ("CCWG Report") also provides helpful guidance. We note that while neither the Bylaws nor the CCWG Report distinguish between IRP challenges on

> grounds of facial invalidity versus other grounds, the Agreement in Principle described above does not appear to be facially inconsistent in significant respects with the Bylaws. However, we also note that the Bylaws do not specifically contemplate a 12-month limit on any claims and appear to require that any time limit run from the time at which the claimant became aware of or reasonably should have become aware of the material impact, which the Agreement in Principle does not address. (The CCWG Report also contemplated that the time limit would run from the time at which the claimant became aware of the alleged violation and how it affected them.)

The CCWG's legal Counsel also proposed this substitute language to make the proposed Rules consistent with the Bylaws and final CCWG Report:

> A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of or reasonably should have become aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.
>
> Challenges which allege that a COVERED ACTION is invalid for all applications ("facially invalid") may be brought at any time within 45 days after CLAIMANT becomes aware of or reasonably should have become aware of the material effect of the COVERED ACTION giving rise to the DISPUTE without regard to the 12-month limitation.

At a minimum, the BC believes that the proposed substitute language must be adopted, since without it challenges to facially invalid covered actions could no longer be brought more than one year after their adoption, even if their application was in violation of the Bylaws or otherwise gave rise to an IRP claim. *Facially invalid actions should never be time-limited.*

However, adoption of the proposed substitute language would still leave the possibility that an action that was invalid as-applied could be time-barred if the affected party did not become aware, or could not reasonably have become aware, of its material effect until more than twelve months after its adoption. Given the slow pace of actual implementation of ICANN decisions, twelve months is far too short for such a time limitation.

As neither the Bylaws nor the CCWG Report contemplate distinct timing rules for various types of Disputes our preference would be to remove the twelve month limitation for "as applied" disputes as well and simply require that challenges be brought within a set time period after the affected party became, or should reasonably have become, aware of its material effect. Given the time necessary to analyze material effect, consult with counsel, and file an action we believe that the minimum time for filing should be increased to at least one year; noting that such an extended filing limit will also create a space in which the aggrieved party and ICANN may reach a mutually satisfactory settlement without resort to legal challenge.

If an overall time limit for “as applied” disputes is retained it should be substantially longer than twelve months – we would suggest a minimum of three years to assure that where there is material harm and a resulting right to challenge, there is a practical remedy to provide redress.

Permissibility of Witness Testimony / Cross Examinations during IRP hearings

The BC appreciates that the IRP Bylaws and Updated Supplementary Procedures are designed with expediency and cost effectiveness in mind. However, the proposed threshold for witness testimony and cross examination should be less stringent. In particular, we feel that the IRP panel should consider the following factors:

- Is a witness necessary for a fair resolution of the claim?
- Is a witness necessary to further the purposes of the IRP?

The panel should only consider the time and expense of witness testimony after first considering the fairness and furtherance of the IRP and the gravity of actual or potential harm to the claimant.

Further, the panel should only consider the time and expense related to witness testimony and cross examinations if one party to the claim can provide proof that such a delay or expense would create a legitimate and unjustifiable financial hardship. A claimant should not be precluded from offering witness testimony or conducting cross examinations simply because it might increase expenses or slightly delay the resolution of the dispute.

This comment was drafted by Jay Sudowski, with edits by Phil Corwin, Chris Wilson, Marie Pattullo, and Steve DelBianco.

It was approved in accord with our charter.