

Report of Public Comments

Title:	Public Interest Commitments Dispute Resolution Procedure (PICDRP)		
Publication Date:	7 May 2013		
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Section I: General Overview and Next Steps			
<p>In the course of the New gTLD Program, a number of New gTLD applicants have made specific Public Interest Commitments. In order to address issues of adherence to such commitments by New gTLD registries in operation, a Public Interest Commitments Dispute Resolution Procedure (PICDRP) has been drafted. The PICDRP is foreseen as a third Post-Delegation Dispute Resolution Procedure (PDDRP) in addition to the already approved Trademark PDDRP and Registration Restrictions Dispute Resolution Procedure (RRDRP). The draft text of the PICDRP was published for public comments to inform further developments and finalization of the procedure.</p> <p>The PICDRP was drafted with an approach and provisions very similar to the RRDRP. Like for the RRDRP, an Expert Panel will determine whether a Registry Operator is in violation of the PIC(s) at issue in the proceeding and recommend remedies to ICANN. As the PICDRP was posted, prior to filing a formal PICDRP proceeding, parties will be required to engage in a mandatory online complaint system (in development) similar to the current Whois Data Problem Report System. PICDRP Expert Panels will be encouraged to reach out to the Registry Operator if any confusion arises as to meaning or scope of one or more PICs at issue in the proceeding. The draft PICDRP text is available here.</p> <p>The comments and this report will help inform decisions on the way forward regarding the PICDRP.</p>			
Section II: Contributors			
<p><i>At the time this report was prepared, a total of ten (10) community submissions had been posted to the Forum, whereof one (1) off-topic. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.</i></p>			
Organizations and Groups:			
Name	Submitted by		Initials
ICANN Ombudsman	Chris LaHatte		CLH
At Large Advisory Committee (2x)	ICANN At-Large Staff		ALAC

United TLD Holdco Ltd	Statton Hammock	UTLD
Google Inc.	Halimah DeLaine Prado	GGL
Valideus Ltd	Brian Beckham	VAL
Donuts Inc.	Jon Nevett	DON
Coalition for Online Accountability	Steven J. Metalitz	COA
Intellectual Property Constituency	Anne Aikman-Scalese	IPC

Individuals:

Name	Affiliation (if provided)	Initials
Dave Wrixon (off-topic – explanation below)	/	DW

Section III: Summary of Comments

General Disclaimer: This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

General comments

Overall views on the PICDRP vary among the contributors, from rejection of the concept to guarded acceptance provided changes are included.

ALAC and GGL express a very strong preference for ICANN itself ensuring compliance with the PICs, rather than deploying the PICDRP as an additional process for that purpose. ALAC notes that the PICs were initially presented to be “enforced by ICANN” and claims that the draft procedure is unacceptable as it presents hurdles for complainants and weaknesses in protecting public interest. GGL claims that the procedure would bring confusion and suggests specific changes to the Registry Agreement Section 2 and Specification 11 to enable direct ICANN enforcement.

IPC and COA highlight that alternative steps, like direct enforcement by ICANN, must remain possible and that a PICDRP should not be the exclusive enforcement mechanism. COA suggests an edit to the procedure text to clarify this aspect. Both also provide detailed comments on the procedure. IPC further notes that additional PICs may ensue as a consequence of recent GAC recommendations.

UTLD and VAL focus on providing detailed comments on the process.

DON expresses support for the comments from GGL, VAL and UTLD, noting that the PICDRP draft raises issues related to standing, materiality, standard of proof and safeguards against abuse.

CLH suggests considering involvement of the ICANN Ombudsman in the process.

(DW comments about IDN transliterations of gTLDs, a subject that is off-topic in this context.)

The detailed comments are summarized below per topic raised.

PICPRS

A Public Interest Commitment Problem Reporting System (PICPRS) similar to the WDPRS, is proposed in the PICDRP draft as a compulsory first step before filing a PICDRP complaint.

Instead of a PICPRS, VAL proposes to have the same initial steps as in the TM PDDRP, notably a 30-day engagement in good faith between the parties, as well as a Threshold Review for subsequent PICDRP complaints.

IPC notes that having PICPRS as a mandatory first step would be premature and, like VAL, proposes engagement in good faith as an alternative. IPC also states that only civil actions filed before this step may lead to suspension of a PICDRP, to prevent registries filing lawsuits during the PICPRS thereby avoiding a PICDRP.

COA refutes the idea that PICPRS be the only gateway and supports VAL's proposal, suggesting that this proposal be considered as an alternative or be incorporated as part of the PICPRS.

Standing and Standards

ALAC notes, as a process flaw, that ICANN itself may not have standing to file a PICDRP complaint unless measurably harmed, and also that members of the public should not have to prove a direct interest in order to complain about PIC adherence.

VAL reserves comments on the implicit outsourcing of a compliance function and refers to the RRDRP with requests for a similar nexus requirement for complainant standing under PICDRP.

Both UTLD and VAL propose to change the standard to "material harm" (as in the TM PDDRP), rather than "measurable harm", and to raise the burden of proof to "by clear and convincing evidence" instead of "by a preponderance of evidence", considered untenable.

IPC supports a change to "material harm" but also suggests making PICDRP prospectively applicable to announced registry actions before they actually occur. IPC further suggests that use of the terms "violation", "non-compliance" and "breach" be harmonized, that the Expert Panel should be able to seek information about a PIC also from ICANN and from the complainant and that all parties be copied on all communications.

Expert appointments

VAL claims that parties should be able to challenge the appointment of a particular expert, invoking WIPO and ICC rules as international standard in this regard.

Remedies

UTLD claims that the Expert Panel should not be entitled to recommending termination of the registry agreement, as only ICANN has the authority to decide on such a remedy. UTLD also highlights that

registry operators must be given reasonable time to implement any remedy and that an Expert Panel determination in support of the respondent should preclude complaints from other parties against the same operator on the same PIC(s).

VAL requests clarifications of how the proposed remedies will be handled, noting issues of implementation and claiming that ICANN should not have discretion to impose remedies beyond those suggested. VAL also states that, like for the TM PDDRP, implementation of remedies should not take place for at least 20 days after determination, to allow for any appeal. VAL further recommends incorporating sanctions in case of abusive complaints, like in the TM PDDRP, as well as including a formal attestation in the complaint stating that it is not filed for any improper purpose.

IPC recommends that any remedy recommended by the Expert Panel should be considered to create a presumption, requiring justification by ICANN if deciding to deviate from the recommendation.

Fees

ALAC notes unknown, possibly significant, fees as undue hurdles for complainants.

UTLD states that the processing fee should not be insignificant and serve to deter frivolous complaints and also that the registry operator should not be required to put up any fees to respond.

VAL requests a meaningful processing fee, to serve as effective deterrent against frivolous complaints.

Section IV: Analysis of Comments

General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.

The comments received illustrate a pronounced community interest in this topic, as also manifested in recent discussions, inter alia in Beijing, and provide important input, with arguments based on principles as well as practicalities. On a high level, the comments propose the following different ways forward overall:

- Abandon PICDRP and make PIC enforcement purely an ICANN Compliance tasks
- Implement PICDRP but keep alternatives available, including direct ICANN enforcement
- Replace PICPRS with good faith discussions between parties, or include that in PICPRS
- Modify the provisions of the PICDRP as suggested

Except when they are in direct contradiction, various combinations of these options can be considered as well as the options per se.

The comments and this report will help inform decisions on the way forward regarding the PICDRP.