NCUC Comments
on the
Registry Restrictions Dispute Resolution Procedure (RRDRP)
1 April 2010

The Non-Commercial Users Constituency (NCUC) welcomes the opportunity to submit its comments on the Registry Restrictions Dispute Resolution Procedure (RRDRP). However NCUC is concerned that this policy fails to understand the inherent values within the various communities and that from a procedural and substantive point of view this proposal constitutes another misguided attempt to create a policy that will jeopardize the rights of non-commercial and individual users. NCUC, therefore, urges ICANN not to include this dispute resolution procedure in the 4th version of the Applicants' Guidebook and seek further deliberation and feedback on this proposal. NCUC remains primarily concerned that by allowing "community" objections to new gtlds, ICANN invites lobbying for gtlds and an opportunity to give special privileges to an arbitrary and immeasurable "community" at the expense of noncommercial, non-institutional, new innovative "communities". The RRDRP provided by staff, confirms the need for that concern.

We note that ICANN is considering to 'merge' this process with the Post-Delegation Dispute Resolution Procedure (PDDRP) – this is a mistake. These two processes concern a different subject matter, are distinct in nature and they should remain distinct in practice. The RRDRP is a process designed to deal with objections and Registry compliance in relation to issues of community-based rights and ones that fall outside the scope of trademark law. The PDDRP is a process that is directly associated with trademark rights. The mere fact that both disputes seek to create liability for Registries means nothing. If ICANN really wants to encourage a smooth registration environment under the new gTLD programme, it should ensure that the policies it seeks to create are subject-specific and do not seek to confuse the parties. Merging these two processes will achieve exactly that. Essentially, ICANN will be asking Providers to deliberate with the same degree of expertise and precision on issues of both trademark law and other rights. This is both problematic and illegitimate.

Another important issue, which demonstrates the RRDRP's lack of 'community-sensitivity' concerns the language of the proceedings. Unlike a typical domain name dispute, the RRDRP will be a process where a community will be able to bring objections that relate with the way it is represented in the Domain Name System. Not all communities are, therefore, capable to represent themselves in English. Think of the Masai in Africa or communities in China and other parts of the world; they should be able to represent themselves in their own language, which will subsequently allow them to demonstrate better their objections based on the cultural, traditional and societal needs of their communities. And, language is part of these

cultural and traditional needs. It is simply unfair to oblige them to use a language that they do not necessarily feel comfortable with or is not able to clearly demonstrate their views.

To this end, the Policy promotes an ideal that seems to be providing wide discretionary powers to the Providers and their Examiners. For NCUC this is problematic and it can easily lead to abuse of the process. It truly is unfair to provide RRDRP Examiners with the discretion to decide whether evidence in the original language should be accepted, whether discovery will be part of the dispute or whether there will be any hearings. The RRDRP proposal fails to provide any incentives for fair dispute resolution as it fails to account for the protection of community standards that have been established by national and international laws. Needless to say, that by giving this kind of discretion to panels, ICANN is proposing a system that encourages the abuse of this discretion, depending on which of the parties the Examiners will seek to satisfy.

Moreover, there is no internal appeals process and no information is provided by ICANN as to the credentials RRDRP providers are expected to have. These objections should not be taken lightly. We are talking about the rights of communities that have been established through norms and laws and to think that these will be solely dependent upon a single examination by a single Examiner is not only dangerous but it will certainly create more problems than the ones it seeks to prevent. The RRDRP should incorporate the availability of an internal appeals process and should encourage the parties to use it. The availability of court proceedings is plausible, but not all communities will be able to get represented in courts. Most of these communities never had to worry about participating in legal disputes or having legal teams. This is, however, what they are asked to do now. A court procedure is expensive and arduous and many communities do not have at their disposal mechanisms to cope with court litigation.

The credential of the Examiners is another important issue that the RRDRP fails to address. For this type of disputes, ICANN should create a uniform three-member panel rule, ensuring that, at the very least, one of the Examiners is knowledgeable of and has a clear understanding of the community, its history and what it stands for. Otherwise, the process will not only be unfair, but – to a certain extent – even pointless. How will Examiners be able to relate to the concerns and objections of the community, if they do not have a clear understanding of its history and tradition? How does ICANN expect parties to place trust on such a system, when it fails to provide them with procedures that emanate from the understanding of the needs of the community?

However and just like the Post-Delegation Dispute Resolution Policy (PDDRP), of great concern is what the RRDRP means for Registries and the whole registration environment. In essence, what the RRDRP encourages the 'policing' of domain name registrations and gives Registries no other option but to proceed to check content. This is highly illegitimate. First of all, Registries are not meant to perform such control and by asking them indirectly to do so,

will upset the registration culture and ultimately harm users. It will raise the costs of registrations and will create an environment based on fear and intimidation. Second, how does ICANN expect Registries to understand the needs, particularities and ethos of the various communities? With this sort of procedure, it needs to be anticipated that Registries will perform domain name checks without giving regard to communities and their needs.

Last but certainly not least, NCUC opposes the way ICANN seeks to exclude itself from the whole process. ICANN sits atop of the registration hierarchy and is the one that drafts the contracts and accredits the Registries. Seeking to escape liability through the provision that ICANN's mandate is limited to the coordination of the DNS "at the overall level" is unconvincing, considering all the other activities that ICANN has engaged over the years (UDRP, URS and other policy activities). The fact that this time ICANN faces the possibility of having individual users and communities turn against it, it does not mean that ICANN should wash its hands off. ICANN should take responsibility in creating a safe and trustworthy environment and this Policy fails to do this.

NCUC urges ICANN to re-consider the substantive and procedural aspects of this Policy before incorporating it within version 4 of the Applicants' Guidebook. Arbitrary, unquantifiable and broad-based "community" objections may be a remedy that is worse than the disease it seeks to cure.