

Report of Public Comments

Title:	Revised Public Interest Commitments Dispute Resolution Procedure (PICDRP)		
Publication Date:	19 December 2013		
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Section I: General Overview and Next Steps			
<p>The Public Interest Commitments Dispute Resolution Procedures (PICDRP) is a dispute resolution procedure to resolve any issues that might arise regarding non-compliance with a Registry Operator (RO)'s Public Interest Commitments (PICs) in Specification 11 of their Registry Agreement (RA) with ICANN. On 15 March 2013, the PICDRP was posted for public comments. A variety of feedback was provided through the public comment forum, and a second version (revised PICDRP) incorporating the 15 March 2013 public comments was posted on 02 October 2013 for public comment.</p> <p>In its revised PICDRP, ICANN largely incorporated the suggested comments received from the 15 March 2013 comment period, including the request that ICANN itself ensure compliance with the PICDRP. In addition, a couple of public comments requested that the standard of harm be changed from "measurable" to "material" and that the burden of proof be changed from "preponderance of evidence" to "clear and convincing evidence." ICANN considered those requests and noted that the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) addresses the standard of harm and burden of proof and the revised PICDRP will remain as stated in the initial PICDRP posted on 15 March 2013.</p> <p>The revised PICDRP is re-organized to highlight:</p> <ul style="list-style-type: none"> • Compliance Obligations of the Registry Operator includes provisions for the Registry Operator to comply to Specification 11 for alleged non-compliance with PICs. • ICANN Preliminary Review Process includes provisions for: <ol style="list-style-type: none"> 1. Notification Requirement and Preliminary Review 2. Initial Review of the PIC Report and Conference 3. Compliance Review and Investigation by ICANN 4. Standing Panel 5. Repeat Offenders <p>When the Revised PICDRP is updated to reflect the comments received, the procedures will be presented to</p>			

the ICANN Board for approval. After that time, ICANN is committed to establish an internal framework to support the execution of the procedures and inform Registry Operators of these procedures.

Section II: Contributors

At the time this report was prepared, a total of [number] (n) community submissions had been posted to the Forum. 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.

Organizations and Groups:

Name	Submitted by	Initials
ARI Registry Services	David Carrington	ARI
At-Large Advisory Committee	ICANN At-Large Staff	ALAC
Verisign	Keith Drazek	VS
Coalition for Online Accountability	Steven Metalitz	COA
ICANN GNSO Business Constituency	Steve DelBianco	BC
New gTLD Applicant Group	Josh Zetlin	NTAG
Registry Stakeholder Group	Paul Diaz	RySG
Intellectual Property Constituency	Claudio Di Gangi	IPC
Valideus	Brian Beckham	VAL

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).

ARI applauds ICANN and the PICDRP Working Group for finessing the document to the current form. ARI also recommends clarification to the definition of "harm" as contained in Part B Sections 1.1-1.3, and expresses criteria concerns under Part B Sections 5.2(a) and (b) whereby a Registry Operator is determined to be a "Repeat Offender." ARI seeks potential process improvements to the issue of Repeat Offenders by requesting consideration to allow for the joining of complaints and to allow for ICANN to use precedent to address complaints where the subject matter for multiple complaints is similar. ARI also expresses concerns by the unbounded reference in Section 5.4 to "financial sanction," and respectfully submit that any such sanction has to be limited to either operational sanction, the various termination rights available to ICANN under the Registry Agreement, or at the very least, financial sanction that is better particularized and limited to some monetary value.

<http://forum.icann.org/lists/comments-draft-picdrp-02oct13/pdfiSmKg4xErF.pdf>

ALAC appreciates radical changes made to the PICDRP in response to the comments of the first draft, however ALAC firmly believes that this process does not address the public interest aspect of Public Interest Commitments. ALAC notes that there must be a provision for allowing reports of PIC

violations, and particularly substantive PIC violations without the need to demonstrate harm. In addition, ALAC highlights the significant aspect of the PIC is to ensure registrant and Internet user trust in the TLD, and to disallow reports of the perceived loss of that trust greatly lessens the benefit of the PIC and could serve to make them completely ineffective. ALAC offers specific comments on the procedural terms, including the use of the undefined term “good standing,” the requirement for interaction between a Reporter and Registry if the complaint issues identified in the report are factually identified (e.g., the need to negotiate evidence-based issues), and the explicitly that the Standing Panel will include one or more members with clear understanding of Public Interest Issues. <http://forum.icann.org/lists/comments-draft-picdrp-02oct13/pdf1lcX67fYnP.pdf>

VS raised concerns of “standing” as permits in Section 1.1. VS believes this “standing” problem can be partially mitigated by raising the threshold for the alleged harm to a materiality standard and require a Reporter to pay a nominal filing fee that is refundable if the Reporter prevails. In addition, VS requests to change Section 1.1 standards from “inconsistency” to “non-compliance.” VS requests definition to “PICPRS” reference in Section 1.2, and proposes modification to the title reference of Section 2 to remove “Initial Review.” In addition, VS recommends Section 2.2, 2.5, and 3.1 be harmonized so that it is clear that the failure to attend a conference will result in the closure of the report. Further, VS believes that the Standing Panel should be composed of people with the skills to perform the task required from the panel and the standard for determining whether an RO is a repeat offender is unacceptable based in part on the mere seriousness and quantity of prior allegations. Further, VS recommends that ICANN should define the financial sanctions mentioned in Section 5.4. <http://forum.icann.org/lists/comments-draft-picdrp-02oct13/pdf1lcX67fYnP.pdf>

COA appreciates the chance to comment on the revised PICDRP and requests for considerations of items, including more specifics regarding “...(a) informal consultation and discussion... and (b) contract enforcement by ICANN,” clarification that ICANN retains the discretion to undertake a compliance investigation and to enforce the contractual obligations which the investigation shows to have been breached per Sections B.3.3 and B.3.4, clarification to the “bar” reference in Section B.5.4, and clarification to state that a third party can bring apparent PIC Spec violations to the attention of the Registry Operator informally. COA recommends to include a provision such as the following: “Nothing in this Procedure shall be construed to limit the authority of ICANN to enforce any provision of the Registry Agreement, including but not limited to Specification 11, or to audit or investigate compliance with any such provision. Nothing in this procedure shall be construed to limit the ability of Registry Operator to voluntarily modify its policies, procedures or practices to cure non-compliance or to improve compliance with Specification 11 or the objections set out in Section A, based on information brought to its attention by any party through any channel.” COA urges ICANN to resolve clarification of Standing Panel items, including the number of panel(s), qualifications and familiarity of the panel(s) with the “domain name industry,” selection and compensation approach of the panel(s), panel conflict of interest process, roles of the panel(s) pertaining to Section B.3.3 versus B.3.4, and appeal mechanism from the decision of the panel(s). COA notes additional changes and corrections, including Section A.2 to include “and other parties,” Section B.1.2 to include “or concretely threatened with harm,” Section B.1.3 to remove “is in good standing and,” Section B.2.2 to include “without demonstrable just cause,” Section B.2.4 to include “(with copy to the Report),” Section B.3.2 to include “and to provide a copy of the response to Reporter,” and Section B.5.3.a to include

“without any substantive change in the policy, practice or behavior that gave rise to the Report.” COA notes Section B.2.3 text of second sentence is garbled and Section B.5.4 needs to include some appeal mechanism for any decision to brand a Reporter as a Repeat Offender and bar it from filing any new reports.

<http://forum.icann.org/lists/comments-draft-picdrp-02oct13/pdfiKk58n9uUn.pdf>

BC appreciates that ICANN is putting in place an enforcement process to ensure Registry Operators are held to their PICs. BC expresses concerns to hold Registry Operators accountable pursuant to Section 4.6 and requests there be a mechanism for an individual or entity to report non-compliance with PICs or other obligations under the Registry Agreement/Registrar Accreditation Agreement without the need to prove harm. BC recommends the PICDRP process and correspondence be made public at the time of any final Determination if not sooner and that ICANN use uniform terms (e.g., ‘PIC Report’ versus ‘Ticket’). Further, BC proposes that ICANN confirm per Section 2.4, that the issues has been resolved with the Reporter before the closure of the PIC report and per Section 2.5 consider if there is any evidence indicating that the Registry Operator, after requesting a conference, failed to participate in it, which might be use as a practice to delay the outcome of the process. BC proposes modifications to (1) Section 3.2 to include “and Registry Operator will also provide a copy of this explanation to the Reporter at the same time it is provided to ICANN” and (2) Section 3.3 to include “and Reporter. Both parties... any...” Regarding section 3.4, BC urges ICANN to publish its explanation for any decisions arising under this section for purposes of transparency. Further, BC suggests that ICANN impose minimum requirements and standards of practice to be applied to the Standing Panel and any Panelists appointed by ICANN pursuant to Section 4.1. BC would like to know the precise basis under which ICANN might not enforce contractual obligations under Section 4.6 and suggests that ICANN provide an opportunity for any Repeat Offender to defend and justify its actions prior to any sanctions being taken regarding Section 5.4. Also, BC agree with the prior comments of the IPC.

<http://forum.icann.org/lists/comments-draft-picdrp-02oct13/pdf35VadwUmRu.pdf>

NTAG thanks ICANN for listening to feedback from new gTLD applicants and the community at large regarding the PICDRP and incorporating that feedback into the revised process that is more efficient and fair than previously presented. NTAG feels that good compromises were made and a good outcome was achieved.

<http://forum.icann.org/lists/comments-draft-picdrp-02oct13/binvuY5pZkVCF.bin>

RySG endorses the NTAG in thanking “ICANN for listening to feedback from new gTLD applicants and the community at large regarding the Public Interest Commitment Dispute Resolution Process (PIC-DRP)” and “subsequently (incorporating) many of the Working Group’s recommendations into this revised PIC-DRP.” RySG submitted comments which mirrored and reiterated VS comments as follows: RySG believes this “standing” problem can be partially mitigated by raising the threshold for the alleged harm to a materiality standard and require a Reporter to pay a nominal filing fee that is refundable if the Reporter prevails. In addition, RySG requests to change Section 1.1 standards from “inconsistency” to “non-compliance.” RySG requests definition to “PICPRS” reference in Section 1.2, and proposes modification to the title reference of Section 2 to remove “Initial Review.” In addition, RySG recommends Section 2.2, 2.5, and 3.1 be harmonized so that it is clear that the failure to attend a conference will result in the closure of the report. Further, RySG believes that the Standing Panel

should be composed of people with the skills to perform the task required from the panel and the standard for determining whether an RO is a repeat offender is unacceptable based in part on the mere seriousness and quantity of prior allegations. Further, RySG recommends that ICANN should define the financial sanctions mentioned in Section 5.4.

<http://forum.icann.org/lists/comments-draft-picdrp-02oct13/pdfYeo92Kf6f4.pdf>

IPC appreciates the opportunity to comment on the revised PICDRP to encourage Registry Operators to fulfill their PICs. IPC notes that the PICDRP should not be the exclusive PIC compliance vehicle, and the role and qualifications of the Standing Panel should be clarified. Further, IPC reiterated proposed language changes raised by other commenters including: COA's suggestion for Section B.1.2, VS/RySG/COA's suggestion for B.2.2, COA's suggestion for Section B.2.4, COA & BC's suggestion for Section B.3.2, COA's suggestion for B.5.3.a, COA's suggestion for Section B.5.4. Further, IPC suggests that any suspension of a PICDRP (e.g., due to private civil action) should need to be commenced prior to the filing of the PICDRP Compliant.

<http://forum.icann.org/lists/comments-draft-picdrp-02oct13/pdfDbSVuFYxs1.pdf>

VAL comments the revised PICDRP addresses a number of issues raised around the 15 March version, and overall provides a more reasonable process. Also, VAL expresses concerns regarding the standard of harm. VAL notes allegations of PIC non-compliance should require a demonstration of "material harm," and ICANN should conduct a Preliminary Review on this basis, in order to discourage frivolous complaints. VAL requests substantive review clarifications to Section 2.3, 3.2, and 3.3. Further, VAL recommends the severity and number of complaints should be weighed against the success of any ICANN Compliance Review or Standing Panel decision regarding Repeat Offenders. VAL suggests that ICANN appears to foreclose parties' options to resort to a court of competent jurisdiction in relation to consideration of any PICDRP determination would contradict the precedent established under the UDRP.

<http://forum.icann.org/lists/comments-draft-picdrp-02oct13/pdfvLMjZZfHnh.pdf>

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.

General Comments

All of the commenters expressed their appreciation towards ICANN for listening to the feedback and incorporating that feedback into the revised process or for the opportunity to comment on the revised PICDRP. Though commenters were generally in favor of the modifications within the Revised PICDRP, they identified specific areas for improvement.

The most common areas suggested for improvement would include:

- Consistency and Clarification of Terms

- Notion of filing PIC Report (Section B.1)
- Transparency of Standing Panels (Section B.4)
- Processing of Repeat Offenders (Section B.5)
- Unbound reference of Sanctions (Section B.5)
- Notion of Appeal Mechanisms (Section B.5)

Consistency and Clarification of Terms

Majority of the commenters provided specific suggestions for improvements across the procedures. These include the following:

- Introduction:
 - COA recommends to include a provision such as the following: “Nothing in this Procedure shall be construed to limit the authority of ICANN to enforce any provision of the Registry Agreement, including but not limited to Specification 11, or to audit or investigate compliance with any such provision. Nothing in this procedure shall be construed to limit the ability of Registry Operator to voluntarily modify its policies, procedures or practices to cure non-compliance or to improve compliance with Specification 11 or the objections set out in Section A, based on information brought to its attention by any party through any channel.”
- Section A.2: COA suggest to include “and other parties”
- Section B.1:
 - B.1.1: RySG & VS suggest to include “inconsistency” to “non-compliance”
 - B.1.2: COA & IPC suggest to include “or concretely threatened with harm”
 - B.1.2: RySG & VS suggest clarity to “PICRS”. ICANN corrected term to “PICDRP”
 - B.1.3: COA suggest to remove “is in good standing and”
- Section B.2: RySG & VS suggest to remove “Initial Review” from the title
 - B.2.2, B.2.5, B.3.1: COA, RySG, & VS suggest to harmonize sections B.2.2, B.2.5 and B.3.1
 - B.2.4: COA & IPC suggest to include “(with copy to the Report)”
- Section B.3:
 - B.3.2: IPC, COA, BC suggest to include “ and to provide a copy of the response to Report”
 - B.3.3: BC suggest to include the following language within the last two sentences of the section “and Reporter,” “both parties,” and “any.” BC suggest to remove “Registry Operator” from the last sentence
- Section B.5.3.a: COA & IPC suggest to include “without any substantive change in the policy, practice, or behavior that gave rise to the Report”

ICANN has included, where possible, the majority of the above referenced suggestions. For those suggestions that were not incorporated, the rationale for not making the change is provided below.

Filing PIC Report

Multiple commenters recommended clarifying the term “harm” pertaining to Sections B.1.1-B.1.3. In addition, two commenters have raised concerns of standing as permits in Section B.1.1 and

proposed mitigating those concerns by raising the threshold for the alleged harm to a materiality standard to discourage frivolous complaints.

At this point in time, it is not appropriate to objectively define “harm” without understanding the various allegations that could arise from non-compliance to PICs. As noted in Section B.1.3, ICANN will review whether the Reporter has: (i) identified the proper parties; (ii) identified at least one PIC with which the Registry Operator failed to comply, (iii) alleged how the Reporter has been harmed; and (iv) set forth the grounds of the claim and submitted appropriate documentation to support the report of non-compliance. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

Three commenters have suggested that the PICDRP should not be the exclusive PIC compliance vehicle. Two commenters suggest that there is a provision for allowing reports of PIC violations without the need to demonstrate harm. Three commenters suggest that ICANN may enforce contractual obligations under Registry Agreement.

In support of Section B.1.3, demonstration of harm will need to be provided for ICANN to adequately perform its review of the PIC report. In addition, ICANN has modified the introduction paragraph to include reference to ICANN’s authority to enforce any provision of the Registry Agreement, not limited to Specification 11 per recommendation of COA.

Standing Panel

Multiple commenters urged ICANN to provide clarification to the composition and required tasks of the Standing Panel.

If ICANN elects to invoke the Standing Panel, ICANN will provide as much transparency as feasible when selecting the Standing Panel. This process will be similar to the evaluation panel selection process. As evident in the Expressions of Interest (EOI), the Standing Panel shall consist of a minimum of three members, with more members to be added as deemed necessary. The Standing Panel will have diversity in geographic, cultural, and experience. The skill sets of the panel will be difficult to determine at this time without active complaints. However, all panel members will receive the uniform information to execute with as much transparency as possible.

Transparency

A commenter urges ICANN to publish its explanation for any decisions arising under Section B.3.4 for purposes of transparency and recommends the PICDRP process and correspondence be made public at the time of any final Determination if not sooner.

ICANN follows a standard approach and process while working with the contracted parties to address non-compliance with their respective agreements and consensus policies. The approach and process are published at <http://www.icann.org/en/resources/compliance/approach-processes>. ICANN's Contractual Compliance team engages with the contracted parties during the prevention or informal resolution stage in an effort to resolve the non-compliance issue(s). If the contracted party fails to

resolve the non-compliance issue(s) or does not engage, the process is then escalated to the enforcement stage (or formal resolution) in which a notice of breach is sent to the contracted party and is published on ICANN.org at <http://www.icann.org/en/resources/compliance/notices>. The notice contains the provisions breached by the contracted party and a chronology of events that led to the notice.

If ICANN elects to undertake a compliance investigation, staff will follow the current compliance approach and ICANN Documentary Information Disclosure Policy (DIDP).

<http://www.icann.org/en/about/transparency/didp>

Repeat Offenders

Three commenters expressed concerns of Sections B.5.2.a and B.5.2.b whereby a Registry Operator is determined to be a repeat offender. Commenters have recommended joining similar complaints, weighing the severity and number of complaints against prior PIC Report results, or providing an opportunity for any Repeat Offender to defend and justify its actions prior to any sanctions.

ICANN recognizes that repeat activity is needed and the intended approach is to use objective criteria to quantify the activity. ICANN has identified in Sections B.5.2 and B.5.3, the minimum and not limited factors to determine a repeat offender. As such, ICANN will consider the context of the complaint and the severity of the complaint proportional to the number of registrations.

Sanctions

Three commenters expressed concerns of the unbound reference in Section 5.4 “financial sanction.”

At this point in time, it is not appropriate to objectively define “financial sanction.” ICANN will determine the appropriate remedial measure should it be financial sanctions against any Registry Operator or bar future reporting from any Reporter to be found as a Repeat offender.

Appeal Mechanism

A few commenters suggest including some appeal mechanism for any decision to brand a Reporter as a Repeat Offender or for consideration of any contradicting PICDRP determinations.

In reference to ICANN’s Bylaws Article IV Accountability and Review, any person or entity that has been materially affected can submit a reconsideration request for ICANN’s Board Governance Committee to review.

<http://www.icann.org/en/news/in-focus/accountability/reconsideration-review>